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CLARITY ON COUNTRY BY COUNTRY REPORTING REQUIREMENTS FOR MULTINATIONAL ENTERPRISE GROUPS

The National Treasury and Planning together with the Kenya Revenue Authority through a Public Notice dated 19/11/2021 released the draft Income Tax Act (Country by Country Reporting) Regulations, 2021 (ITA Regulations, 2021) to guide on the implementation of the Provisions of Section 18B of the Income Tax Act.

Section 18B was introduced by the Finance Act, 2021 and effective 1st January 2022. The Section requires multinational enterprise groups to submit returns giving information on their activities in other jurisdictions.

For this purpose, the Act defined a multinational enterprise group ("MEG") to mean:

"A group that includes two or more enterprises which are resident in different jurisdictions including an enterprise that carries on business through a permanent establishment or through any other entity in another jurisdiction."

Further, an Ultimate Parent Entity ("UPE") has been defined to mean:

"An entity that is a resident in Kenya for tax purposes; is not controlled by another entity; and owns or controls a multinational enterprise group. "

An UPE of a MEG will be required to submit to the Commissioner a return describing the group's financial activities in Kenya, where its gross turnover exceeds the prescribed threshold, and in all other jurisdictions where the group has taxable presence, not later than 12 months after the last day of the reporting financial year of the group.

The Act however did not provide clarity on the prescribed gross turnover threshold.

The information required in the group return in relation to each jurisdiction in which the group operates shall consist the group's aggregate information relating to:

- revenue;
- profit or loss before income tax;
- income tax paid;
- income tax accrued;
- stated capital;
- accumulated earnings;
- number of employees; and
- tangible assets other than cash or cash equivalents.

The group reporting has been necessitated by limitations of law to enable the Commissioner to get information from offshore entities for multinational entities whose UPEs are resident in Kenya.

The draft ITA Regulations, 2021 is intended to bring more clarity on the procedure and the threshold for filling the Country-by-Country Report (CCR).

We summarize below the contents proposals of the draft ITA Regulations, 2021.



New Definitions not previously covered by the Finance Act, 2021

“Group” means a collection of enterprises related through ownership or control such that it is either required to prepare Consolidated Financial Statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on a public securities exchange. A group for Country-by-Country reporting purposes includes a single enterprise with one or more foreign permanent establishments.

“Excluded MNE Group” means, with respect to any Fiscal Year of the Group, a Group having total consolidated group revenue of less than [20 million Euro] or [KShs. 2.5 Billion as of January 2022] during the Fiscal Year immediately preceding the Reporting Fiscal Year as reflected in its Consolidated Financial Statements for such preceding Fiscal Year.

“Constituent Entity” means

- i) any separate business unit of an MEG that is included in the Consolidated Financial Statements of the MEG for financial reporting purposes, or would be so included if equity interests in such business unit of an MEG were traded on a public securities exchange;
- ii) any such business unit that is excluded from the MEG's Consolidated Financial Statements solely on size or materiality grounds; and
- iii) any permanent establishment of any separate business unit of the MEG included in (i) or (ii) above provided that the business unit prepares a separate financial statement for such permanent establishment for financial reporting, regulatory, tax reporting, or internal management control purposes.

“Reporting Entity” means the Constituent Entity that is required to file a CCR conforming to the requirements in Paragraph 5 of the ITA Regulations, 2021 in its jurisdiction of tax residence on behalf of the MEG. The Reporting Entity may be the UPE, the Surrogate Parent Entity, an UPE of a MEG with a turnover of 20 Million Euros that is resident in Kenya for tax purposes or any entity described in Paragraph 3(2) of the ITA Regulations, 2021.

“Surrogate Parent Entity” means one Constituent Entity of the MEG that has been appointed by such MEG, as a sole substitute for the UPE, to file the CCR in that Constituent Entity's jurisdiction of tax residence, on behalf of such MEG.

“Fiscal Year” means an annual accounting period with respect to which the UPE of the MEG prepares its financial statements.

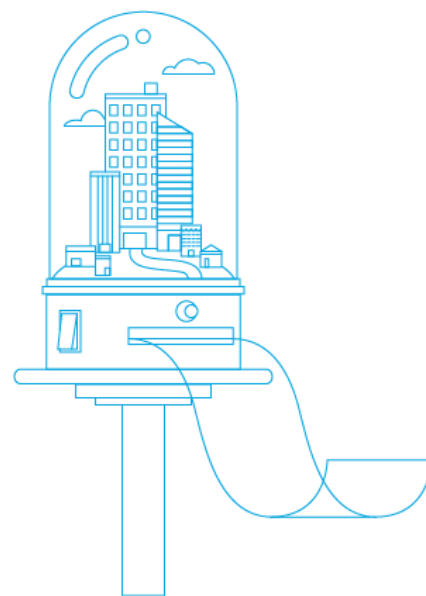
“Reporting Fiscal Year” means that Fiscal Year the financial and operational results of which are reflected in the CCR.

“Qualifying Competent Authority Agreement” means an agreement (i) that is between authorized representatives of those jurisdictions that are parties to an International Agreement and (ii) that requires the automatic exchange of CCRs between the party jurisdictions.

“International Agreement” shall mean the Multilateral Convention for Mutual Administrative Assistance in Tax Matters, any bilateral or multilateral Tax Convention, or any Tax Information Exchange Agreement to which Kenya is a party, and that by its terms provides legal authority for the exchange of tax information between jurisdictions, including automatic exchange of such information.

“Consolidated Financial Statements” means the financial statements of an MEG in which the assets, liabilities, income, expenses and cash flows of the UPE and the Constituent Entities are presented as those of a single economic entity.

“Systemic Failure” with respect to a jurisdiction means that a jurisdiction has a Qualifying Competent Authority Agreement in effect with Kenya, but has suspended automatic exchange (for reasons other than those that are in accordance with the terms of that Agreement) or otherwise persistently failed to automatically provide to Kenya CCRs in its possession of MEGs that have Constituent Entities in Kenya.



Proposed procedure for filling the Country-by Country Report

Any UPE of a MEG with a turnover of 20 Million Euros (including extraordinary and/or investment income) that is resident in Kenya for tax purposes shall file a CCR by not later than 12 months after the last day of its fiscal year.

A Constituent Entity which is not the UPE of a MEG shall file a CCR Report not later than 12 months after the last day of its fiscal year (due date) provided that.

- i. the entity is resident in Kenya for tax purposes; and
- ii. Meets one of the below conditions:
 - the UPE of the MEG is not obligated to file a CCR in its jurisdiction of tax residence; or,
 - the jurisdiction in which the UPE is resident for tax purposes has a current International Agreement to which Kenya is a party but does not have a Qualifying Competent Authority Agreement in effect to which Kenya is a party by the due date of the return; or
 - there has been a Systemic Failure of the jurisdiction of tax residence of the UPE that has been notified by the Commissioner to the Constituent Entity resident for tax purposes in Kenya.

If a MEG has more than one Constituent Entities that are resident for tax purposes in Kenya and one or more of the conditions set out above are met, the MEG may designate one of such Constituent Entities to file the CCR with the Commissioner with respect to any Reporting Fiscal Year on or before the due date.

The MNE should also notify the Commissioner that the filing is intended to satisfy the filing requirement of all the Constituent Entities of such MEG that are resident for tax purposes in Kenya.



A Constituent Entity which is not the UPE of a MEG will however not be required to submit the CCR with the Commissioner with respect to any reporting fiscal year if the MEG of which it is a Constituent Entity has already made available a CCR through a Surrogate Parent Entity that files that CCR with the tax authority of its jurisdiction of tax residence and that satisfies the following conditions.

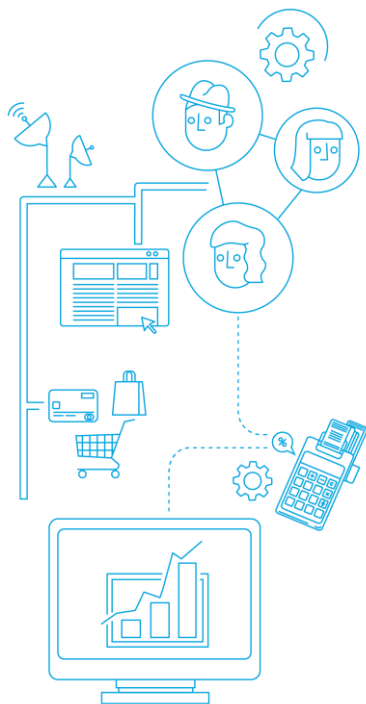
- (i) the jurisdiction of tax residence of the Surrogate Parent Entity requires filing of CCR containing:
 - a) Aggregate information relating to the amount of revenue, profit (loss) before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees, and tangible assets other than cash or cash equivalents with regard to each jurisdiction (including entity information) in which the MEG operates; and
 - b) An identification of each Constituent Entity of the MEG setting out the jurisdiction of tax residence of such Constituent Entity, and where different from such jurisdiction of tax residence, the jurisdiction under the laws of which such Constituent Entity is organized, and the nature of the main business activity or activities of such Constituent Entity.
- (ii) the jurisdiction of tax residence of the Surrogate Parent Entity has a Qualifying Competent Authority Agreement in effect to which Kenya is a party by the due date of filling the CCR;
- (iii) the jurisdiction of tax residence of the Surrogate Parent Entity has not notified the Commissioner of a Systemic Failure;
- (iv) the jurisdiction of tax residence of the Surrogate Parent Entity has been notified by the Constituent Entity resident for tax purposes in its jurisdiction
- (v) that it is the Surrogate Parent Entity of the respective MEG; and
- (vi) a notification has been provided to the on the Surrogate Parent Entity of the respective MEG responsible for filing the CCR in its jurisdiction.

The KRA has further indicated that the CCR filled by the respective MEGs will be used for the purposes of assessing high-level transfer pricing risks and other base erosion and profit shifting related risks in Kenya, including assessing the risk of non-compliance by members of the MEG with applicable transfer pricing rules, and where appropriate for economic and statistical analysis.

The KRA also assures to preserve the confidentiality of the information contained in the CCR at least to the same extent that would apply if such information were provided to it under the provisions of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

Through the public notice, the KRA has invited the members of the public and various stakeholders to submit their views on the draft ITA Regulations, 2021 on or before Friday, 10th December, 2021.

It is our considered view that the regulations now bring clarity on the implementation of the provisions of Section 18B of the Income Tax Act, as the effective date of 1 January 2022 draws nearer. However the draft regulations do not specify how the CCR's should be submitted to the KRA as they only state that this will be done in such form and manner, including by electronic means, as may be specified by the Commissioners from time to time and to such office of the Commissioners as is so specified. More clarity and certainty would be required to ensure that the targeted MEGs remain compliant as of the effective date.



Key proposals of the draft Income Tax Regulations, 2021

- Any Ultimate Parent Entity of a Multinational Enterprise Group with a turnover of 20 Million Euros (including extraordinary and/or investment income) that is resident in Kenya for tax purposes shall file a Country-By-Country Report.
- If a Multinational Enterprise Group has more than one Constituent Entities that are resident for tax purposes in Kenya the Multinational Enterprise Group may designate one of such Constituent Entities to file the Country-By-Country Report with the Commissioner on its behalf.
- A Constituent Entity which is not the Ultimate Parent Entity of a Multinational Enterprise Group will not be required to submit the Country-By-Country Report with the Commissioner if the Multinational Enterprise Group of which it is a Constituent Entity has already made available a Country-By-Country Report through a Surrogate Parent Entity through the tax authority of its jurisdiction of tax residence provided the report is in line with the regulations in Kenya.
- Country-by-country report shall be filed not later than 12 months after the last day of the fiscal year of the (Ultimate Parent Entity of an) MNE Group.

The effective date for the Regulations will be for Fiscal Years of MNE Groups beginning on or after 1 January 2022.

Caveat

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