



# TAX ALERT

## TAX APPEALS TRIBUNAL RULES AGAINST KRA ON WITHHOLDING TAX MATTER

### INTRODUCTION

The Tax Appeals Tribunal (TAT) delivered a judgement on 01 April 2021 in the case of McKinsey v Kenya Revenue Authority (KRA) in regard to the application of withholding tax on professional fees under the Kenya – South Africa double tax treaty (DTT). The tribunal made it clear that in the event a double tax treaty does not contain a separate management or professional fees article, professional fees would ordinarily be classified as business profits thereby not subjecting them to withholding tax in Kenya. The ruling is in line with guidance provided by the Organization for Economic Cooperation and Development (OECD).

### BACKGROUND

McKinsey and Company Inc. Africa Proprietary Ltd (McKinsey) had challenged the tax assessment raised by the KRA in regard to the withholding tax on professional fees. KRA misinterpreted the Kenya – South Africa DTT by concluding that professional fees were taxable under Article 22 of the Kenya-South Africa DTT which deals with ‘other income’ and failed to consider the provisions of Paragraph 77 of the OECD Commentary on Article 7 which provides for income by way of management or professional fees to be taxed under business profits

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### THE RULING

The tribunal stated that the fees paid to the South African entity falls within the confines of business profits and was not attributable to a PE of the South African entity in Kenya. The tribunal agreed that Article 7 of the DTT is the appropriate Article to determine whether Kenya or South Africa has the taxing right of such income and in this case it was held that South Africa had the right to tax the professional fees.

### THE IMPLICATIONS

Taxpayers who have mistakenly deducted withholding tax on payments to nonresidents in the jurisdiction mentioned in the article may, where the circumstances allow, be entitled to withholding tax refunds. This could have further implications on other DTT's Kenya has signed.