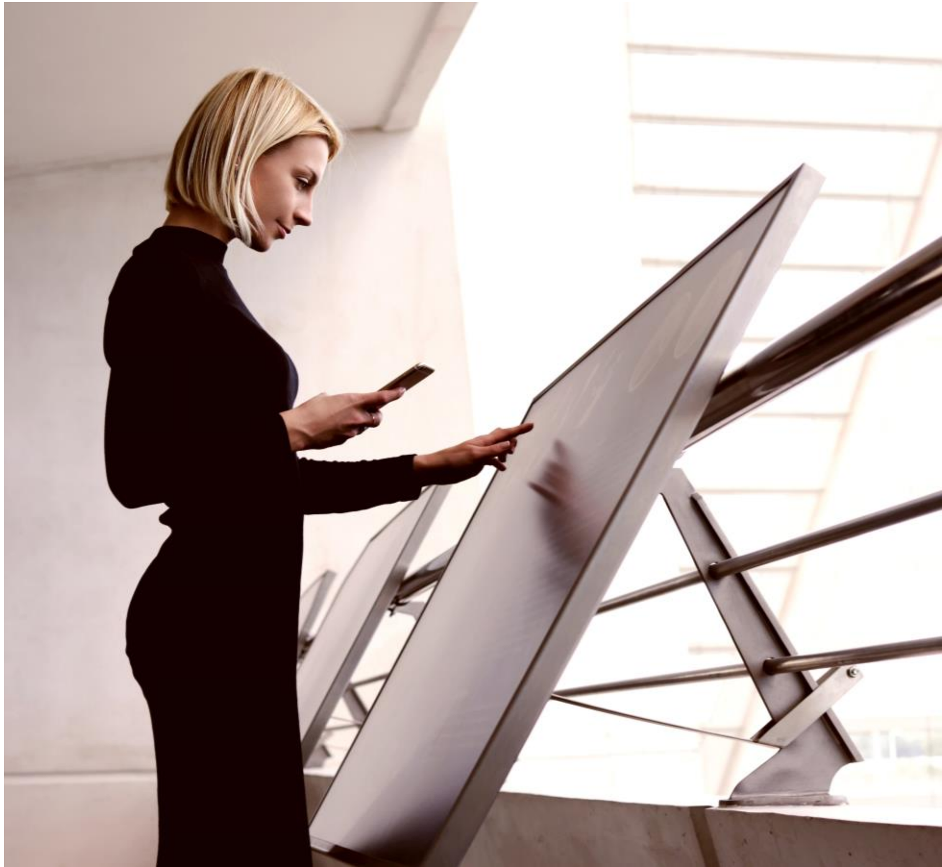
Finance Bill 2022

&

Case Law Review



French Chamber of Commerce

June 2022

At a Glance

Global

143 countries

756 offices

56,028 people

Africa

22 countries

2,747 people

Kenya

East Africa

East Africa's hub firm

14 Partners & Directors

230 Employees

Our services

- Assurance
- Tax
- Advisory
- Business processing services

Dipesh Shah
Managing Partner, Grant Thornton Kenya
M +254 20 375 2830
E dipesh.shah@ke.gt.com

At a Glance

Tax Services

– Annual Compliance;

– KRA Audit Support

– Tax Dispute Resolution – Objection & Appeal

– Tax Health Check;

– Transfer Pricing;

– Tax Due Diligence; and

– Tax Advisory.

Samuel Mwaura

Partner, Grant Thornton Kenya

M +254 20 375 2830
E samuel.mwaura@ke.gt.com

Focus Areas

1 Finance Bill 2022

- Income Tax
- Value Added Tax

2 Case Law Review

- Kenya – France Double Taxation Avoidance Agreement

Samuel Mwaura

Partner

Dangerous stunts

State of the Economy

MPs 'not pressured' by IMF, World Bank on Finance Bill

Monday, May 30, 2022

Business Daily

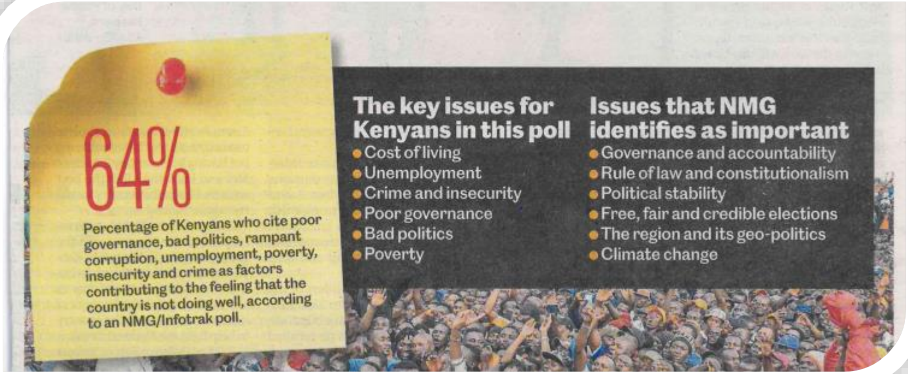
Pwani Oil closes plant, blames lack of dollars

Pwani Oil, the manufacturer of Freshfri, Salit and Fry Mate cooking oils, has temporarily shut down its oil plant due to shortage of raw...

Business Daily

MPs increase debt ceiling to Sh10trn

Parliament Tuesday evening increased the public debt ceiling to Sh10 trillion as a stop-gap measure to allow the next government to borrow...



Grant Thornton

Kamau Maryann
Senior Associate

Finance Bill 2022

Financial Derivatives

Nairobi Securities Exchange Derivatives Market (NEXT)

- Went live on 4th July 2019
- Allows the Nairobi Stock Exchange to trade in single stock futures
- Kenya is the second country in Africa, after South Africa to introduce a derivatives market
- Over Ksh.168 million has been transacted in the two years since the launch of the segment in July 2019.

Grant Thornton

Financial Derivatives

Taxation of gains accruing to **non-residents** from financial derivatives

– The Cabinet Secretary in his budget speech proposed the introduction of measures to tax the gains accruing to non-residents from financial derivatives traded on the Nairobi Stock Exchange

Grant Thornton

Capital Gains Tax

Capital Gains Tax

- The Bill has proposed to increase the capital gains tax from 5% to 15%
- The Departmental Committee has recommended to increase to 10%

Digital Space

Digital Service Tax

The Bill proposes to amend the Income Tax Act to increase the DST rate from 1.5% to 3%

- Exempt non-resident persons with a permanent establishment in Kenya from DST

VAT on digital supplies

Amend the definition of a digital market place in the VAT Act by:

Deleting the expression *"sell or provide services, goods or other property"*

Substitute with the words ***"sell goods or provide services"***

Digital Space

Registration Threshold – Digital Supplies

The Bill proposes to amend the VAT Act by:

- Excluding persons supplying imported digital services over the internet or an electronic network or through a digital marketplace from meeting the KES 5 million VAT registration threshold.

VAT on Imported Digital Service

The Bill proposes to amend the VAT Act by:

- Exclude an import of services made over the internet or an electronic network or through a digital marketplace from Reverse VAT under Section 10 of the VAT Act

Grant Thornton

Samuel Mwaura

Partner

Case Law Review - A Win For Taxpayers

Kenya – France Double Taxation Avoidance Agreement

Brief Facts

- A foreign Multinational entered into an agreement with a French entity for provision of technical services including general management, strategy development and corporate affairs. In exchange, Multinational in Kenya paid management and professional fees.
- In 2011, the Kenya- France DTA came into force. Based on its understanding of the DTA, Kenyan entity stopped deducting withholding on payments to France.
- In 2013, KRA conducted an audit and demanded KES 310,068,589 being withholding tax on management fees paid to the French entity.

KRA's Arguments:

- The Kenya –France DTA does not contain an express, separate provision for management fees.
- The income on management fees therefore ought to be dealt with under Article 21 of the DTA which deals with "Other Income"
- According to KRA, Article 21 allocates the taxing rights to Kenya and therefore the payments made to the French Entities ought to have been subjected to withholding tax by operation of section 35 of the Income Tax Act.

Kenyan Entity Arguments:

- The Kenyan entity argued that payments made to the French entity amounted to business profits.
- Article 7 of the DTA provides that business profits are taxable in the State where an entity is resident **but may be taxed in the other Contracting State if the entity has a PE in the other Contracting States**.
- In this case, Kenyan entity does not have a PE in Kenya. France therefore has the taxing rights

Kenya – France Double Taxation Avoidance Agreement

Issue for determination	– Whether KRA was entitled to demand withholding tax on payments made to the French Entity

Kenya – France Double Taxation Avoidance Agreement

Court's Analysis

- The Tribunal referred to its earlier decision in **Mckinsey –vs- Commissioner** which had similar facts in issue.
- In this case, KRA sought to impose withholding tax on payments made to a South African entity where the DTA did not contain an express provision on management fees.
- According to the taxpayer in that case, the payments made to the South African Entity ought to be classified as business profits in the absence of a specific clause on management and professional fees.
- In making a determination, the Tribunal found that taxing rights over business profits shall only be taxable in the other state where an entity has a permanent establishment.

Kenya – France Double Taxation Avoidance Agreement

Upshot

- Tribunal made a similar finding to the effect that Article 21 of the Kenya-France DTA had no application in this case.
- KRA has no taxing right on the management and professional fees payable to the French Entity as the same fall under Article 7, which in lieu of a PE, gives the taxing right to France.
- The assessment of KES 310,068,589.00 issued by KRA was set aside.

Thank you