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Kenya Tax Alert

Country by Country Reporting Draft Regulations Issued

The Finance Act 2021 introduced country-by-country (“CbC”) reporting requirements for multinational enterprises (MNEs) with effect from 1 January 2022.

In a bid to provide clarity on the CbC reporting requirements, the Cabinet Secretary for The National Treasury and Planning (“the CS”) has issued the draft Income Tax (Country by Country Reporting) Standard for Multinational Enterprises Regulations 2021.

In this alert, we summarise the key components of the draft regulations and implementation process.

Overview of Country-by-Country Reporting

CbC reporting requires MNEs to file, annually, a report containing data on the global allocation of the MNE's income, taxes and details of their economic activities in various jurisdictions.

These measures are aimed at enhancing transparency through comprehensive exchange of information between revenue authorities.

The CbC requirements are part of Action 13 of the Base Erosion and Profit Shifting ("BEPS") Action Plans, that require MNEs to file CbC reports with tax authorities in countries where they have a taxable presence.

Scope of Kenya's CbC Requirements

The proposed regulations largely mirror the recommended international approach and cover the following:

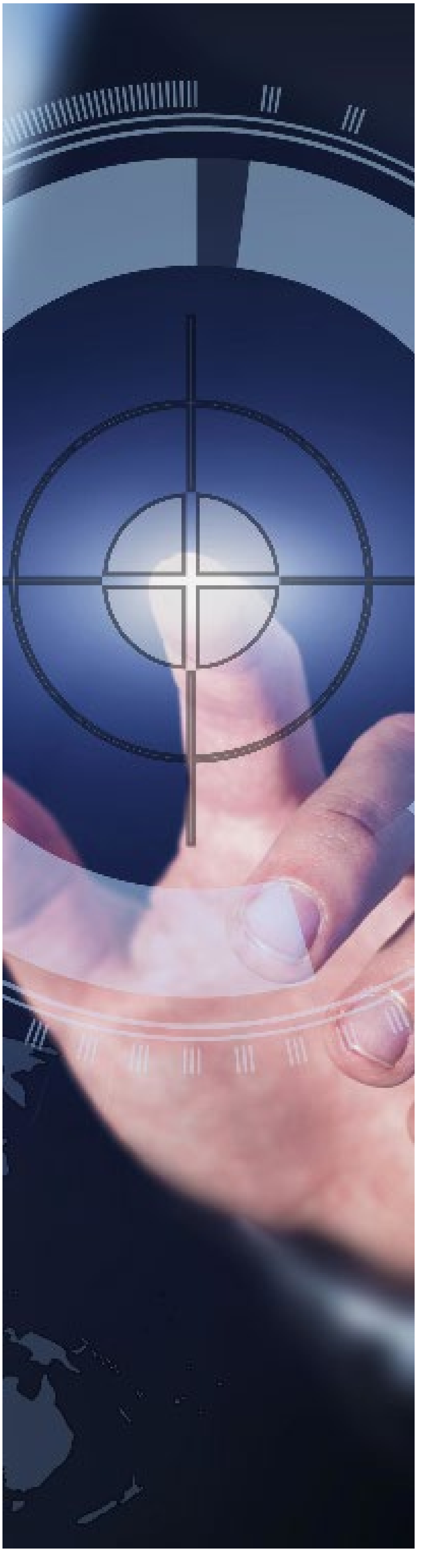
- CbC report filing requirements for Kenyan headquartered multinational enterprise group.
- A notification requirement for subsidiaries and branches of MNEs with a taxable presence in Kenya.

The regulations exclude MNEs having total consolidated group revenue of less than 20 million Euros or Kshs. 2.5 Billion as of January 2022. The turnover threshold includes extraordinary and/or investment income.

Content of the CbC reports

The regulations provide that the CbC report filed should contain the following for each jurisdiction in which the MNE operates:

- Aggregate information relating to;
  - the amount of revenue
  - profit or loss before income tax
  - income tax paid and accrued
  - stated capital
  - accumulated earnings
  - number of employees,
  - tangible assets other than cash or cash equivalents
- A list of the entities of the MNE setting out:
  - tax residence of each entity (jurisdiction of legal incorporation should be specified where the same is different from the tax residence)
  - the main business activities of each entity



Filing procedure

The draft regulations provide that any MNE headquartered in Kenya that meets the turnover threshold of Euro 20 Million shall file a CbC report for each fiscal year not later than 12 months after the last day of the fiscal year of the MNE Group.

There are circumstances under which a MNE that is not headquartered in Kenya may be required to file a CbC report in Kenya. These are:

- If the Ultimate Parent Entity of the MNE Group is not obligated to file a CbC Report in its jurisdiction of tax residence; or
- The jurisdiction in which the Ultimate Parent Entity of a MNE is based does not provide for exchange of information with Kenya by the time of the filing deadline; or
- There has been a systemic failure in the jurisdiction of the Ultimate Parent Entity and the Commissioner has notified the MNE in Kenya.

The CbC reports will be filed in such form and manner, including by electronic means, as may be specified by the Commissioners from time to time.

Use and confidentiality of the CbC reports

The Kenya Revenue Authority (“KRA”) will use the CbC reports for purposes of assessing transfer pricing and BEPS risks in Kenya.

The regulations provide that transfer pricing adjustments by the KRA may not be based on the CbC Report.

The regulations also provide that the KRA shall preserve the confidentiality of the information contained in the CbC reports.

Non- compliance penalties

Any person who fails to comply with the regulations shall be subject to the penalties prescribed under the Tax Procedures Act 2015.

Effective date

Once gazetted, the Regulations are effective for Fiscal Years beginning on or after 1 January 2022.

Our view

The CbC regulations will enable the KRA to have visibility of the financial and related information that will aid in assessing transfer pricing risks. For MNEs, this means additional transfer pricing compliance and reporting requirements.

CbC reports are primarily to be filed by a company headquartered in Kenya where the Group meets the threshold turnover of 20 Million Euros.

A MNE Group that is controlled outside Kenya will not be required to file a CbC Report other than a notification indicating the jurisdiction of the parent company where the Group's CbC reports are filed. However, a subsidiary or branch of a MNE that is tax residence in Kenya can be required to file a CbC report if the jurisdiction of its parent company has not implemented CbC reporting or if there are difficulties in implementing the exchange of CbC Reports with the KRA.

Where a MNE Group has more than one entity in Kenya, the Group can designate one entity to file the CbC reports.

The content of the CbC report is similar to the template provided under Action 13 of BEPS Action Plan. Considering that the main objective of the CbC reports is to boost the tax authority's transfer pricing risk assessment capability, we recommend that the CbC reports are reviewed in conjunction with the transfer pricing policies of the MNE prior to submission.

The sources of the data used when completing the CbC Reports should also be used consistently from year to year. A MNE can choose to use data from audited financials, consolidated reporting packages or management accounts. It is however important to reconcile the financial data to the overall transfer pricing policies of the Group.

The threshold of 20 Million Euros is lower than the Organization for Economic Co-operation and Development (OECD) threshold of consolidated group revenue of 750 million Euros thus most MNEs will have filing requirements in Kenya.

The international guidelines on the use of the CbC Reports are clearly stipulated in the OECD. For instance, the KRA can use the CbC data as a basis for making enquiries into the MNE's transfer pricing arrangements during the audit or for assessing high-level transfer pricing and BEPS risks. However, CbC reports, should not be used to propose transfer pricing adjustments based on the MNEs global formulary apportionment of income.

Considering that transfer pricing audits in Kenya involve extensive and sometimes inordinate request for information by the KRA, its is likely that the CbC reports will provide an avenue for the KRA to make extended enquiries on the operations of the MNE.

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