www.pwc.com

Taxation of expatriates in Kenya

June 2013

pwc

Agenda

- Overview of legislation on employment income subject to income tax/PAYE
- Tax Residency
- Determination of income subject to tax/PAYE
- Employer/employee relationship for tax purposes
- Tax planning options for expatriates
- Assignment structure
- NHIF & NSSF Obligation
- Illustrative case study

Starting from the basics of individual taxation …

From the Income Tax Act:

"Individual" is defined as a natural person.

"..a tax known as income tax shall be charged…for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya."

"…income upon which tax is chargeable… Is income in respect of –

(a) Gains or profits from… employment or services rendered…

(c) pension, charge or annuity…"

Income from employment

Employment income is the amount paid to:

- A person who is, or was at the time of the employment, a **resident** person in respect of any services rendered by him in Kenya or outside Kenya.
- A **non-resident** person in respect of any employment with or services rendered to an employer who is resident in Kenya or the permanent establishment in Kenya of an employer who is not so resident.

Who then is liable to tax on employment income?

- Individuals are liable to tax on employment income as follows:

  i. ***resident individuals*** - taxable on worldwide employment income

  ii. ***non-resident individuals*** - taxable on the income received from employment with:

     - a Kenya resident company or
     - permanent establishment in Kenya of a non-resident company (e.g. Kenyan branch of foreign company)

  Note:

Where there is no PE in Kenya, the Kenyan entity that sponsors immigration documents is deemed to be the employer. The employer may opt to run a shadow payroll for purposes of PAYE. This may be done by either the permits sponsor or a third party.

Residency rules

A person is resident where:

1. they have a permanent home in Kenya and are in Kenya even for a single day in the tax year (calendar year)
2. they do not have a permanent home in Kenya but are in Kenya for:
   - 183 days or more in aggregate during the current tax year
   - An average of more than 122 days per year in the current tax year and the two preceding years

NB: Many expatriates on short term assignments in Kenya have been netted by this provision. 2nd Special Pass holders.

Discussion: ....

NB: residency status could be affected by the tie-breaker clauses of a Double Taxation Agreement with another country. To be discussed in another slide.

Taxation – PAYE obligations

According to Kenyan legislation (Sec 37(1)):
An employer paying emoluments to an employee shall deduct therefrom, and account for tax thereon, to such extent and in such manner as may be prescribed."

An "employer" is defined as: any resident person responsible for the payment of, or on account of, emoluments to an employee,
and
an agent, manager or other representative so responsible in Kenya on behalf of a non-resident employer.

PAYE – what is an emolument?

Income Tax Act (Sec 5(2))
"gains or profits" include: wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling, entertainment or other allowance received in respect of employment or services rendered.

PAYE guide (2009)

- Wages, salary, leave pay, sick pay, payment in lieu of leave, directors' fees and other fees, overtime, commission, bonus, gratuity or pension.
- Cash allowances
- The amount of any private expenditure of the employee paid by the employer otherwise than as a loan.
- Non-cash benefits where the aggregate value excess KES 3000 pm – taxed at the higher of cost or fair market value
- Value of housing where provided by the employer.

Who is an employee/employer?

- An **'employee'** is defined in the ITA to include an individual receiving emoluments in respect of any employment, office, appointment or past employment.
- **Employer** defined: 'employer' includes any resident person responsible for the payment of, or on account of, emoluments to an employee, and; an agent, manager or other representative so responsible in Kenya on behalf of a non-resident employer'

(Where a company has no PE in Kenya, the sponsor of work permits is considered the defacto employer)

Employee versus Consultant

- The label "consultant" does not necessarily mean that the person is not an employee. The substance of the relationship has to align to its form. There are no legislated guidelines on this point but some factors have been set out by courts of law.

Tax planning option for expatriates

Using a Double Taxation Agreement

- Tax exemptions – short term expats
- Claiming foreign tax credits

Per domestic legislation

- Ensuring that physical presence thresholds for residency are not crossed
- Using tax efficient remuneration e.g. using home leave passages paid by employer rather than home leave allowances.

Other tax planning options

Tax planning opportunities revolve around non-cash compensation:

Benefit	Planning opportunities
School fees	School fees can be taxed on the employer at 30% without requiring a gross-up.
Low value benefits	Where non-cash benefits are provided and their aggregate annual value does not exceed KES 36,000, the benefits are tax free.
Expatriate passages	Expenditure for trips between Kenya and any place outside Kenya for expatriates are tax free. Expatriate: non-Kenyan engaged outside Kenya and who is in Kenya only to serve the employer.
Relocation expenses	Actual relocation expenses borne or reimbursed by the employer can be considered a business cost rather than an employment benefit.
Service gratuity	Gratuity payments paid to a registered pension are tax free up to KES 240,000 pa (change effective Jan 2011)

Tax planning options cont;

Benefit	Planning opportunity
Staff meals	Provide meals at the premises for low income employees.
Housing	Where a deemed benefit is applied on the basis of % income, use a cash allowance equal to the fair market value rent.
Staff loans	Staff loans offered at the prescribed rate of interest (currently 9%) have no FBT or PAYE impact.
Pension	Contributions to a registered pension are tax free up to KES 20,000 pm. The deduction is applied first to the employee and the remainder to the employer.
Medical	Medical insurance premiums paid by the employer to a locally registered insurer are tax free.
Per diems	Company can meet all the accommodation and travel costs directly and ensure that per diem allowance is within KES 2,000 threshold.

Taxation – tax credits

Inbound expatriates

Individuals can sometimes claim foreign tax credits where they suffer double taxation on the same income. In Kenya, foreign tax credits are claimable for inbound employees (employees whose host country is Kenya but whose home country is abroad) as follows:

- Where there is a Double Taxation Agreement (DTA) between Kenya and the other country. Currently, Kenya has concluded DTAs with: Canada, Denmark, India, Norway, Sweden, Zambia, United Kingdom, Germany , Italy and France.
- Inbounds exercising their employment in Kenya would be taxed in Kenya and claim the Kenyan taxes paid as a credit in their home country.
- Credits are generally limited to the lower of the foreign taxes paid and the Kenyan taxes due.

Taxation – tax credits

Outbound expatriates

Outbound expatriates (employees whose home country is Kenya and who are on assignment outside Kenya) can claim credits in Kenya for foreign taxes suffered:

- Where the person involved is a Kenyan citizen who has suffered foreign taxation on his foreign employment income.
- Where there is a DTA between Kenya and the foreign country.
- Credits are generally limited to the lower of the foreign taxes paid and the Kenyan taxes due.
- Proof of foreign taxes paid are required when filing the Kenyan tax return.

Other deductions affecting expatriates

NSSF

- Required contributions:
  - ✓ Employee: Normal Kshs 200 but up to Kshs 600 p.m. max
  - ✓ Employer : Max Kshs 200 pm
- Expatriate exemption possible if in Kenya for up to 3 yrs and apply

NHIF

- Required contributions:
  - ✓ Employee : Max Kshs 320 pm (likely to increase if newly introduced higher tariffs see light of day)
  - ✓ Employer : Nil

Note: $1=Kshs 85

Assignment structure

- Needs to be explicit as to which party is the employer as this will impact tax withholding obligations.
- Needs to clarify compensation structure and delivery of compensation e.g. salary paid via home payroll and per diem via host payroll
- Needs to clarify tax methodology.
- Needs to compel assignee to comply with laws of host jurisdiction.
- Needs to clarify support and entitlements for pre-assignment, assignment and post-assignment phases.

Illustrative Case Study

Company:	Smith Consulting SA (Member of Extensive Network Firms – encompassing 35 countries globally) with a branch office in Kenya.
Industry:	Consulting: Communications and High Technology Projects
Project:	Smith Consulting SA has won a consulting project with Jones Telecoms to upgrade existing infrastructure at their offices in Kenya. Smith Consulting SA will deliver the services through their own employees, local resources and available skills drawn from their Network firms.
Structure:	Phased project plan with resources travelling as required for assignments ranging from 1 month to 12 months (Management staff). Monthly home leave trips.
Employment:	Resources remain under existing employment contracts in the home country. Resources are issued with Secondment Contracts detailing the allowances / entitlements during the international assignment (daily per diems, hardship allowances etc). Will only pay assignment allowances in Kenya and in Kenya currency – no salary payments will be remitted in Kenya.
Home Countries:	UK, Spain, India, Netherlands, RSA and Philippines

Q&A