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RSMEA Newsletter

Draft Income Tax – Advance Pricing Agreement and Minimum Top Up Tax Regulations, 2025

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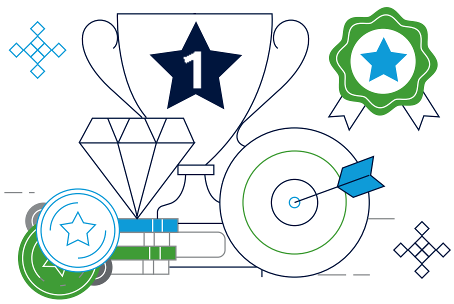


INTRODUCTION

Through a Public Notice dated 3rd November 2025, the Kenya Revenue Authority (KRA), acting on behalf of the Cabinet Secretary for the National Treasury and Economic Planning, released the following draft regulations for public comments:

- Draft Income Tax (Advance Pricing Agreement) Regulations, 2025; and
- Draft Income Tax (Minimum Top-Up Tax) Regulations, 2025.

1. DRAFT APA REGULATIONS, 2025

APAs were introduced by the Finance Act 2025 under Section 18G of the Income Tax Act (ITA) and will take effect on 1st January 2026. The APA framework allows a taxpayer and the KRA to agree in advance on the transfer price for related-party transactions over a fixed period. This would enhance pricing & tax certainty, reduce transfer pricing disputes, and align Kenya with international best practices.

Key provisions of the draft APA regulations

Sections of APA	Details
Scope of regulations	The APA regulations apply to transactions contemplated under Sections 18(3) and 18A of the ITA. That is, transactions subject to transfer pricing regulations in Kenya. These include: ▪ Transactions between a resident person and a related non-resident person; and ▪ Transactions between a resident person and a non-resident person, or a related resident person in a preferential tax regime (PTR)
Types of APAs	A taxpayer may apply for the following types of APAs: ▪ A Unilateral APA where there is no tax treaty (Double Taxation Agreement); ▪ A Unilateral, Multilateral or Bilateral APA where there are tax treaties; or ▪ A Unilateral APA where the person undertakes a transaction with a related resident person operating in PTR
Pre-filling	Taxpayers must apply for a pre-filing meeting in respect to an APA **at least 12 months before the start date of the APA** period. The application must contain the following information: ▪ **Proposed covered transactions** – Details of the transactions intended to be covered under the APA ▪ **Parties involved** – Names, addresses, and tax PINs of the applicant and related parties ▪ **Proposed APA period** – Duration for which the agreement will apply ▪ **Transfer Pricing (TP) Documentation** – Prepared in accordance with the ITA, including TP method(s) applied, explanation of compliance with the arm's length principle and critical assumptions ▪ **Financial and supporting documents** – Last five years' financial statements, trial balances, tax computations, and intra-group agreements ▪ **Tax status and representation** – Indicate if income is tax-exempt in Kenya or other jurisdictions and provide tax representative contact details ▪ **Additional information** – Any other details required by the Commissioner For bilateral/multilateral APAs, the same information should be shared with all relevant Competent Authorities After receiving the required pre-filing information, the Commissioner must invite the applicant for a pre-filing meeting within 30 days. Further, within 30 days after the pre-filing meeting, the Commissioner must notify the applicant on whether to submit a formal application for an APA
Submission of APA application	Upon receiving approval to proceed from the pre-filing stage, a taxpayer must submit the formal APA application in the prescribed form within 30 days after receiving the notification from the Commissioner. The Commissioner shall consider the application and may propose alternative TP methods, adjust the scope of the agreement, or decline the application The taxpayer has a duty to disclose any ongoing tax investigations, audits, or other material facts that could influence the application's outcome

Sections of APA	Details
Fees and payments	The taxpayer applying for the APA will bear the following costs: a) All costs such as professional fees related to the APA process b) A non-refundable application fee of **KShs. 5 million** c) A non-refundable renewal fee of **KShs. 2.5 million** d) The cost of an expert required to give expert opinion during the application of an APA (if necessary) The application fee is payable after the pre-filing meeting and notification to proceed, while the renewal fee is payable after the Commissioner's notification approving renewal
Timeframe of APA's	The APA will be issued for a period not exceeding 5 consecutive years
Negotiation of APA's	For **Unilateral APA** – the Commissioner will negotiate all aspects of the APA directly with the applicant, including revisions, termination, and renewal. Should negotiations for a Unilateral APA fail, the applicant may request a review of the Commissioner's decision For **Bilateral or Multilateral APAs**, negotiations will involve mutual exchange of briefs between the Commissioner and competent authorities of treaty partners, in line with tax treaties. If a different agreement is reached with a treaty partner, the Commissioner must inform the applicant of the changes in the terms and the taxpayer must confirm acceptance of agreed terms within **30 days**, failing which the application may be rejected. After confirmation, the Commissioner and treaty partners finalize the APA terms If negotiations fail, a bilateral APA can be converted to a unilateral APA with the Commissioner's consent, and in a multilateral APA, the applicant may proceed with the remaining countries
Withdrawal or rejection of an APA	The Commissioner may reject an APA application for the following reasons: ▪ Non-compliance with the TP regulations in Kenya ▪ Transactions based on hypothetical scenarios ▪ Inefficient use of resources due to limited scope or value ▪ Matters under appeal or litigation ▪ Transactions involving tax avoidance or treaty abuse ▪ Any other reasonable grounds determined by the Commissioner The Commissioner must notify the taxpayer in writing with reasons for rejection, and the taxpayer may request a review within 30 days of receiving the decision An applicant may withdraw their APA application at any time before conclusion by written notice. The application will also be deemed withdrawn if the applicant fails to submit a formal application after pre-filing or fail to provide requested information within the stipulated timelines
Execution and annual compliance	Once an APA is accepted, the Commissioner will draft and execute the agreed terms with the applicant (or with treaty partners for bilateral/multilateral APAs) The taxpayer must file an **Annual Compliance Report within six months after year-end**, which must include the following information: ▪ Audited financial statements for the year of income (for the applicant and, if applicable, other parties in bilateral/multilateral APAs) ▪ Ownership structure of the local and foreign persons involved in the controlled transaction(s) ▪ Organization chart of the local entity ▪ Details of controlled transaction(s) – nature, quantum, percentage, entities involved, and their locations ▪ Transaction flow – physical flow of goods, invoice flow, and payment flow. ▪ Report of relevant controlled transaction(s) and amounts for the applicant (and similar report for other parties in bilateral/multilateral APAs) ▪ Description of any material changes in accounting methods or an affirmative statement if none ▪ Analysis of compensating adjustments with tax computations and supporting documents ▪ Any other documents required by the Commissioner

Sections of APA	Details
Renewal and revision	**A taxpayer may request renewal of an APA for up to five years, provided the request is made at least six months before the current APA expires.** The renewal process requires submission of updated information and supporting documents similar to those under the pre-filing stage The Commissioner may approve renewal under the following conditions: ▪ There has been no change in the facts and circumstances underlying the original APA ▪ The critical assumptions identified in the original APA remain valid and relevant ▪ The taxpayer has fully complied with all terms and conditions of the previous APA Upon receiving the renewal request, the Commissioner must notify the taxpayer in writing within 30 days, stating the decision and reasons. If approved, the taxpayer must submit a formal application within 30 days of notification, after which the APA will be executed in accordance with the prescribed process If the taxpayer fails to submit the formal application within the stipulated time, the renewal request will be deemed withdrawn. Where renewal is not possible due to changes in transactions, anticipated changes in circumstances, a different transfer pricing method, or changes in law, the taxpayer may make a written request for a new APA An APA should be revised if critical assumptions fail, such as significant changes in business activities or economic conditions, or if there is a change in law or a tax treaty that affects the agreement
Cancellation and revocation	The Commissioner may cancel an APA under the following circumstances: ▪ Non-compliance with the terms and conditions of the APA by any party involved in the transaction ▪ Errors or mistakes in the APA application, annual compliance reports, or renewal submissions ▪ Failure to provide required information, documentation, or compliance reports ▪ Failure to conclude a revised APA (Unilateral, Bilateral, or Multilateral) when necessary ▪ Cancellation of the APA by a foreign competent authority involved in the agreement Upon cancellation, the Commissioner must notify the taxpayer and any relevant foreign authorities in writing, specifying the grounds for cancellation and the effective date of cancellation The Commissioner may revoke an APA if any party involved commits fraud, misrepresentation, omission of material facts, or fails to disclose ongoing tax investigations or audits. The revocation takes effect from the first day of the covered period, and the parties are notified in writing with the grounds and effective date
Roll-backs	A taxpayer may request a rollback of an APA to prior years if: ▪ The proposed transfer pricing methodology is relevant for resolving prior years' issues ▪ Facts and circumstances of those years are substantially the same as the APA period ▪ All relevant tax returns for rollback years have been filed Rollback applies only to unaudited years where controlled transactions occurred, and amended tax computations must be submitted within 30 days of signing the APA. It cannot apply to transactions already ruled on by a court or tribunal or under judicial proceedings Any adjustments to rollback years resulting from the APA application will attract penalties under the provision of the TPA
Record keeping and compliance	The taxpayer must retain all records used in concluding and complying with the APA, including application documents and annual compliance reports, in accordance with the Tax Procedures Act Additionally, the Commissioner may conduct audits or investigations on transactions not covered by the APA. Applying for an APA does not suspend or delay any ongoing or future audits

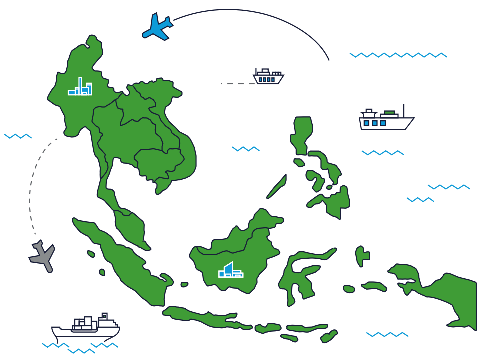
Sections of APA	Details
Other provisions	▪ **Compensating adjustments** – If the actual results of covered transactions differ materially from the APA terms, the taxpayer must make compensating adjustments to align with the agreement ▪ **Legal effect :** An APA is binding on both the Commissioner and the taxpayer but does not serve as a precedent for other years, transactions, or parties not covered by the agreement ▪ **Confidentiality:** All information obtained during the APA process is subject to confidentiality provisions under the TPA and relevant tax treaty exchange-of-information articles

Our comments

The draft APA Regulations establish a comprehensive framework for the application, negotiation, and execution of APAs in Kenya to enhance transfer pricing certainty, reduce disputes, and align Kenya with international best practices. However, as currently drafted, key concerns include:

- The 12-month pre-filing requirement is unnecessarily long for businesses with well-established transfer pricing systems.
- Requiring taxpayers to submit documents to multiple tax authorities creates administrative burdens. KRA should streamline the process and assist with simultaneous submissions using its information exchange framework.
- The high non-refundable application and renewal fees (Ksh 5 million and Ksh 2 million respectively) may discourage small and medium enterprises from the APA process. Similar to applications for private rulings, there should be no fee for APA application.
- The negotiation process is well-structured, but timelines for concluding negotiations should be specified to avoid delays.
- The regulation provides for a rejection of an APA where low-value or limited transactions are submitted. Small and medium-sized enterprises often have smaller intercompany transactions but still face TP uncertainties. Denying them access to APAs because of transaction size limits their ability to achieve certainty and avoid disputes.
- The annual compliance reporting ensures monitoring but adds an administrative burden. A simplified reporting for low-risk taxpayers could help.
- Cancellation and revocation grounds are comprehensive, though taxpayers should have an appeal mechanism before cancellation/revocation.

On the positive, the fact that transactions under the APA would not be subject to audits while information provided is subject to confidentiality is comforting for taxpayers. If the above concerns are addressed, the Regulations will provide a strong, predictable framework that enhances certainty for taxpayers, reduces transfer pricing disputes, and positions Kenya as a regional leader in implementing OECD-aligned APA regimes.



2. DRAFT MINIMUM TOP-UP TAX REGULATIONS, 2025

Minimum Top-Up Tax (MTT) was introduced through the Tax Laws (Amendment) Act, 2024, under Section 12G of the Income Tax Act. The MTT is part of Kenya's compliance with the OECD/G20 Pillar II Rules on Global Anti-Base Erosion (GloBE) Rules, designed to ensure that large Multinational Enterprises (MNEs) pay a minimum level of tax in the jurisdiction where they operate.

Analysis of the draft MTT regulations

<table>
<tr><th>Key Provision(s)</th><th colspan="2">Details</th></tr>
<tr><td>Scope of Regulations</td><td colspan="2">MTT applies to entities in Kenya who are members of MNE group with consolidated annual turnover of at least EUR 750 million in the consolidated financial statements of the ultimate parent entity (UPE) in at least two of the four years of income immediately preceding the tested year of income

For periods shorter than 12 months, turnover will be annualized to estimate full-year revenue

MTT is payable by a covered entity if its combined effective tax rate (ETR) is less than 15%

Entities exempted from MTT
A public entity not engaged in business
Taxpayers exempt from tax under the ITA
A pension fund and the assets of that pension fund
A real estate investment vehicle that is an UPE
A non-operating investment holding company
An investment fund that is an UPE
A sovereign wealth fund
An intergovernmental or supranational organisation, including a wholly owned agency or organ of the intergovernmental or supranational organisation</td></tr>
<tr><td rowspan="3">Computation of net income or loss</td><td colspan="2">The net income/loss for the relevant entity will be the amount of profit/loss the entity has for the year, based on its financial accounts used in the group's consolidated statements

How it will be calculated:
Start with the company's financial accounting income/loss
Use the same accounting standards as the group (Kenyan standards if possible). If Kenyan standards can't be used, use another accepted accounting standard, but accounts must be reliable and big differences (over EUR 1 million) must be adjusted to match the group's standard
Do not remove intra-group transactions or apply purchase accounting adjustments
The following adjustments should then be made:</td></tr>
<tr><th>Add back the following items, if applicable:</th><th>Deduct the following items, if applicable:</th></tr>
<tr><td>Net tax expense
Equity losses recorded in the financials
Losses from revaluation methods included in the financials
Gains from disposal of assets under restructuring rules not included in the financials
Asymmetric foreign currency losses included in the financials
Policy disallowed expenses (illegal payments, fines & penalties)
Prior year errors and changes in accounting principles (unless it materially decreases the tax liability)</td><td>Dividend received or accrued recorded in the financials
Equity gains recorded in the financials
Gains from revaluation methods included in the financials
Losses from disposal of assets under restructuring rules not included in the financials
Asymmetric foreign currency gains included in the financials
Accrued pension expense not recorded in the financials
Stock based compensation not recorded in the financials</td></tr>
</table>

<table>
<tr><th>Key Provision(s)</th><th colspan="2">Details</th></tr>
<tr><td rowspan="2"></td><td>

- Any returns to policyholders not shown in profit or loss, if the related liability change is recorded in the accounts
- Certain intra-group financing expenses if:
  - The financing increases the company's expenses without a matching increase in taxable income for the other;
  - The other party is in a non-low-tax jurisdiction; and
  - The company's effective tax rate is below 15% (or would be without the expense)

</td><td>

- Amount charged to policyholders for taxes paid in respect to returns to them and included in the financials
- Returns to policyholders not recorded in financials

</td></tr>
<tr><td colspan="2">

The income or loss of a permanent establishment (PE) should be based on its own financial accounts, or on a standalone basis if separate accounts do not exist. Only income and expenses attributable to the PE under tax rules are included, and its results are not combined with the main entity except where allowed

If a PE has a loss, that loss is treated as an expense of the main entity (not the PE) when calculating qualifying income or loss – **but only if** the loss is also treated as an expense for tax purposes in the main entity's jurisdiction and is not offset against income taxed in both jurisdictions. If this applies, any future income from the PE is counted as income of the main entity, up to the amount of the previous loss

</td></tr>
<tr><td rowspan="2"></td><td colspan="2">

Allocation of Net Income or Loss from Flow-Through Entities (FTE)

- If a covered person owns a FTE, its share of income/loss are allocated according to the above Regulations
- Allocation rules ensure income or loss is correctly attributed to owners based on ownership interests and transparency status
- FTE means an entity that is fiscally transparent in its home jurisdiction, meaning its income, expenses, profit, or loss are treated as belonging to its owners for tax purposes
  - Tax Transparent Entity: Owners report income as if earned directly
  - Reverse Hybrid Entity: Owners do not report income until distributed
- If the FTE operates through a permanent establishment, any remaining income after owner allocations is assigned to that PE
- These rules prevent double counting or omission of income in the computation of net income or loss

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<tr><td colspan="2">

International Shipping Income

If a covered person earns international shipping income or qualified ancillary shipping income, the following special adjustments apply:

- ✓ Losses from these activities are excluded from the net income or loss calculation
- ✓ Ancillary income for all group members cannot exceed 50% of total international shipping income
- ✓ Direct costs related to shipping and ancillary activities must be allocated to those activities; indirect costs are allocated proportionally based on revenue
- ✓ All direct & indirect costs attributed to shipping activities are excluded from the main income computation

Shipping income and ancillary income are excluded from qualifying income if the strategic or commercial management of ships is carried out from Kenya.

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<tr><th>Key Provision(s)</th><th colspan="2">Details</th></tr>
<tr><td></td><td colspan="2">**International shipping income includes income from transporting passengers or cargo in international traffic, leasing ships for such purposes, and related activities

Qualified ancillary shipping income includes income from activities connected to international shipping, such as container leasing, ticket sales for international voyages, and certain service provisions</td></tr>
<tr><td>Allocation of net Income or loss from a Flow-Through Entity</td><td colspan="2">FTE's income/loss will be allocated to its owners based on their ownership interests. If owners are not covered persons, their share is excluded from the covered person's income unless:
• The flow-through entity is the UPE, or
• It is held directly or through a tax-transparent structure by the UPE
Income or loss allocated to another covered person is also excluded to avoid double counting

If the FTE operates through a PE, any remaining income after owner allocations is assigned to that PE. For tax-transparent entities:
• If not the UPE, remaining income is allocated to owners according to their ownership share
• If the UPE, remaining income after PE allocation is assigned to the parent entity

For reverse hybrid entities, remaining income stays with the entity

These rules apply separately for each ownership interest</td></tr>
<tr><td>Election for company in distress</td><td colspan="2">This rule applies when a covered person is released from paying a debt, records the income from that release in its financial accounts and elects to make a GLoBE information return. The debt release must meet one of these conditions:
▪ Occurs under insolvency, bankruptcy, or similar legal proceedings in Kenya
▪ Results from an arrangement with an unrelated creditor, supported by an independent expert opinion confirming the company cannot meet payments to unrelated parties within the next 12 months
▪ If the above 2 conditions do not apply and the company's debt is forgiven by an unrelated creditor, and at the time of forgiveness the company's liabilities are greater than the fair market value of its assets

If conditions (i) and (ii) above applies, the net income/loss is adjusted to exclude the income from the debt release. If condition (iii) applies, the income/loss is reduced by the lower of:
▪ The income recorded from the debt release
▪ The amount liabilities exceed asset value before the release
▪ The amount of tax attributes (losses, deductions, credits) reduced due to the release

"Tax attributes" include any loss, deduction, allowance, credit, or similar item that reduces tax under Kenyan law</td></tr>
<tr><td rowspan="2">Adjusted covered taxes (ACTs)</td><td colspan="2">ACTs include current & deferred tax expenses (including accrued items) recorded in financial accounts, plus any changes in equity or other comprehensive income related to taxable amounts.</td></tr>
<tr><td>The following items are then added back:
• Current tax accrued as an expense before taxation
• Net loss deferred tax assets recognized under the regulations</td><td>The following items are excluded
• Tax expenses for excluded income, uncertain tax positions
• Taxes not expected to be paid within three years
• Taxes relating to the prior year of income
• Top-up taxes under other rules (IIR and QDMTT)
• Taxes from qualified under-taxed profits</td></tr>
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<tr><th>Key Provision(s)</th><th colspan="2">Details</th></tr>
<tr><td rowspan="2"></td><td>• Taxes paid for uncertain tax positions from prior years</td><td>• Taxes paid by insurance companies on return to policyholders</td></tr>
<tr><td colspan="2">The deferred tax expense recorded in the financial accounts shall be adjusted as follow:
▪ Exclude deferred tax expense for items excluded from net income or loss
▪ Exclude disallowed or unclaimed accruals (unless paid)
▪ Exclude valuation or recognition adjustments
▪ Exclude re-measurement due to tax rate changes
▪ Exclude tax credits except substitute loss carry-forward deferred tax assets
▪ Add recaptured deferred tax liabilities paid in the year
Special rules:
▪ Deferred tax expense for rates above 15% is capped at 15%
▪ Deferred tax assets recorded below 15% may be adjusted to 15% if attributable to net income or loss
▪ No double counting of covered taxes</td></tr>
<tr><td>Recaptured Deferred Tax (RDT) liabilities</td><td colspan="2">A covered person is considered to have a recaptured deferred tax liability if:
• It has a deferred tax liability (other than an excluded liability) recorded in its deferred tax expense for a year of income and that liability is not reversed within five years following the year in which it first arose
The amount of the recaptured deferred tax liability for the current year is treated as a reduction to covered taxes in the fifth preceding year. It requires recalculation of the ETR and top-up tax for that prior year
Deferred tax liabilities relating to the following items are excluded from recapture:
▪ Cost recovery allowances on tangible assets
▪ Licenses or arrangements for immovable property or natural resource exploitation involving significant tangible asset investment
▪ Research and development expenses
▪ Decommissioning and remediation costs
▪ Fair value accounting on unrealised net gains
▪ Foreign currency exchange net gains
▪ Insurance reserves and deferred acquisition costs
▪ Gains from sale of tangible property reinvested in Kenya
▪ Accounting principle changes related to the above items</td></tr>
<tr><td>Other adjustments to covered taxes</td><td colspan="2">Any change to a covered person's tax liability for a previous year, recorded in its accounts, is treated as an adjustment in the year the change occurs
If the change reduces taxes already counted in a prior year, that year's ETR and top-up tax must be recalculated, and adjustments made to that year and any affected years. This also applies if Kenya's tax rate drops below 15% for any deferred tax expense previously claimed as a covered tax and not yet reversed
If deferred tax expense was originally recorded at a rate below 15% and later paid at a higher rate, the prior year's covered taxes must be adjusted—but only up to the amount recalculated at 15%
If a current tax expense included in covered taxes is not paid within three years, the ETR and top-up tax for that year must be recalculated by excluding the unpaid amount
A deferred tax expense from a substitute loss carry-forward is included in the adjustment when it arises and when it reverses, but only if the related foreign tax credit offsets tax on income included in the covered person's income or loss</td></tr>
</table>

Key Provision(s)	Details
	The amount of a substitute loss carry-forward deferred tax asset is limited to the lesser of the foreign tax credit allowed to be carried forward or the tax loss multiplied by the applicable tax rate, and it must be recalculated at 15% The substitute loss carry-forward deferred tax asset should be recast at 15%
Election to carry-forward losses	A covered person is considered to have made a net loss election if it has a net loss in a year of income and elects to carry forward that loss to subsequent years of income When this election is made: • The deferred tax asset for that year is deemed to equal the net loss multiplied by 15% • The balance carried forward to subsequent years is reduced by the amount of the net loss deferred tax asset utilized in any year of income The election ceases to apply if: ✓ The covered person revokes the election in the prescribed form ✓ The Commissioner issues a notice of revocation to the covered person When the election ceases, any remaining net loss deferred tax asset is reduced to zero with effect from the first day of the first year of income in which the election ceases to apply **Additional requirements** – The election must be lodged with the first GloBE information return of the covered person and the election applies to all covered persons that belong to the same multinational group
Combined Effective Tax Rate (ETR) and MTT	The formula for computing the combined effective tax rate (ETR) is: **Combined ETR** = (Sum of all adjusted covered taxes ÷ Sum of all net income or loss) × 100 If the combined ETR for the FY is less than **15%,** an entity is required to pay MTT calculated as follows: **MTT** = (15% – Combined ETR) × Excess Profit + any additional top-up tax Where: • **Excess Profit** = Net income or loss of the covered person for the year of income, reduced by the substance-based income exclusion (SBIE) • SBIE is 10% of employee costs and 8% of the net book value of tangible assets (adjusted annually as follows)

Year beginning	*Employee costs*	*Net book value (NBV) of tangible assets*
2023	10%	8.0%
2024	9.8%	7.8%
2025	9.6%	7.6%
2026	9.4%	7.4%
2027	9.2%	7.2%
2028	9.0%	7.0%
2029	8.2%	6.6%
2030	7.4%	6.2%
2031	6.6%	5.8%
2032	5.8%	5.4%
2033 and subsequent years	5.0%	5.0%

<table>
<tr><th>Key Provision(s)</th><th colspan="2">Details</th></tr>
<tr><td></td><td colspan="2"><u>Notes:</u>
✓ If two or more entities are members of the same group in Kenya, the MTT is determined on a group basis and allocated among the entities in proportion to their net income after SBIE
✓ A covered person may elect how the MTT liability is allocated among group members</td></tr>
<tr><td>Substance-Based Income Exclusion (SBIE)</td><td colspan="2">In determining the SBIE of a covered person, the computation of the NBV of tangible assets shall exclude property (including land or buildings) held for sale, lease, or investment
For operating leases, the lessor may include a portion of the NBV of leased assets located in Kenya, subject to conditions:
- Amount allowed = excess of lessor's average net book value over lessee's right-of-use value
If an employee works more than 50% of the time in Kenya or an asset is located in Kenya for more than 50% of the year, the full amount is included; otherwise, only a proportionate amount applies – based on proportion of time in Kenya
Employee costs and tangible assets of a PE are not counted for the main entity.
For FTE, eligible costs and assets not allocated to owners are allocated based on ownership interests, provided they are located in Kenya
NBV is based on the average value at the beginning and end of the year, excluding:
✓ Any increase in asset value from revaluation
✓ Incremental depreciation from revaluation
For a PE, the employee costs and NBV of tangible assets must be those shown in its own separate financial accounts, provided the employees and assets are located in Kenya</td></tr>
<tr><td>Additional Top-up Tax (ATT)</td><td colspan="2">An ATT shall arise in a year of income if:
• The sum of the net income of all covered persons for that year is nil or results in a net loss;
• The sum of adjusted covered taxes for that year is less than zero; and
• The sum of adjusted covered taxes is less than the expected amount, calculated as:
Expected Adjusted Covered Taxes = Net Loss × 15%
The amount of ATT = Expected Adjusted Covered Taxes – Actual Adjusted Covered Taxes</td></tr>
<tr><td rowspan="2">Special rules for corporate restructuring</td><td colspan="2">An adjustment under special rules shall apply in cases of mergers, demergers, or transfers of ownership interests within a multinational group</td></tr>
<tr><td>Mergers</td><td>An entity is considered under merger rules if:
▪ Two or more multinational groups merge to form a single group; or
▪ An entity that was not part of any multinational group merges with an existing group
Key points:
For any of the 4 years prior to the tested year, the consolidated annual turnover threshold (EUR 750 million) is deemed met if the combined turnover of merging entities equals or exceeds EUR 750 million
In the acquisition year, only the financial accounting net income/loss and ACTs recorded in the consolidated financial statements of the UPE are considered</td></tr>
</table>

Key Provision(s)		Details
	Demergers	An entity is considered under demerger rules if a single multinational group splits into two or more groups no longer consolidated under the same UPE **Treatment:** In the first tested year after the demerger, the demerged group meets the threshold if its annual turnover is EUR 750 million or more For the second to fourth tested years, the group meets the threshold if turnover is EUR 750 million or more in at least two of those years
	Transfers of ownership interests	Where an entity becomes or ceases to be a member of a multinational group due to ownership transfer: ▪ If the target joins or leaves the MNE group or becomes the UPE of the group, the target is treated as a member if any portion of its assets, liabilities, income, expenses, or cash flows is included on a line-by-line basis in the consolidated financial statements of the UPE in the acquisition year ▪ In the acquisition year, only the income/loss and ACTs recorded in the CFSs of the UPE are considered ▪ In the acquisition year and subsequent years, the entity must determine its net income/loss and ACTs using its historical NBV of assets and liabilities ▪ Employee costs under for SBIE purposes are limited to those recorded in the CFSs of the UPE ▪ NBV of tangible assets is adjusted proportionally to the length of time the entity was part of the group during the year ▪ Deferred tax assets and liabilities transferred between groups are treated by the acquiring group as if it had always controlled the entity when those items arose ▪ Deferred tax liabilities previously included in adjustments are treated as reversed by the disposing group and as arising in the acquisition year for the acquiring group, with any subsequent reduction to covered taxes under Regulation 8 applying in the year the amount is recaptured
	GloBE reorganisation	Where transfers occur as part of a GloBE reorganisation: ✓ Gains or losses on transfers are excluded from the transferor's net income or loss if qualifying. The transferee determine net income/loss using the transferor's carrying values of the acquired assets and liabilities ✓ If a GloBE reorganisation involves a non-qualifying gain or loss, the transferor includes the non-qualifying amount in its net income/loss, and the transferee adjusts carrying values accordingly ✓ For transfers outside a GloBE reorganisation, the transferor includes the full gain/loss in its net income/loss, and the transferee uses the NBV of acquired assets and liabilities based on the UPE's accounting standard

Key Provision(s)	Details
Ultimate Parent Entity that is a Flow-Through entity	A flow-through entity that is an UPE shall reduce its net income for the year if the amount of net income is attributable to an ownership holder who: ▪ Is subject to tax on such income within 12 months after the end of the year at a nominal rate of 15% or more; or ▪ It can reasonably be expected that the combined taxes of the UPE and the ownership holder equal or exceed 15% of that income The net income shall also be reduced by income allocated to an ownership holder if: ▪ The ownership holder is a natural person tax resident in the same jurisdiction as the UPE and holds 5% or less of profits and assets; or ▪ The ownership holder is a governmental entity, international organization, non-profit organization, or pension fund tax resident in the same jurisdiction and holds **5% or less** of profits and assets The net loss of the FTE shall be reduced by the amount attributable to the ownership holder, except where the ownership holder cannot use the loss for its taxable income computation The above rules also apply to PE through which the FTE wholly or partly carries on business
Minority-owned covered persons	The ETR and top-up tax for members of a minority-owned subgroup are computed as if each subgroup were a separate multinational group. Further, the ACTs and net income/loss of minority-owned subgroup members are excluded from the residual effective tax rate and net income calculations of other covered persons For minority-owned covered persons outside a subgroup, the ETRs and top-up tax are computed on an entity basis, and their figures are excluded from group-level residual calculations **Definitions:** ▪ Minority-owned covered person: A covered person in which the UPE has a direct or indirect ownership interest of 30% or less ▪ Minority-owned parent entity: A minority-owned covered person that controls another minority-owned covered person ▪ Minority-owned subgroup: A minority-owned parent entity and its minority-owned subsidiaries ▪ Minority-owned subsidiary: A minority-owned covered person controlled by a minority-owned parent entity
Joint venture	A joint venture shall be treated as if it were the UPE of a separate multinational group if ▪ Its financial results are recorded under the equity method in UPE's consolidated financial statements; and ▪ The UPE holds directly or indirectly at least 50% of its ownership interests **Key points:** ▪ The joint venture and its joint venture subsidiaries are treated as covered persons of a separate group for purposes of determining and computing MTT ▪ PEs of a joint venture or its subsidiaries are treated as separate joint venture subsidiaries The rules do not apply to: ▪ An UPE of a multinational group already subject to the Regulations ▪ Entities held through structures excluded under Section 12G of the Act that operate exclusively to hold assets or invest funds for their investors ▪ Entities whose income is substantially excluded from net income or loss computation ▪ Entities held by a multinational group composed exclusively of entities from MTT **Definitions:**

Key Provision(s)	Details
	▪ Joint venture subsidiary: An entity whose assets, liabilities, income, expenses, and cash flows are consolidated by the joint venture under a recognized accounting standard in Kenya
Multi-Parented Groups (MPGs)	A covered person is treated as part of a multi-parented group if: – It is consolidated on a line-by-line basis by the multi-parented multinational group; or – Its controlling interests are held by entities within the multi-parented multinational group Key points: – The consolidated financial statements of the multi-parented group shall be those prepared under a recognized accounting standard in Kenya by the UPE – Each UPE of the separate groups that form the multi-parented group is regarded as an UPE for compliance purposes – Each covered person must submit a return unless a single designated filing entity is appointed to file on behalf of the group, including information for all constituent groups **Definitions:** **Multi-parented multinational group**: Two or more groups where the UPE enter into an arrangement that is either: ▪ A stapled structure – ownership interests in ultimate parent entities are combined and cannot be traded independently, and consolidated financial statements present all entities as a single economic unit ▪ A dual-listed arrangement – ultimate parent entities agree to combine their businesses by contract, share distributions based on a fixed ratio, manage activities as a single economic entity, and prepare consolidated financial statements as one unit
Currency conversion	A covered person must convert amounts if: ▪ They are denominated in a currency other than the reporting currency used in the consolidated financial statements of the UPE; and ▪ The amounts were not converted during the preparation of those consolidated financial statements Key points: ▪ Conversion must follow the foreign currency translation principles of the financial accounting standard that would have been applied if the conversion were done during consolidation ▪ For thresholds or materiality tests denominated in euros (e.g., EUR 750 million turnover), conversion to the euro must use the average daily exchange rate for December of the year immediately preceding the tested year, as determined by the Central Bank "Reporting currency" means the currency used in preparing the consolidated financial statements of the ultimate parent entity
Notification to the Commissioner	An entity subject to these Regulations must notify the Commissioner in the prescribed form, – Within **60 days** from the date of publication of these Regulations; or – Within **6 months** from the first day of the year of income for any subsequent years Any change to the information provided must be reported in accordance with the **Tax Procedures Act** This notification ensures the Commissioner is aware of all entities within scope of the minimum top-up tax rules and can monitor compliance effectively

Key Provision(s)	Details
Top-up tax return and GloBE information return	**Top-up tax return** A covered person shall: a. Submit a top-up tax return in the manner prescribed by the Commissioner; and b. File the return **not later than the last day of the sixth month** following the end of the year of income **GloBE information return** A covered person or a designated local entity shall file a **GloBE information return** for the year of income in the form, content, and manner specified by the Commissioner, consistent with GloBE model rules **Filing deadlines:** ▪ **18 months** after the end of the first year of income in which the covered person becomes subject to MTT; or ▪ **15 months** after the end of subsequent years of income A covered person is **not required to file** a GloBE information return if: ▪ The UPE is located in a jurisdiction with a qualifying competent authority agreement with Kenya; or ▪ The designated filing entity is located in such a jurisdiction The GloBE information return shall include: ▪ Common information about the multinational group (including tax identification numbers and jurisdictions); ▪ Organizational structure and controlling interests; ▪ Calculation of effective tax rate and top-up tax payable in Kenya; and ▪ Any other information required by the Commissioner Returns may be amended in accordance with the Act or the Tax Procedures Act
Safe harbours	A covered person opts to apply simplified compliance measures provided under the GloBE Rules. Until a year of income commencing on or after 1st July 2028, a covered person may elect the Transitional CbCR Safe Harbour as set out in the GloBE Rules. A covered person may also elect the Non-material Constituent Entity simplified calculations as provided under the GloBE Rules *These elections are optional but must be exercised in accordance with the conditions specified in the GloBE Rules. Safe harbours reduce compliance burden during the initial implementation phase by allowing simplified calculations for qualifying entities*

Payment of MTT and record-keeping	Payment of MTT and ATT must be made to the Commissioner **by the end of the fourth month** following the end of the year of income
	
	Payment shall be in **Kenya Shillings**, converted from the presentation currency of the consolidated financial statements using the **average foreign exchange rate for the year of income**
	
	Where the amount of top-up tax paid exceeds the actual tax payable, the provisions of the **Tax Procedures Act on overpaid tax** shall apply
	
	Record-keeping
	
	▪ The person must keep all records necessary to determine and verify the MTT liability
	▪ Records must be maintained in accordance with the **Income Tax Act** and the **Tax Procedures Act**
	▪ Documentation should include:
	    a. Financial statements and supporting schedules used to compute net income or loss
	    b. Details of adjusted covered taxes and any elections made under these Regulations
	    c. Evidence supporting SBIE calculations

Key Provision(s)	Details
	Records must be retained for the statutory period required under Kenyan tax law to facilitate audits and compliance reviews
Automatic exchange of information	The Cabinet Secretary may notify the public of any agreement made under the **Multilateral Competent Authority Agreement on the Exchange of GloBE Information**. The purpose of such agreements is to support the administration and enforcement of minimum top-up tax under these Regulations Penalties - a person who commits an offence under the Regulations shall be liable to the applicable sanctions provided under the Tax Procedures Act
Transition	The transition year is the first year a company becomes subject to these Regulations – which apply starting 1st January 2025 and onwards When calculating the ETR in the transition year (and later), the company must include all deferred tax assets and liabilities recorded in its financial accounts for that year Deferred tax items are generally taken at the corporate tax rate used in the accounts, but if that rate is **less than 15%**, special rules allow adjustments (e.g., some assets can be taken at 15% if linked to net losses). Deferred tax assets from excluded items or certain transactions after 30 November 2021 are not counted For asset transfers before the transition year, the basis for tax calculations should use the disposing entity's carrying value
Interpretation and elections	The GloBE Rules are a relevant source for interpreting Section 12G of the Act and these Regulations Covered persons may apply any elections permitted under the GloBE Rules that are not otherwise provided in these Regulations, subject to the conditions set out in the GloBE Rules Elections made under this provision must include any required consequential adjustments to maintain compliance Elections shall also apply for purposes of a Qualified Income Inclusion Rule or Qualified Undertaxed Profits Rule, where applicable Covered persons cannot make the De Minimis Exclusion election under Article 5.5 of the GloBE Rules

Our comments

The draft MTT rules borrow heavily from the GloBe Rules under the OECD G20 Pillar II framework for anti-base erosion. However, its complexity introduce significant administrative and operational challenges for MNEs. They will need robust systems for calculating effective tax rate, substance-based income exclusions, deferred tax adjustments, and group-level allocations. Separate systems may be required to track deferred tax liabilities, recalculating prior-year ETRs, and maintaining extensive documentation.

As KRA collate public opinion on the Regulations, they should focus on simplifying technical provisions through clear guidance and practical examples. They should engage stakeholders in meaningful consultations to address implementation challenges. KRA needs to assess compliance costs and consider phased or transitional measures. It should ensure alignment with global GloBE standards while adapting to Kenya's context. Capacity-building initiatives such as training and digital tools should be provided for businesses and tax officers.

NAIROBI

1st Floor, Pacis Centre,
Slip Road, off Waiyaki Way, Westlands
P.O. Box 349, 00606
Nairobi, Kenya

Tel: +254 20 3614000/4451747/8/9
Mobile: +254 706 347950/772 786111
Email: info@ke.rsm-ea.com
Website: www.rsm.global/kenya
Contact: Elvis Ogeto (Managing Partner)

MOMBASA

Acacia Center, Mezzanine 1,
Nyerere Avenue
P.O. Box 87227, 80100
Mombasa, Kenya

Tel: +254 41 2311778/2312640/2224116
Mobile: +254 707 613329
Email: infomsa@ke.rsm-ea.com
Website: www.rsm.global/kenya
Contact: Ashif Kassam (Managing Partner)

KAMPALA
ASSOCIATE OFFICE

6th Floor, DTB Centre,
Plot 17/19, Kampala Road
P.O. Box 31704,
Kampala, Uganda

Tel: +256 414 342780
Email: info@ug.rsm-ea.com
Website: www.rsm.global/uganda
Contact: John Walabyeki (Managing Partner)

DAR ES SALAAM
ASSOCIATE OFFICE

1st Floor, Plot No. 1040,
Haile Selassie Road, Masaki
P.O. Box 79586
Dar es Salaam, Tanzania

Tel: +255 22 2602714 / 2602774
Email: info@tz.rsm-ea.co.tz
Website: www.rsm.global/tanzania
Contact: Lina Ratansi (Managing Partner)

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