



# African Footprint

Technical Newsletter of the Crowe Horwath International African firms

Issue 17 - November 2015

## Kenya

Kenya uses the Shilling as its currency and the GDP per capita (nominal) is U.S.\$1587 (2015 Est). Kenya's main exports are horticultural products, tea and coffee. It is the 8th largest economy in Africa.

### Economic Trends

Kenya has embarked on development agenda in all the sectors of the economy. The full agenda outlining the strategies is mapped in the Vision 2030 in which Kenya aspires to be a middle income country by the Year 2030. Kenya is already a middle income country, thanks to the GDP rebase which was done in September 2014 to reflect and capture comprehensively all the sectors of the economy.

### Investment Opportunities in the Major Economic Sectors in Kenya

Kenya and the majority of the East Africa countries are agricultural economies. In Kenya agricultural exports are tea, horticultural produce and coffee which have brought in substantial foreign exchange.

### Agriculture

The agricultural sector continues to dominate Kenya's economy, although only 15 percent of Kenya's total land area has sufficient fertility and rainfall to be farmed. Agriculture is the second largest contributor to Kenya's gross domestic product (GDP) after the service sector. The highlands of Kenya have fertile soil that is best for the growth of tea, coffee, sisal, pyrethrum, corn and wheat.

### Fisheries

Fisheries are of local importance in Kenya. The key economic area for fishing is around Lake Victoria and there is great untapped potential on Lake Turkana. This is an important opportunity for fishery investors.

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***Feedback from our Readers!***

Should you wish a specific topic to be covered in our next issue, please let us know by emailing your request to our editor [kent.karro@crowehorwath.co.za](mailto:kent.karro@crowehorwath.co.za)

### Industry

The industrial hubs in Kenya are found in the urban areas of Mombasa and Nairobi. Most of the manufacturing work is in the processing of agricultural products. There are limited meat processing and dairy industries as well as leather, paper, textile, and sugar production. Petroleum products are manufactured at government-owned refineries on the coast. Kenya relies on imported crude for its jet fuel and diesel. Imported raw materials are also used in the manufacture of machinery and motor vehicles.

### Services

The service sector in Kenya contributes about 63 percent of GDP and its dominant segment is tourism. The tourism industry has exhibited steady growth in most years since independence and has become the country's principal source of foreign exchange.



Other elements of Kenya's services sector are the financial services sector, especially the Insurance and Banking sectors, which have been recording tremendous growth and profits in equal measure as witnessed by their expansionary strategies in the whole Eastern Africa region. Most big banks in Kenya have a presence in many other countries in East Africa. Banks in Kenya are regulated by the Central Bank of Kenya (CBK). The insurance sector is regulated by the Insurance Regulatory Authority (IRA). Kenya currently has 43 licensed commercial banks plus seven representative offices of foreign banks, and 47 insurance companies.

### Energy

Kenya is endowed with geothermal resources mainly located in the Rift Valley. It is estimated conservatively that the Kenya Rift has a potential of greater than 10,000 MW of geothermal power. Geothermal utilization first started by drilling two wells in 1956 in Olkaria I and was followed by increased interest in the 1970s. Initial production started in 1981 when the first plant of 15MW was commissioned in Olkaria I. Currently 45MW is generated by Olkaria I geothermal power station, 70 MW by Olkaria II (both operated by Kenya Electricity Generating Company (KenGen)) and an Independent Power Producer (IPP) is producing 12MW at Olkaria III. KenGen and the IPP produce a total of 129 MW of geothermal energy and this is expected to increase to 576MW within the next 20 years. The national geothermal potential is estimated at between 7,000 and 10,000 MW.

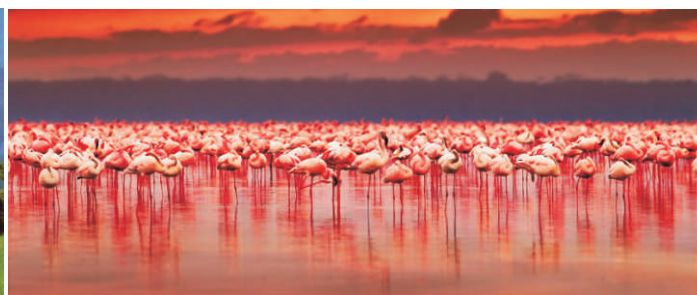
The largest share of electricity supply in Kenya is from hydroelectric stations at dams along the upper Tana River and from the Turkwel Gorge Dam in the west, a petroleum-fired plant on the coast, and geothermal facilities at Olkaria. Electricity imported from Uganda makes up the rest of the supply. The Kenya Electricity Generating Company (KenGen) is state owned and deals with the generation of electricity while the Kenya Power and Lighting Company (KPLC), handles transmission and distribution.

### Oil and Gas

The oil industry is relatively new in terms of mining and exploration. Oil was first discovered in 2012 by a British firm, Tullow Oil. Recent analysis on the viability of the project shows that the oil is economically feasible for mining purposes. Currently the oil industry is controlled by importation and refining.

Tullow Oil discovered 39 metres of net oil pay and 11 metres of net gas pay in the Ngamia-2 well which is 1.7 kilometers away from the Ngamia-1, the site of the country's maiden find in early 2012. Exploration is still in progress in other parts of the country which may eventually increase the output.

Cephar Osoro / Eric Mutuku  
Horwath Erastus & Co  
Kenya



## Freedom of Association under the Public Benefit Organizations Act, 2013 in Kenya

The Bill of Rights under the Constitution of Kenya 2010 safeguards the rights and freedoms of individuals. The commitment to nurture and protect the well-being of the individual, the family, communities and the nation, is spelt out in the Preamble to the Constitution of Kenya 2010.

Everyone has the right to freedom of association with others as stated under the Constitution of Kenya 2010, which provides that every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

The Public Benefit Organizations Act, which will shortly replace the Non-Governmental Organizations Act No.19 of 1990, by aligning with the Kenyan Constitutional requirement, provides that every organization has the freedom to join in association with other organizations as it may desire and to participate in forming a forum of public benefit organizations under the Act.

Not for profit organizations can therefore choose between joining an independent Self-Regulation Forum and joining a Federation established under the Public Benefit Organizations Act. The Self-Regulation Forum has to be approved by the Public Benefit Organizations Regulatory Authority established under the Public Benefit Organizations Act. Both the Federation and the Self-Regulation Forum are required to have their own duly elected governing boards and By-laws for their administration.

### Limitation to the freedom

Freedom of association can be limited as long as the limitation is in accordance with the laws of the land and rules of natural justice.

The Public Benefit Organizations Act requires the Self-Regulation Forums to develop and maintain codes of conduct. The codes of conduct adopted should be consistent with the national and foreign policies and the laws of Kenya. As aptly observed by John D. Rockefeller Jr, every right implies a responsibility; every opportunity an obligation and every possession a duty. This is a positive right granted by the state whose application lies with the organizations.

### Case Study

The Constitutional provision has been tested in Kenya Court Appeal Case No. 1 of 2007, Nicky Njuguna & 3 others v Registrar of Trade Unions & another where the Respondent (Registrar of Trade Unions) refused to register Kenya Police Union as a trade union.

The court ruled that a law that entirely took away the right of all the members of the National Police Service to form, join and participate in a Union was unconstitutional and null and void for being inconsistent with the Constitution of Kenya 2010 and that the Respondent's action breached the Police Union's freedom of association.

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## Signature of MoU between the DFSA and the FSC Mauritius

The Dubai Financial Services Authority (DFSA) and the Financial Services Commission, Mauritius (FSC Mauritius) entered into a Memorandum of Understanding (MoU) on 1 October 2015 on Capacity Building and Other Collaboration. The MoU was signed in Dubai by Mr Ian Johnston, Chief Executive of DFSA and Mr Dharam Dev Manraj, Chairperson of the FSC Mauritius.

The DFSA and the FSC Mauritius recognise the importance of capacity building in the region and the MoU signed testifies the commitment of both Authorities to strengthen cooperation and collaboration in this regard. The Authorities acknowledge the need to increase technical exchanges for the purpose of better understanding and knowledge of each other's financial regulation. The MoU also sets forth the intent of both Authorities to enhance mutual cooperation towards promoting and developing cross border activities.

The FSC Mauritius has so far signed 3 Multilateral MoUs, 2 Regional MoUs, 25 MoUs regarding supervision of AIFMD Entities, 22 MoUs with Foreign Authorities and 6 MoUs with Local Authorities.

Source: FSC Mauritius

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## Revised South Africa – Mauritius Double Tax Treaty

### Dual Residence

Currently, under the 1996 treaty, if an entity can be deemed resident in both Mauritius and South Africa, the entity will be judged on (i) where its management and control is being exercised for the Mauritius authorities and (ii) on its 'place of effective management' for the South African authorities. Broadly speaking, if a Mauritius entity can demonstrate that its place of effective management is in Mauritius, it will be taxable in Mauritius and the treaty will protect it from South African taxation.



The revised treaty states that when an entity is deemed to be tax-resident in both states, the tax authorities of both states will 'by mutual agreement endeavour to settle the question' and determine the tax residence of the entity, and thus how the DTA will apply. Should no agreement be found, the entity will not be able to claim access to the treaty benefits and risks being taxed in both countries.

It appears therefore that the revised treaty will give much leeway to tax officials to subjectively determine how an entity should be taxed (administrative discretion), and bring much uncertainty for companies facing the dual residence issue.

### Important points

The level of investment from South Africa into Mauritius has consistently outweighed the reverse level of investment several times, and the impact of the changes, which affect mostly investments into South Africa will therefore be relatively limited.

It is to be noted that the revised treaty is based on the OECD model and provides for the latest OECD standard in terms of Tax Information Exchange.

We believe that Mauritius will remain the ideal platform for South African businesses to expand into Africa and Asia, whilst hedging their currency exposure. They can make use of the favourable business environment which goes far beyond the business friendly fiscal framework, and starts with the free economy, the modern and flexible legislation and the total absence of exchange control.

The inclusion of a Most Favoured Nation clause in support of the revised treaty would, in our view, avoid the shift of funds flows from Mauritius to another jurisdiction which would merely reproduce what the South African authorities are trying to stop. It would also help ensure that all genuine businesses are able to carry on their growth and expansion with reinstated stability and certainty.

*Source: FSC Mauritius*

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## Transfer Pricing in Africa and the Benefits of Exchange and Sharing of information by Tax Authorities

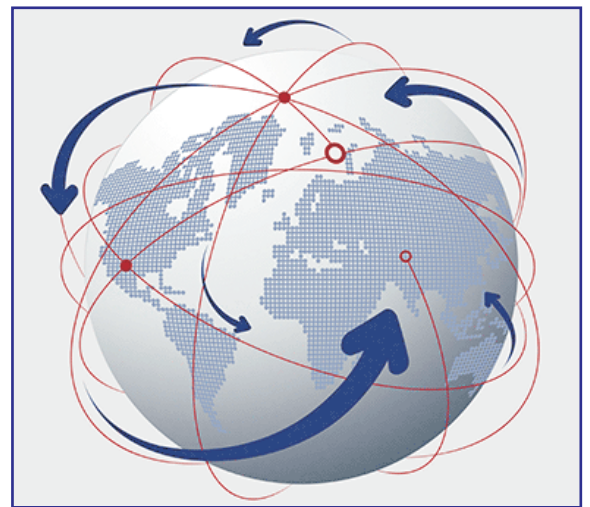
“If a company avoids tax or transfers the money to offshore accounts what they lose is revenues; here on our continent, it affects the life of women and children – in effect in some situations it is like taking food off the table for the poor.” (Koffi Annan, 2013).

In line with international trends and also with OECD guidelines, The African Tax Administration Forum (ATAF) has increased its focus on cross-border transactions and the pricing of cross-border transactions (transfer pricing) which requires that prices of goods and services in transactions between connected persons / parties be set at what is known as “arm’s length”.

Increased transfer pricing capabilities of tax authorities is resulting in increased audit activity and, as a result, more disputes are being taken to either arbitration or to local courts.

In South Africa, it is now common knowledge that the South African Revenue Service (SARS) has at its disposal, at least two highly skilled multi-disciplinary teams in its Transfer Pricing Unit. These teams are known to employ the services of at least the following professional staff: Mathematicians; economists; Chartered Accountants; tax professionals; and statisticians amongst others. Several African countries who are also members of ATAF have similarly up-skilled their transfer pricing and audit capabilities.

In 2009, and following reports of a number of high profile corporates who were caught dodging billions in tax, G20 leaders vowed to clean up the international tax system. In response, the OECD released its Base Erosion and Profit Shifting (BEPS) Action Plan which included addressing transfer pricing problems. In fact, at least 6 of the 15 actions in the plan were focused on transfer pricing or transfer pricing related matters. The work of the BEPS programme is now complete and many reports have been published. Many recommendations have been made but it remains to be seen how and when these recommendations may be implemented.



In addition to the increased focus on transfer pricing, global tax authorities have been cooperating for a few years now to further develop and enhance the existing tax treaty network by supplementing the network with new Transfer and Exchange of Information Agreements (TEIA).

Of particular interest is the fact that the exchange and sharing of information is automatic. This assists tax authorities in obtaining valuable information on taxpayer activity. Modern technological improvements and enhancements use information to profile more risky taxpayers leaving “no place to hide”.

In our South African tax practice, we have seen a distinct increase in the number of clients who are being directed by foreign financial institutions to approach us to regularise their tax affairs in South Africa before the commencement of mandatory reporting in 2017 / 2018.

Based on the increased focus internationally on transfer pricing and the historical flows of funds from developing to developed countries, addressing transfer pricing and related compliance matters sooner rather than later has never been more urgent. It is a fact that adequate and properly prepared transfer pricing documentation will assist in more easily dealing with queries from tax authorities when questions are asked.

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## Unclaimed Financial Assets Act, Kenya

The Unclaimed Financial Assets Act, No. 40 of 2011 came into force on 16 December 2011. However, the office that was to enforce the law and deal with matters related thereto, was not established until this year (2015). The Act provides a legislative framework for dealing with financial assets that are presumed to have been abandoned.

An asset is unclaimed (abandoned) when the records of the holder do not reflect the identity of the person entitled to the asset(s), the holder has not previously paid or delivered the assets to the apparent owner or other person entitled to the asset(s) and / or the last known address, as shown in the records of the holder, or the apparent owner is in a country that does not provide by law for the custodial taking of the asset(s) or its unclaimed assets law is not applicable to the assets.

### Unclaimed Financial Assets Trust Fund

A Trust Fund has been established under the Act into which all monies that become or are deemed to be unclaimed assets are paid. The owner of an asset that became an unclaimed asset may claim and be paid out of the Fund an amount equal to the value of the asset.

Accounts of the Fund shall be audited and published in the Gazette and in at least two newspapers with national circulation by the Auditor-General or an auditor appointed by the Authority under the authority of the Auditor-General.

### Duties of Holders of Unclaimed Assets

1. Holders are required to make reasonable efforts to locate and notify the owner about the assets by sending a written notice to the apparent owner at his last known address informing him that the holder is in possession of the assets.
2. The holder shall within a period of not less than sixty days and not more than one year after informing the apparent owner, presume the unclaimed assets abandoned and make a report concerning the asset(s) to the Unclaimed Financial Assets Authority.
3. The report by a holder of the assets and all abandoned assets should be delivered to the Authority on or before the first day of November of each year for the twelve-month period ending on the immediately preceding thirtieth day of June. The Authority may extend the period up to sixty (60) days after the deadline.
4. Where the holder pays or delivers assets to the Authority in good faith and another person claims the assets from the holder, the Authority upon receipt of written notice of the claim, shall defend the holder against the claim and indemnify the holder against any liability in respect of the claim.

5. The Authority shall reimburse the holder for any payments or charges incurred on the unclaimed asset out of the proceeds remaining after deducting the Authority's selling costs.

### Sale of Unclaimed Assets

The Authority shall, not later than three years after the receipt of the abandoned assets, sell such assets subject to a reserve price, to the highest bidder at a public auction.

Sale of unclaimed assets shall be preceded by publication notice, at least three weeks in advance of sale, in at least one newspaper of national circulation.

### Claims on Assets

A person claiming an interest in an asset delivered to the Authority may file a claim with the Authority, which shall be considered within ninety days and a written notice given to the Claimant. If the claim is allowed, the Authority pays the Claimant for the assets received or the proceeds if it has been sold.

A Claimant aggrieved by the Authority's decision may appeal to the court within ninety days after the decision of the Authority or within one hundred and eighty days after the filing of the claim where the Authority has failed to act on the claim.

### Application of the Act

The Unclaimed Financial Assets Act applies retrospectively to cover all assets that would, but for the absence of the Act, be deemed to be unclaimed assets under the Act if it had been in force at that earlier date.

### Penalties under the Act

Failure to pay or deliver assets to the Authority within the time prescribed by the Act shall be an offence the penalty for which shall be payment of interest. Interest is payable at the current monthly rate of one percentage point above the adjusted prime rate per annum per month on the assets or value of the assets from the date the assets should have been paid or delivered.

A person who willfully fails to render any report or perform other duties required under the Act shall be liable to pay a penalty of seven thousand shillings (USD 70/-) but not more than fifty thousand shillings (USD 500/-) for each day the report is withheld or the duty is not performed.

A person who willfully fails to pay or deliver assets to the Authority as required under the Act shall be liable to a penalty equal to twenty-five percent of the value of the assets that should have been paid or delivered.

The modern rationale for the Act is that the State can best preserve and protect the interests of the rightful owner and possibly reunite the owner with his/her property.

### Way Forward

Latest reports (October 2015) indicated that over USD 50 Million in assets had been surrendered to the Unclaimed Financial Assets Authority since the Authority began operating formally. Much more money from dormant bank accounts, stocks and other tradeable securities, it is believed, are yet to be delivered to the Authority.

This new law presents an opportunity for families, individuals and even companies that may have operated in Kenya since independence (1963), to trace and lay claim to assets that may have over the years remained idle, dormant or abandoned in banks, insurance companies, stock brokers and trading companies or certain trusts and endowment funds.

Those persons from countries that had many settlers in Kenya around the time of independence (1963) and after, may wish to particularly check if a family member or company may have left any financial asset in Kenya. Such countries will include Great Britain, South Africa, Germany, Netherlands, Canada, India, some Arabian countries and more. Support to persons wishing to check / trace possible abandoned financial assets in Kenya can be obtained by contacting any Crowe Horwath International member firm for initial support and contact with the Unclaimed Financial Assets Authority in Kenya.

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## Not all Directors Created Equal from a Value-Added Tax Perspective

The South African Value-Added Tax Act (the VAT Act) is in many instances a carbon copy of the New Zealand Goods and Services Tax (GST) Act. As a result, it is to be expected that rulings by the New Zealand Revenue Authority (NZRA) and judicial interpretation of the New Zealand GST Act would be precursors of what is to come in South Africa from a VAT enforcement and compliance perspective.

A recent draft Public Ruling issued by the New Zealand Revenue authority focuses the attention on one of the perhaps more obscure tax risks facing non-executive directors (NEDs) of large corporates.



NEDs often hold directorships in their personal capacity in a large number of organisations, with director's fees and other consideration potentially exceeding R1 million in any twelve month period. The NED would be carrying on continuous activity, in the course of which he makes supplies to the boards on which he serves for consideration. In VAT terms, this constitutes the carrying on of an "enterprise", unless specifically excluded from the definition in the VAT Act. Upon exceeding the R1 million threshold over any twelve month period, the NED would be a "vendor" as defined in the VAT Act. Any consideration charged would then be deemed to be inclusive of VAT, whether or not VAT was actually charged by the NED.

The "enterprise" definition in the VAT Act specifically excludes any services rendered by an office holder in performing his duties to the extent that any amount constituting remuneration (as contemplated in the definition of "remuneration" in paragraph 1 of the Fourth Schedule to the Income Tax Act) is paid or is payable to such office holder. This exclusion does not apply, however, to any employment or office accepted by any person in carrying on any enterprise carried on by him independently of the employer or concern by whom the amount of remuneration is paid or payable.

The term "dependent" is not defined in the VAT Act and it must therefore be given its ordinary meaning.

NEDs are unlikely to have contracts which regulate their hours of work and are not under the supervision and control of the company as to the manner in which they conduct themselves or the specific hours worked. Although, typically, the fees they receive are based on the number of board meetings attended, the NEDs duties and obligations extend beyond the mere attendance at board meetings. Such duties would include the need to remain abreast of company developments and understanding the business of the company. The majority of these duties are performed away from the company's premises.

The role of NEDs requires them to maintain an independent and autonomous stance in relation to the company in order to challenge policy and strategic decisions. NEDs often serve on various boards and their productive capacity is not acquired by any one specific organisation. Arguably therefore, the very nature of the NEDs duties makes them independent in relation to the company.

Companies would probably err on the side of caution when it comes to the decision whether or not to deduct PAYE from a director's "remuneration". Despite the fact that the company making the payments to the NED deducts income tax (PAYE) from the remuneration paid to the NED, he would also be liable to register and account for VAT if his total consideration for the twelve month period exceeds R1 million and he operates independently from the "employer".

NEDs employed by a company which makes their employee's time available to other corporates where they serve as directors, would not be required to register for VAT in their personal capacities. The employer company would, however, have to be registered if the NED accounts to it for any director's fees earned and such employer company's turnover exceeds the VAT registration threshold.

Boards on which the director serves are often not entitled to recover any VAT paid as input tax credits and would, as a result, probably not be amenable to accept extra charges from the director where he failed to levy VAT in prior periods.

Keeping in mind that an undeclared income of R1 000 000 per year will translate into a VAT liability of over R600 000 over the five year period that SARS will typically assess, plus R60 000 late payment penalty, interest in the order of R180 000, not to mention the draconian additional penalties leviable in terms of the Tax Administration Act, 2011, any NED who may have overlooked his VAT liability should want to voluntarily regularise his VAT affairs before being asked to do so by SARS.

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## MEA Conference 2016

The end of the year is upon on us and while everyone is starting to settle down for the holidays, we at Crowe Horwath in South Africa are busy preparing for the MEA meeting, which we have the honour of hosting next year.

The conference will be taking place 17-19 February 2016 in Sandton, Johannesburg. The main meeting will commence with an opening dinner on 17 February and will conclude after lunch on Friday 19 February 2016.

The agenda is yet to be finalised but will include amongst others an A&A seminar and Risk Consulting.

The conference will be taking place at the DaVinci Hotel and Suites – A Contemporary Masterpiece. The hotel is located adjacent to the prime location of Nelson Mandela Square, on the cosmopolitan square in the heart of the Sandton business and leisure district. Apart from all the regular amenities, the hotel also has a fitness centre and health spa and attendees can enjoy the convenience of luxury shopping at the Legacy Corner Mall and Sandton City just an elevator trip away.

The hotel is conveniently situated next to the Gautrain station offering attendees direct transport from O R Tambo international airport to the Gautrain station from which the hotel will offer transport to the hotel.

We are working on a post conference tour and will be presenting a few options to delegates. Based on demand we will also have an accompanying person's tour.

You will be notified as soon as online registration has opened.

Should you have any queries in regard to the conference, please do not hesitate to contact Monique Ross at [monique.ross@crowehorwath.co.za](mailto:monique.ross@crowehorwath.co.za) or alternatively on +27 11 217 8138.

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## Payroll Taxes based on Tax Residence Status in Libya

### Non Resident

An individual will be regarded as a non-resident of Libya, and thus not liable for personal income taxes, only if he can demonstrate that he has not resided in Libya for more than 30 days and his entry visa is only for a business visit. However, if his/her residency period is more than 30 days, then the income arising in Libya will be subject to personal taxes. An individual coming to Libya on a business visa for a period of more than 30 days, will be subject to tax only for periods exceeding 30 days, i.e. he will be exempt from tax for the first 30 days. 30 days should be continuous and is reckoned from the date in the Entry Visa.

### Resident

If the individual is resident in Libya then he/she will be subject to Libyan tax if he or she is being paid for services rendered in Libya irrespective of whether or not the salary is actually paid in Libya. An individual who comes to Libya on a business visa and stays in Libya for no longer than 30 days will not be taxed on his/her income.

Foreign nationals who are granted a residence visa are deemed resident in Libya and taxed on all income arising in Libya. A resident employee is taxed from the date of his/her arrival in Libya to the last date of his/her final exit visa.

When an employee comes to Libya for the first time, and he does not exceed 30 days, he will be exempted from both tax and INAS (Social Security Charges), but if he come for the second time, he will be subject to tax only for the income of the period in excess of 30 days as stated earlier and his salary should not be less than L.D 2,000 (1USD=1.30L.D) per month and exempt from INAS payment.

### Tax on Income generated outside Libya for residents

- Wages and Salaries paid to Libyans who work abroad are tax exempt in Libya.
- Foreign employees who come to Libya with an employment agreement working with the government, public, private body or companies in Libya are exempted from tax on their income sources outside Libya.

### Repatriation of salaries by foreign nationals and Exchange Control Compliance

Foreign nationals employed by Government entities and paid in Libya can remit 50% of the net salary (net of Tax) in foreign currency to his or her home country. The percentage is increased to 75% in exceptional cases, for example in the case of desert-based employees. Foreign companies choosing to pay their foreign nationals overseas may do so but are required to account for these payments and to deduct the Libyan tax due and pay it to the Tax Department.

Ahmed Ghattour  
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Libya

## Horwath Zeller Karro - Gil Gorgulho

Gil Gorgulho, a partner in the Cape Town firm of Horwath Zeller Karro has recently been elected as the Chairman of the Board of Directors of South African Institute of Chartered Accountants. This is a great honour and reflects the high esteem in which he is held in the South African accountancy profession.

The partners and staff of Horwath Zeller Karro congratulate Gil on this achievement.

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