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Trending M&A Topics in the African Deal Room

2023 KPMG Africa Tax Summit

Tax amid disruption and uncertainties

Cape Town, South Africa

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4-5 April 2023

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Today's presenter

Tanya Engels
Partner
KPMG in South Africa

Vincent Lacombe
Partner
KPMG Avocats

Oludayo Adeniji
Associate Director
KPMG in Nigeria

Sandeep Manin
Associate Director
KPMG East Africa

01

Pitfalls on indirect sale of shares

Overview of taxation of indirect transfer

Concerned transactions

- Transactions on Pan-African groups, *i.e., situations when one offshore holding that owns subsidiaries in many African countries is sold to an offshore purchaser.*

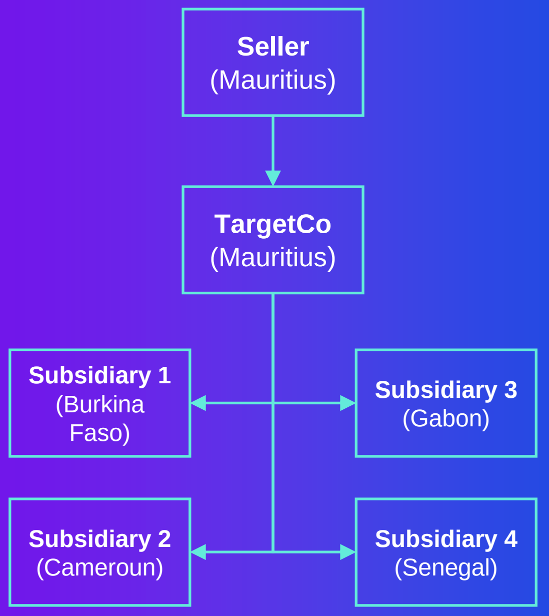
Taxation of capital gain

- Capital gain tax (CGT) is due in the seller's or the target's jurisdiction (with DTT exemption or structure with jurisdictions where no CGT applies).

Implementation of taxation of indirect transfer

- African jurisdictions implemented rules to attract a tax due on the indirect change of ownership of their resident entity.
- Initially limited to mining and oil and gas companies or real estate companies.
- Extension to indirect transfer of shares to any type of business.

Example of transaction



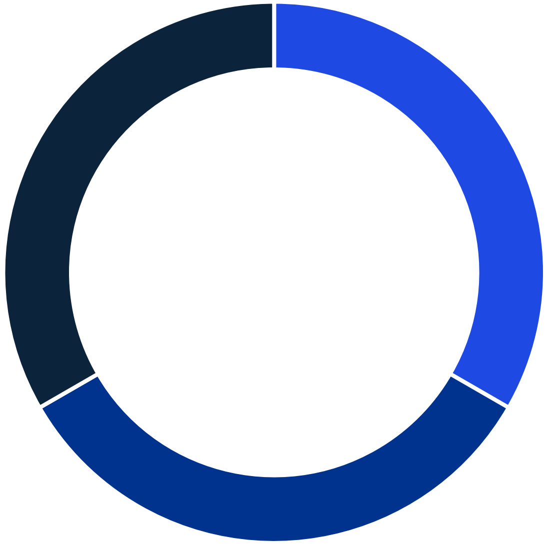
3 main approaches to tax indirect transfer

Sample of French speaking African countries: Cameroon, Gabon, Burkina Faso, Togo, Ivory Coast and Senegal

Absence of taxation

Ivory Coast, Togo or Senegal:

Taxation is limited to direct transfer, no CGT or transfer tax on indirect transfer



Transfer tax

Cameroon & Gabon

A proportional registration duty is due locally, based on a portion of the purchase price

Capital gain tax

Cameroon, Gabon & Burkina Faso

The increase in value (i.e. difference between the historic value and the purchase price) is taxed locally

Capital gain taxation

Tax basis

No definition or instruction on how to compute the capital gain resulting in no clear taxable basis for the CGT.

What is the Sale price ?

PPA Approach
Apportionment of global price to each entity

Valuation Approach
A specific standalone valuation can be done to substantiate the “sale price”.

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What is the Acquisition price ?

NBV
Net book value or acquisition price in direct shareholder accounts

FMV
FMV of the company at the time the group was purchased by the seller

Net Equity
Net equity of the company at the date of disposal

Other?

Capital gains taxation

Filing and payment shall be done shortly after closing of the transaction (30 days to 3 months)

Filing and payment

Seller is generally the liable person for CGT.

To secure the collection protective mechanisms implemented by local administration:

- **Withholding** in Burkina Faso and Gabon
- **Joint liability** of the local entity in case of default from the foreign seller

Liable person

Double tax treaty

OECD model article on capital gain (Article 13) does not cover indirect disposal of shares.

The "catch-all" clause may usually allow to avoid the application of the local CGT.

Subject to interpretation by local administration

Transfer tax

01

Registration duties

Gabon and Cameroon apply proportional registration duties on indirect disposal of shares.

The tax basis being the purchase price only, they are usually very costly.

Gabon: 3%

Cameroon : 5%

Some DDT may allow a reduction of the registration duties.

02

Stamp duties

Stamp duties may apply when the registration of the SPA or a reiterative act is required.

Note that some jurisdictions do not levy stamp duties on indirect transfer registration.

Strategies to manage the taxation and mitigate the risks

1

SPA and warranty terms

Obtain certainty that CGT and transfer taxes due by the seller will be filed and paid, to avoid any joint liability

Agree on mechanism to report the withholding obligation of the local entities in the global purchase price

2

Advance ruling

Secure the amount of tax due prior to the closing of the transaction

Avoid any future reassessment at the level of the local entity

3

Documentation of the transaction

Administrations require supporting documents on how the tax basis was determined.

Possibility to provide reiterative acts, with information related to the local transferred entity to avoid disclosure of the global SPA

Summary of rules in the panel of countries

	CGT	Transfer tax	DTT with France*
Burkina Faso	Specific capital gain tax on indirect transfer of shares *(«Taxe sur les plus-values de cessions de titres de sociétés»)*	Fixed registration duties at CFA 6k	No capital gain tax; No registration duties because of the offset of France's registration duties
Cameroon	Capital gain tax on indirect transfer of shares	Registration duties at 5%	No capital gain tax; Registration duties applied
Gabon	Capital gain tax on indirect transfer of shares	Registration duties at 3%	No capital gain tax; Registration duties applied after offsetting France's registration duties
Ivory Coast	N/A	N/A	N/A
Senegal	N/A	N/A	N/A

**Based on the situation when the seller is a French resident.*

Indirect share transfers: South African context

- South Africa only has taxing right if shares transferred are “land-rich”
- High threshold – value of shares being transferred must be >80% attributable to immovable property in South Africa (includes mineral rights)
- IMPORTANT TO NOTE that 80% test is applied to shares being transferred, which is not necessarily the South African company
- In practice the threshold is rarely exceeded
- If threshold not exceeded, no need to check treaty relief (South Africa has no taxing right in any event)

02

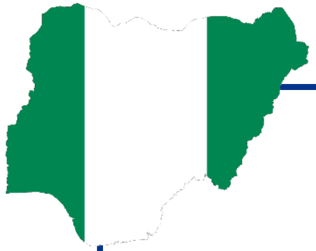
Evolving world

Background

- One of the major evolving trend involves change in tax legislation. Tax Authorities across jurisdictions have made significant changes to tax legislation. These changes may have positive and adverse implications for M&A transactions.

- Another evolving trend is the impact technology has had in tax administration across jurisdictions, especially in Africa. Tax authorities across Africa have continued to embrace technology and this has mostly had positive implications.

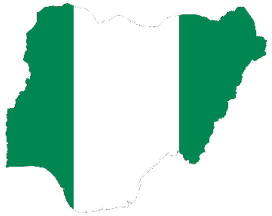
Changes in Tax Legislation – West Africa



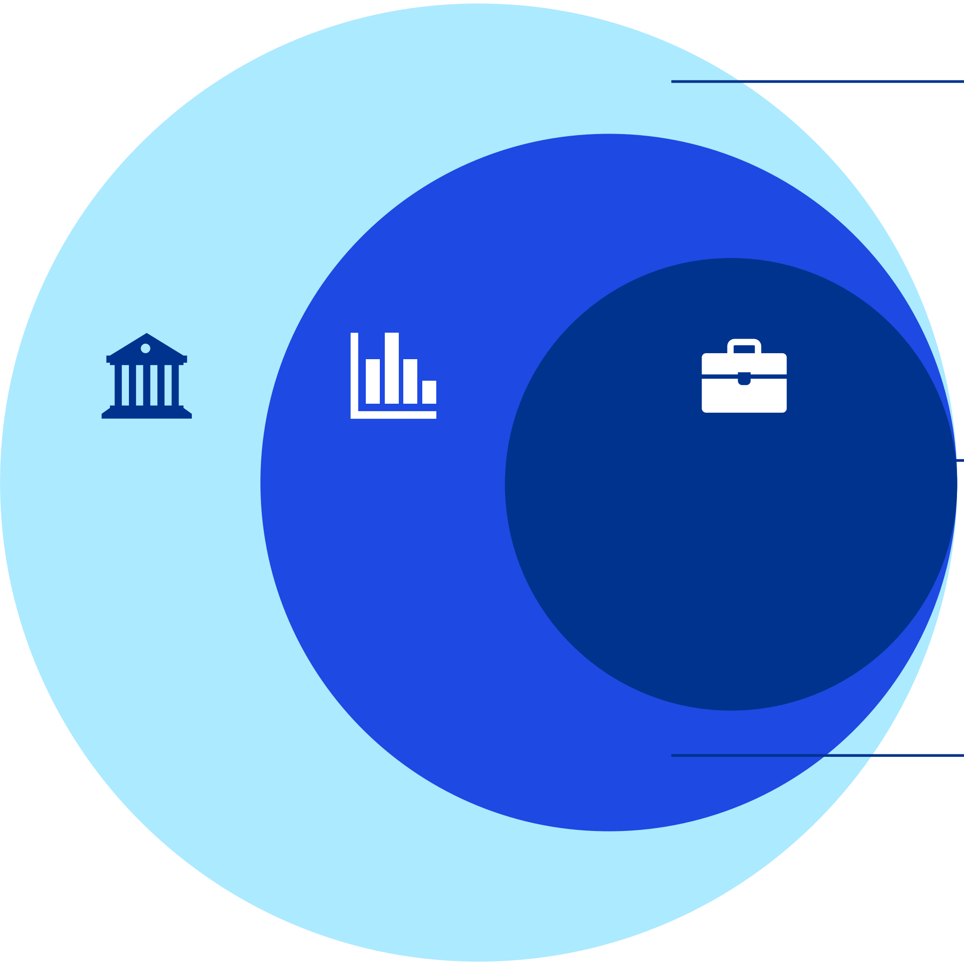
Nigeria started making key changes to its tax legislation in 2020 fiscal year through the passage of Finance Act 2019. Subsequent to this, Finance Acts 2020 and 2021 have been passed. Finance Act 2022 currently awaits presidential assent. Other key legislation have also been passed during these periods.

Ghana has also recorded changes to its tax laws. This is typically through its budget pronouncements. Most recently, the Ghanaian government passed its 2023 National Budget Statement, and with it came changes to critical areas of the tax laws.

Changes in Tax Legislation – Nigeria



Changes Relevant to M&A Transactions



Related Party Reorganisations

In 2020, the Finance Act introduced changes to the Companies Income Tax, The Value Added Tax and the Capital Gains Tax to the effect that reorganisations between related parties (who have been so related for 365 days pre and post reorganisation) will enjoy CIT, VAT and CGT concessions.

Tax on exit of investments

The Finance Act 2021 introduced capital gains tax on share disposals where the aggregate value of the share proceeds is NGN100million or above [approximately $220k]. Before this amendment, share disposals were tax neutral. However, in order to preserve capital flight from the Nigerian capital market, the amendment introduced provisions that defers CGT on share disposal where the proceeds of such shares are reinvested in the shares of Nigerian companies

Federal Competition and Consumer Protection Act

The Act amongst other things, grants the FCCPC powers to regulate mergers. Consequently, entities who wish to carry out merger activities need to report such activities to the FCCPC for sanctioning. However, some mergers which are deemed small do not require approval.

Changes in Tax Legislation – Nigeria

Other relevant changes

FIRS' powers to access companies on percentage of profit

The tax laws was amended through Finance Act 2021 to grant the FIRS powers to assess non-resident digital companies to tax on a percentage of their profit where the profit reported by such entity is less than expected.

Exemption of small companies from tax

The tax laws was also amended to exempt small companies (companies with turnover of N25million or less) from corporate tax as well as VAT tax compliance and reporting.

Real Estate Investment Trusts

The tax laws was also amended to make real estate investment trust companies a viable investment instrument from a tax perspective. The entity is now deemed a pass through vehicle for tax purposes.

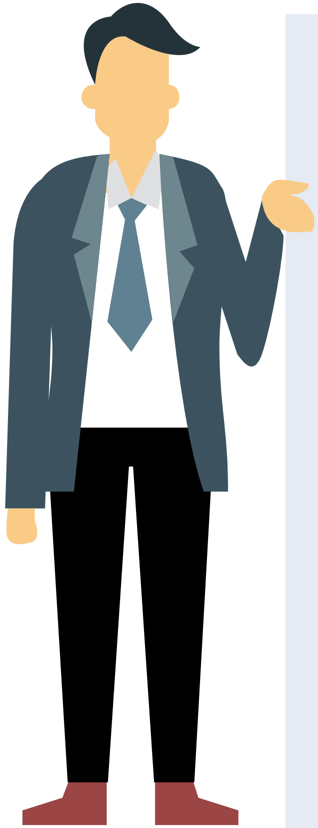
Adjustment of tax rates

The tax laws also adjusted tax rates in Nigeria. These are:

1. VAT from 5% to 7.5%
2. TET from 2% to 2.5%
3. CIT from a flat rate of 30% to a progressive rate ranging from 0 – 30%.

Changes in Tax Legislation – Ghana

Changes Relevant to M&A Transactions



Modification of condition for Zero-Rated Classification of a Transfer of Business under a Going Concern

The tax laws has modified the conditions under which a supply of goods as part of the transfer of a business by one taxpayer to another shall qualify as zero-rated. The conditions are when:

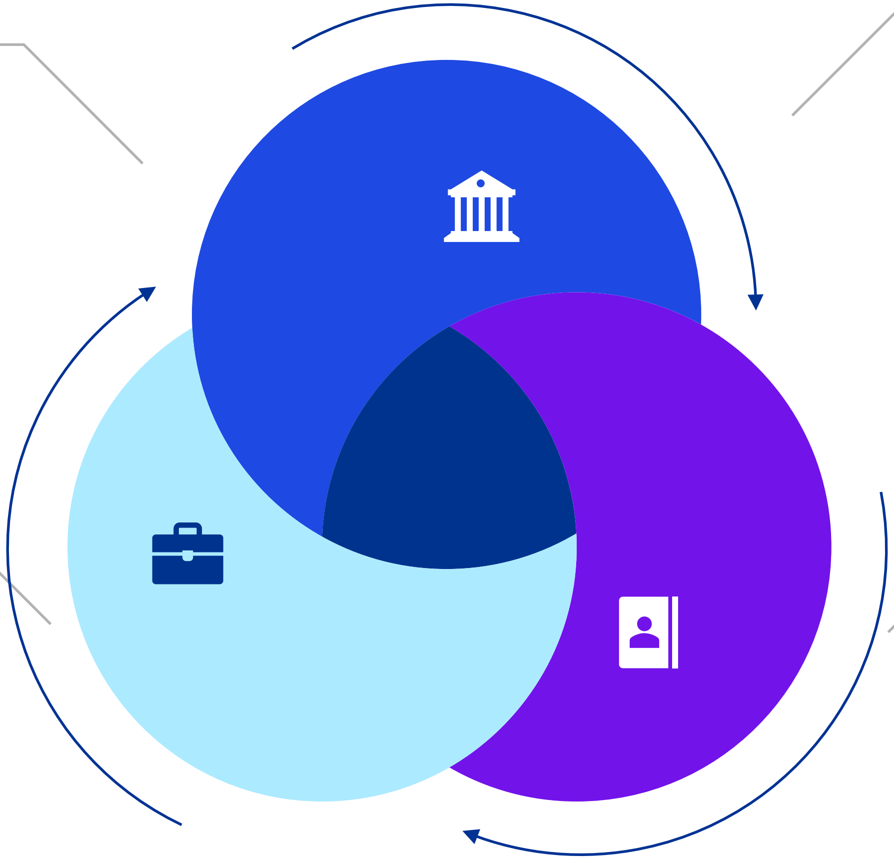
- ✓ the taxpayer's VAT registration has been cancelled; and
- ✓ the taxpayer has given notice in writing to the C-G of the facts of the sale of business at least fourteen (14) calendar days before the sale closes, the purchaser acquires any legal interest in the asset to be acquired, or the assets are fully transferred.

Changes in Tax Legislation – Ghana

Other Key changes

Increment in Standard VAT rate

The standard VAT rate in Ghana has now been increased from 12.5% to 15%. This is pursuant to the budget pronouncement of 2023.



VAT Exempt and non-exempt items

- ✓ Amendments has been made to the tax laws to exempt from VAT, any wager/stake in any form of betting or gaming.
- ✓ Similarly, effective 1 January 2023, imported textbooks and other printed materials are now subject to VAT

Revenue Monitoring

In order to drive revenue monitoring in Ghana, taxpayers have been mandated to provide physical access to the Commissioner General (CG) or an authorized Ghana Revenue official. This access will be to the digital infrastructure of the taxpayer such that the CG can connect to the tax payers system.

Electronic Transfer Levy (E-levy)

- ✓ The Electronic transfer levy Act has been amended to reduce the e-levy from 1.5% to 1%.

Technology in Tax Administration

Technological tools

TaxPro Max

In 2021, the FIRS launched the Tax ProMax Portal. This portal helps to foster tax compliance in Nigeria

e-Tax Online Platforms

States, like Lagos now have an online platform for filing tax returns, paying tax liabilities, applying for TCC’s, etc.

Online Notification Portal

Launched by FCCPC on 14 October 2021; automates the process of filing and calculation and payment of fees; also used for pre-notification consultation

Sentinel National Payment Gateway and Electronic Solution

Launched October 2022; Simplification of tax compliance for companies engaged in online gaming activities. Affected business are required to comply latest 31 December 2022.

Technology in Tax Administration

Technological tools

GRA Taxpayer Portal

In 2021, the GRA introduced the Taxpayer Portal. This portal allows taxpayers to file all tax returns online, apply for tax clearance certificates and has also automated the system of issuing tax credits certificate

Ghana.gov portal

It is a digital service and revenue collection platform, created to provide a single point of access to Government of Ghana services for the most public sector organisations. This platform was also instrumental to the introduction of the GRA Taxpayer Portal as it facilitates payment of taxes to the tax authority

Electronic Invoicing of VAT

In 2022 the GRA developed E-Invoicing System for authentication invoices issued by VAT registered taxpayers. The system can also be used to issue invoices.

Integrated Custom Management System

This was introduced to replace and existing system to improve compliance with the legal requirements that govern international trade, and facilitate greater cooperation in Customs processing

03

Are you safe? Representations & warranties

The Basics

Representations

A statement of fact made to induce another to enter into a contract

Warranties

An assurance by one party of the existence of a fact upon which the other party may rely

Difference

The maker of the inaccurate statement has made a misrepresentation, and the recipient is entitled to remedies for misrepresentation.

If a warranty is untrue, it is breached and the recipient of the warranty is entitled to damages for breach of contract.

- Representations are tied to past statements and warranties are tied to future-looking statements.

Why are they important?

- Confirmation of due diligence process
- Making diligence process more efficient
- Allocation of risk between parties
- Termination
- To protect the insured party against unintentional and unknown breaches of a seller’s or target’s representations or warranties in a transaction

Should the buy/sale agreement include insurance?

Benefits to each party

Buyer

- Removes the requirement of chasing multiple, individual and/or foreign sellers
- Enforcement issues – Avoids suing new management team for breach of contract terms
- Protects buyer(s) where indemnity rights don't otherwise exist
- Limits potential risks

Seller

- Clean exit
- Limits portfolio risk – tax and legal
- Disclosure and qualifiers must be understood in light of a sandbagging clause

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