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Ruling provides clarity on Kenyan withholding taxes for inbound services

By Karen Miller and Joon Chong

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A recent decision by the Tax Appeals Tribunal of Kenya has provided much needed clarity on withholding tax payable by South African residents providing services to Kenyan entities.

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Kenya applies a 20% withholding tax on payments made for services rendered by non-residents to Kenyan residents. South African residents providing such services have argued that the withholding tax provisions should not apply because under Article 7 of the South Africa-Kenya Double Tax Agreement (DTA), South Africa has the taxing rights on the service income (provided the South African entity does not have a permanent establishment in Kenya). The Kenyan Revenue Authority (KRA) has, however, argued that Article 7 does not apply and has sought to impose the withholding tax.

This issue has finally been ruled on in the recent case of *McKinsey and Company Inc v Commissioner of Legal Services Board Coordination* held at the Tax Appeals Tribunal in Kenya. The Tribunal finding in favour of the taxpayer, held that professional fees paid by the Kenyan entity to the South African service provider fell within Article 7 of the DTA and that the KRA had no right to withhold taxes on the payment of the fees.

Whilst the KRA may appeal the decision, the outcome of this case provides some comfort to South African residents providing services to Kenyan entities. There should be no Kenyan withholding taxes imposed on service fees paid by the Kenyan entity to the South African entity. Where withholding taxes have already been withheld and paid to KRA, it should also be possible for the South African resident entity to claim a refund. (This also means that the South African entity would not qualify for any section 6quat rebate claimed on the Kenyan withholding taxes, against South African income tax.)

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