

WELCOME!

Webinar will commence at 10.05 am



RSM TAX WEBINAR

8th July 2020



FINANCE ACT, 2020

Presented by: Ashif Kassam / Lucas Kihara

Voluntary Tax Disclosure Programme - 1st Jan 2021

- 3 years effective 1st January 2021
- Disclose tax liability for the purpose of being granted relief on penalties and interest
- Application to be made 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 2016 to 30th June 2020)
- No prosecution in respect to the tax liability disclosed, and:
 - full remission of interest and penalties if the principal tax is paid in the first year;
 - 50% remission of interest and penalties if the principal tax is paid in the second year; and
 - 25% remission of interest and penalties if the principal tax is paid in the third year.

Voluntary Tax Disclosure Programme - 1st Jan 2021

- The application shall be voluntary and all material facts are disclosed
- An application shall not result in the payment of a refund
- Deduced into an agreement setting out the terms of the payment and the period, which shall not exceed 1 year from the date of the agreement
- Failure to meet terms of the agreement - full interest and penalties remitted become due
- No right of appeal with respect to taxes, penalties and interest remitted
- Failure to disclose material facts before expiry of agreement - relief granted withdrawn, assessment and collection of any balance of tax liability, or commencement of prosecution. Right of appeal provided
- Not applicable to a taxpayer who is under an audit or investigation, or is a party to any ongoing litigation or has been notified of a pending audit or investigation
- Disclosure shall be confidential

Minimum Tax - 1st Jan 2021

- Where installment tax liability is lower than 1% of the gross turnover, a minimum tax at 1% of the gross turnover is payable quarterly on 20th of the fourth, sixth, ninth and twelfth months
- Installment tax - lower of the preceding year's tax multiplied by 110% and the current year's estimate
- For individual taxpayers, installment tax is payable if the preceding year's tax liability is KShs 40,000 or more
- Drafting error - contradiction between the sub-sections - payable if the installment tax is higher (instead of lower)

Minimum Tax - 1st Jan 2021

- Exceptions include those:
 - earning emoluments which are taxed at source;
 - paying tax under the residential rental income tax;
 - paying tax under the turnover tax regime;
 - subject to capital gains tax;
 - whose income is exempt from tax under the First Schedule; and
 - in the extractive industries, taxed under the Ninth Schedule.
- Provision not clear where income comprises of dividend income taxed at source

Digital Services Tax - 1st Jan 2021

- 1.5% of the gross transaction value on the provision of services derived from or accrued in Kenya through a digital market place
- Due at the time of the transfer of payment for the service to the service provider
- In the case of a resident person or a non-resident person with a permanent establishment in Kenya, such tax shall be treated as an advance tax to be offset against the final tax liability
- Digital market place is defined “as a platform that enables, by electronic means, direct interaction between buyers and sellers of goods and services”
- Commissioner empowered to appoint an agent for purposes and collection of digital services tax

Digital Services Tax - Proposed VAT Regulations

- Taxable supplies to include **B2C** (customer not registered for VAT) supplies:
 - Downloadable digital content including mobile applications, e-books and movies;
 - Subscription-based media including news, magazines, journals, streaming of TV shows and music, podcasts and online gaming;
 - Software programs including downloading of software, drivers, website filters and firewalls;
 - Electronic data management including website hosting, online data warehousing, file-sharing and cloud storage services;
 - Supply of music, films and games, search-engine and automated helpdesk services including supply of customized search-engine services;
 - Tickets bought for live events, theatres, restaurants etc. purchased through the internet;
 - Supply of distance teaching via pre-recorded medium or e-learning including supply of online courses and training;
 - Supply of digital content for listening, viewing or playing on any audio, visual or digital media;
 - Supply of services on online marketplaces that links the supplier to the recipient, including transport hailing platforms;
 - Any other digital marketplace supply as may be determined by the Commissioner.
- Simplified tax invoice and no claim of input VAT
- B2B -reverse VAT provisions apply

Income Tax - Other Changes - 1st Jan 2021

- Disallowing the following expenses against taxable profits:
 - An entrance fee or annual subscription paid to a trade association which has elected to pay tax, meaning that all subscriptions to trade associations are non-deductible
 - Legal and other costs, including expenditure on rating, incurred on the issue of shares or debentures to the public and listing on a securities exchange in Kenya without raising capital
 - Club subscriptions paid by an employer on behalf of an employee
- The provision to exclude expenditure on the construction of a public school, hospital, road or any other similar social infrastructure with the approval of CS Finance deleted
- **Residential Rental Income** - Rental income limit subject to 10% tax increased from KShs 10 million to KShs 15 million. Non-taxable income threshold increased from KShs 144,000 to KShs 288,000 p.a.

- Lump sum pension granted to a person who is 65 years of age or more is now taxable - 30th June 2020
- Bonuses, overtime and retirement benefits paid to those in the lowest income bracket taxable - 30th June 2020
- Monthly pension remains exempt to those 65 years of age or more
- **HOSP - 1st Jan 2021**
 - Removal of the relief under HOSP - KShs 96,000 pa.
 - No transitional clause for those already under the scheme
 - Income earned from HOSP, now subject to 15% withholding tax

Other Changes

- Tax Appeals Tribunal Act
 - An appeal to the TAT shall be limited to the grounds or documents stated in the appeal to which the decision relates
- KRA Act
 - Legal action against the authority for any act, neglect or default complained of to be instituted within 3 years
 - In case of a continuing injury or damage, the legal action should be commenced within 6 months after the cessation of the injury or damage
 - Further, a 1 month written notice specifying the particulars of the claim and intention to initiate legal proceedings should be served to the Commissioner General

VAT Changes

- Input tax shall not be allowed where the registered supplier has not declared the sales invoice in a return
- Items now vatable include:
 - Purchase of light aircrafts (below unladen weight of 2,000 kgs) and helicopters. These are now also subject to IDF
 - Leasing of helicopters
 - Various parts of aeroplanes and helicopters including launching gears, air combat simulators, ground flying trainers and pneumatic tyres
 - Tractors used for agricultural purposes
 - LPG including propane
 - Specialised solar and wind energy generating equipment and for use in manufacture of solar batteries
 - Various cookers and stoves including energy saving
 - Taxable goods used in the manufacture of clean cooking stoves
- Items exempt:
 - Maize corn seeds
 - Supply of ambulance services
- Items zero-rated:
 - Supply of maize, cassava, wheat and meslin flour for a period of 6 months

Excise Duty Changes

- Licence includes any activity in Kenya for which the Commissioner may impose a requirement for a licence
- The Commissioner to seek the approval of CS Treasury to inflation adjust the specific rates; the notice to be laid before National Assembly within 7 days of its publication; and the National Assembly to consider it with 28 sitting days
- Excise duty on betting of 20% removed. CS Treasury has indicated that this will be reintroduced within 6 months

- An additional 2.5% duty on custom value in respect to goods entered for home use from an EPZ. This is in addition to the import duties chargeable under ECCMA
- IDF of 1.5% instead of KShs 10,000 to goods imported under the EAC Duty Remission Scheme



TAX LAWS (AMENDMENT) ACT, 2020

Presented by: Ashif Kassam

Personal Tax

Individual Tax and Tax on Wife's Employment, Professional and Self-Employment Income - KShs	Rate - %	Cumulative Tax - KShs PM. Less Relief
First 288,000 pa. (24,000 pm.)	10%	Nil
Next 200,000 pa. (16,666 pm.)	15%	2,500
Next 200,000 pa. (16,666 pm.)	20%	5,833
Over 688,000 pa. (57,333 pm.)	25%	

Personal tax relief increased from: KShs 16,896 pa. (KShs 1,408 pm.) to KShs 28,800 pa (KShs 2,400 pm.)

- Monthly income subject to the highest tax bracket increased from KShs 47,059 to KShs 57,333
- The tax rates for withdrawal before the expiry of 15 years from the date of joining a registered pension/provident scheme or the NSSF, for withdrawals in excess of the tax free limits, aligned to the individual tax rates
- Tax rate for withdrawal from a registered pension/provident scheme or NSSF after the expiry of 15 years from the date of joining, for amounts over KShs 1.2 million, reduced from 30% to 25%
- Individual SAR shall be adjusted to accommodate both rates of 30% for the 3 months and 25% for the remaining 9 months and by reference to the appropriate relief in force

Qualifying Interest

- Interest earned by a resident individual - 15% withholding tax, to be final tax
- Previously, only interest earned from a licenced bank, financial institution or building society, Central Bank of Kenya and on a bond approved by the CS Finance was subject to 15% withholding tax as final tax

Turnover Tax

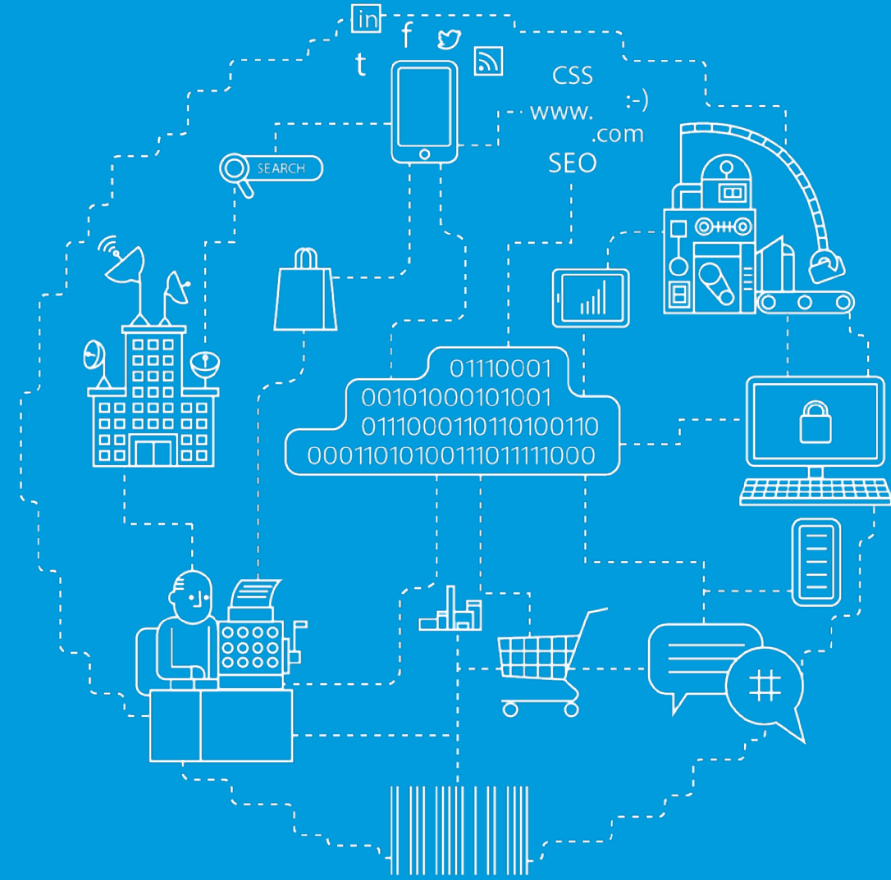
- TOT - 1% of gross receipts of the business, payable monthly
- Turnover of between KShs 1m and KShs 50m
- Extended to incorporated companies
- VAT registration limit still KShs 5m
- This limit does not apply to rental income and management, professional or training fees:
 - Management or professional fees - made to a person, other than a payment made to an employee, as consideration for managerial, technical, **agency**, contractual, professional or consultancy services
 - Agency fees - made to a person ---- or on behalf of the Government and excludes any payment made by an agent on behalf of a principal when such payments are recoverable
- Option to be subjected to corporation tax, with prior approval
- The collection of presumptive tax at 15% of the Single Business Permit fee removed
- For corporations, iTax not configured for migration
- Companies will have to prepare 3 months return (January - March 2020) under the corporation tax rate regime and 1% TOT thereafter
- Instalment tax paid will be utilised against the tax assessed for prior periods and overpayment treated as advance against TOT liability
- Penalty reduced from KShs 5,000 to KShs 1,000

Corporation Tax

- Corporation tax rate reduced from 30% to 25% effective 1st January 2020
- WHT on dividend payments to non-residents increased from 10% to 15%
- The 30% electricity rebate introduced in 2019 not allowed as deductible expenses against taxable profit
- Tax is due at the end of the accounting period and therefore for accounting periods ending on January - March, 30% shall be applicable. April onwards, the new rate of 25% will be applicable

Investment Allowance

- Investment deduction regime removed - no transition provision
- Use of the word “may” as opposed to “shall”
- Sale of buildings will now be treated as a trading receipt
- No transitional provision



OVERVIEW OF TAT AND COURT RULINGS

Presented by: Ashif Kassam

KRA vs Republic (Ex-Parte Fintel) - CoA - 5th Feb 2019

- Issue - Due date for payment of withholding tax - date of actual payment or date of accrual
- ITA defines paid to mean “distributed, credited, dealt with or deemed to have been paid in the interest or on behalf of a person”
- Section 35 (1) / (3) - “A person shall, upon payment of an amount -----, which is chargeable to tax, deducted therefrom tax at the appropriate ----- rate”
- Ruling:
 - ITA has given the word “paid” a technical as opposed to an ordinary definition
 - A payment is deemed to have been made even when no money has passed over
 - “Deduct” is used as an accounting term referring to the act or process of subtracting an item or expenditure from gross income to reduce the amount of income subject to income tax
This need not be done physically but at the point of book entry, when the tax benefit passes
 - No justification for the respondent to move to the High Court after invoking the jurisdiction of the Local Committee - done in good faith and the appellant suffered no prejudice
- What happens where one relied on the HC ruling (5th Oct 2012) that WHT is due on payment?

Republic (Ex-Parte I&M Bank) vs KRA - HC - 5th Dec 2017

- Issues:
 - Is an objection allowed within 60 days if not responded to by KRA (Objection Decision) where all necessary information has been submitted?
 - Can the existence of a right of appeal to another forum prevent a taxpayer from seeking redress under an alternative process i.e. Judicial Review in this case?
- Ruling:
 - Application to a higher court, where an alternative remedy is available, is an abuse of the court process and primarily aimed at forum shopping
 - The issues raised in the Judicial Review would have been better dealt with by the TAT in the exercise of its appellate jurisdiction
 - Similar ruling in Republic (Ex-parte Krystalline Salt) vs KRA where it was also determined that agency notices can be appealed decision to TAT

Everret Aviation vs KRA - HC - 16th Mar 2013

- Issue - Are freelance pilots subject to PAYE or WHT?
- Considerations:
 - Freelance pilots not integrated into workplace, procure licence independently, could not be dismissed or forced to fly and have no management duties
 - Contract for service (consultancy) - master can require what is to be done. Work although done for business, is not integrated into it but is only an accessory to it
 - Contract of service (employment) - master can require what is to be done and how it shall be done

Everret Aviation vs KRA - HC - 16th Mar 2013

- Ruling:
 - Both resident and non-resident pilots were employed under a contract for service as they were doing similar tasks under contracts of service - employer substantially in control, bore the risk of loss and chance to profit, identified the tasks to be performed, determined the pay and release
 - As KRA did not appeal on the TAT ruling that non-resident pilots were subject to WHT, this was not touched by the ruling
- In the case of UAP Life Assurance vs KRA
 - Control test, integration test, test of economic or business reality (ultimate risk of loss or chance of profit) and mutuality of obligations test (commitments) considered
 - Agents had a small monthly subsidy other benefits but most income was commission based
 - Employment Act is the principal statute for employment matters
 - As agents are governed by the Insurance Act, an understanding of that Act was required
 - Appeal allowed

Fontana / Total Touch Cargo / F.H. Services / Coca Cola - VAT

- **Fontana** - The court held that for a service to be deemed as exported, it matters not whether the service is performed in Kenya or outside Kenya, as the determining factor is the location where the service is to be finally consumed or used, which should be outside Kenya
- **F.H. Services and Total Touch Cargo** - The use or consumption of the service carries more weight than the place of performance and that the test for export of service is **simply where the service is consumed**
- **Coca Cola (2013)** - In its reasoning, the tribunal stated that consumption or use of a service is not determined by reference to the location or the payer or person requisitioning the service. What is pertinent, **is the location of the consumer of the services**
- **Coca Cola (2018)** –

What is the test in establishing whether services are exported?

- Determining factor of “services exported out of Kenya” is where those services are used or consumed, which should not be Kenya
- OECD Guidelines are built on two core-principles: the ‘neutrality principle’ where VAT is a tax on final consumption that should be neutral for business, and the ‘destination principle’ whereby internationally traded services and intangibles should be subject to VAT in their jurisdiction of consumption

- **Coca Cola (2018) -**

Who is the consumer of the marketing services and who has the taxing rights?

- Guideline 3.2 of the International VAT / GST Guidelines, 2017 provides that for business to business supplies, the jurisdiction in which the consumer is located has the taxing rights over internationally traded services or intangibles. The Tribunal found that the Kenyan consumer is a third party in so far as the marketing service agreement was concerned
- Marketing services were rendered to Coca-Cola Export who in turn provided the services to Swaziland (manufacturer of the concentrate) which were then imported into Kenya as a product, not as a service. The Tribunal concluded that although the services are performed in Kenya, at that stage, there is no way of determining with finality that every Kenyan who sees the advert purchases a beverage. The test is not where the service is performed but where the consumer is located
- Kenyan consumers of the beverage are the largest audience of the advertising services but are 3rd party to the agreement. The benefit is accrued by Coca-Cola Export who enhances the business and sales of the concentrate. Accordingly, and in applying the destination principle, USA has the taxing rights
- This judgement is in contrast to the previous Coca-Cola Case judgement (2013), where the Tribunal found that the consumers of advertising services rendered by Coca-Cola Central East and West Africa Limited to Coca-Cola Export Corporation were Kenyan households which enjoyed the advertisements in Kenya

Brookhouse vs KRA - TAT - 27th Mar 2020

- Issue - Tax treatment of school fees given as non-cash benefits and on a discounted basis
- Considerations:
 - Section 5(4)(d) - Notwithstanding anything to the contrary ----- "gains or profits" do not include -----
- educational fees of employee's dependants or relatives disallowed under Section 16(2)(a)(iv) which have been taxed in the hands of the employer
 - Section 16(2)(a)(iv) - Notwithstanding any other provision of this Act, no deduction shall be allowed in respect of ----- expenditure incurred by a person in the maintenance of himself, his family or establishment or for any other personal or domestic purpose including ----- educational fees of employee's dependents or relatives
- Ruling:
 - General provision yields to a special provision should they operate in the same field on the same subject (principle of generalia specialibus non derogant)
 - While it may have been difficult to determine the market value of the benefit, the same could not have been said for the cost of the benefit
 - Non-cash education benefit to the employees not subject to PAYE, but the cost incurred in providing the non-cash benefit should be disallowed when computing taxable income
 - In case of schools exempt from tax, the fees would become a taxable benefit

Brookhouse vs KRA - TAT - 27th Mar 2020

- Issue - Period allowed for assessment
- Ruling:
 - All tax returns are subject to self-assessment regime and not just income tax returns
 - The five year period runs from the time of the notice of intention to audit and not from the date of assessment
 - For KRA to rely on the provision of wilful neglect, evasion or fraud, they need to specifically prove that
- Ruling appealed by KRA

Pevans vs KRA - TAT - 6th Nov 2019

- Issue - Definition of winnings and if KRA can demand the WHT as if it was tax due and payable
- Ruling:
 - Withholding tax is only deductible on winnings and not on the amount staked by the punter
 - KRA had no legal basis of demanding WHT as if it was tax due and payable by the withholding tax agent
 - Up to 7th Nov 2019, KRA can only charge 10% penalty up to Shs 1 million for failure to deduct the tax but cannot demand the principal withholding tax from the agent
 - KRA cannot demand tax without the issue of tax assessments as this is unprocedural and in breach of a taxpayer's constitutional rights
- Ruling appealed by KRA

Republic (Ex-Parte M-Kopa) vs KRA - 18th April 2018

- Issue - Whether private rulings are binding
- Considerations:
 - Judicial review is concerned with the process that a statutory body employs to reach the decision and not the merits of the decision itself - individual given fair treatment
- Ruling –
 - A validly issued private ruling creates a legitimate expectation
 - A private ruling is binding until lawfully withdrawn and not by mere implication
 - A private ruling can only be withdrawn where rational grounds of the intention to withdraw have been communicated to the taxpayer in clear terms and the taxpayer has been given an opportunity to comment

Private Ruling

- An application shall be in writing and shall:
 - include all relevant details of the transaction to which the application relates together with all relevant documents;
 - specify precisely the question on which the interpretation is required; and
 - give a full statement setting out the interpretation by the applicant of the tax law in relation to the transaction.
- Can a taxpayer rely on the principle of estoppel in a legal defense if the ruling contravenes the law?
- There is no waiver, estoppel or acquiescence of or against a statute or law
- Private ruling to be issued within 60 days and no requirement for the Commissioner to publish it in two daily newspapers

Consolidated Appeal By KSAA to HC

WHT on Demurrage Charges

- Demurrage charges are subject to withholding tax between 21st Sept 2018 and 6th Nov 2019
- From 7th Nov 2019, demurrage charges included as part of shipping income earned by non-resident ship owners, and chargeable to tax at a rate of 2.5% of the gross amount received

VAT on Delivery Order and Bill of Lading Charges

- Delivery order and bill of lading charges constitute elements of freight for the imported goods
- Held that delivery order and bill of lading charges are not subject to VAT

Consolidated Appeal By KSAA to HC

Tax on Cargo Transhipments

- Transhipment refers to the act of taking cargo out of the ship and loading it on another or the transfer of cargo to another mode of transportation
- Held that freight on transhipment of cargo cannot be taxed in Kenya under section 9(1) of the Income Tax Act since this income is not derived from Kenya

Deemed Dividends Distribution

- Where the Commissioner is of the opinion that a company has not distributed to its shareholders as dividends within a reasonable period (not exceeding 12 months from the end of the accounting period) that part of income which could have been distributed without prejudice to the requirements of the company's business, he may direct that such excess be treated for tax purposes, on a date 12 months after the end of the accounting period, as having been distributed as dividends to the shareholders.
- Held that the onus is on the taxpayer to demonstrate that the deemed distribution will prejudice the requirements of the company's business

Intex Construction vs KRA - TAT - 27th Sept 2017

Issues:

- Can interest be restricted on companies owned wholly by resident shareholders
- Financial claims do not attract VAT as these are for a compensation in respect of which no goods or services have been provided

Ruling:

- VAT on financial claims is payable. In construction, VAT is based on contract price plus any other variations agreed between the parties as provided for under conditions of the contract and that all such charges which form income to the contractor
- Deemed interest is only due in case of a thinly capitalised company (controlled (25%) by a non-resident person alone or together with four or fewer persons), where a non-resident person provides loans directly or through their non-resident associates on an interest free basis

Shreeji Enterprise vs KRA - TAT - 25th Mar 2020

Issue - Claim of input VAT where the taxpayer had all the documentation required by the VAT Act

Considerations:

- How can trader be missing when KRA has dealt with them
- Was there a direct and immediate link with output VAT
- Can one be penalised if he has no knowledge of the fraudulent acts or intentions of other persons in the supply chain
- It is the responsibility of the tax authorities to carry out the necessary inspections of business to detect VAT fraud and the taxpayer is not owed to investigate on the status of the counterparty
- Burden of proof shifts to the revenue authority in case of fraud

Ruling:

- The taxpayer did not have the capacity, duty or knowledge to enforce remittance of tax by a supplier

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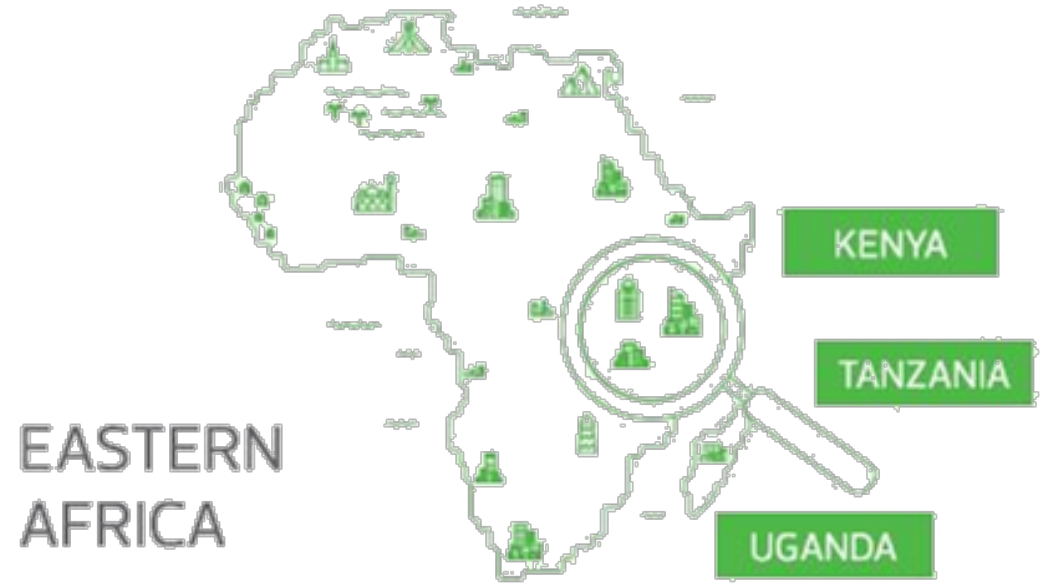


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Key Industry Experience

Manufacturing -
retail/consumer
products



Real estate &
construction



Non-governmental
organisations



Trading



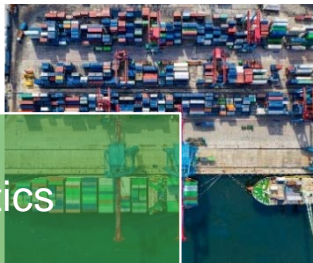
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