



# Withholding Tax Presentation by:

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## Presentation Outline

- 1 Overview of Withholding Tax (WHT)
- 2 Payments Subject to WHT
- 3 Legal provisions on WHT
- 4 Withholding Tax Rates
- 5 Pension and Provident Schemes
- 6 Consequences of Non-Compliance
- 7 Examples and Recent Case Law
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# Overview of WHT



## What is Withholding Tax (WHT)?

- ✓ Tax deducted at source on payments to both resident and non-resident persons on income from various sources.

Depending on the **income source**, WHT can either be a **final tax (F)** or an **advance tax (A)** payment



- ✓ Interest, agency fees, royalties, management, professional and training fees for resident companies; (A)
- ✓ Interest, agency fees, royalties, management, professional and training fees for non-resident companies; (F)
- ✓ Interest payments to an individual; (F)
- ✓ Commissions; (A)
- ✓ Amounts withdrawn from registered pension fund; (F)
- ✓ Payments to non-residents for the use or occupation of property; (F)



- ✓ Qualifying Dividends - dividends chargeable to tax with the exception of dividends from Co-operative societies (F)
- ✓ Non-qualifying dividends – from co-operative society dividend (A)

# Why withhold

## KPMG tax?



- ✓ Cash flow to the government
- ✓ An advance payment of tax hence providing an additional compliance measure
- ✓ Cost effective collection measure through the use of other taxpayers
- ✓ Provides a manageable avenue for taxation of non-residents deriving income from Kenya

- ✓ **Section 3(2), Section 10, Section 35, Paragraph 3 and 5 of the Third Schedule** to the ITA and **WHT Rules 2001**
- ✓ Section 10 provides that any payment paid by a resident person or a person having a permanent establishment in Kenya in respect of:
  - Management or professional fee or training fee;
  - A royalty or natural resource income;
  - Interest and deemed interest;
  - The use of property;

Shall be deemed to be income accrued or derived in Kenya



- ✓ **Section 35** of ITA provides for payments subject to WHT both to resident and non-resident persons. These include:
- Interest, agency fees, dividends, royalties, management, professional and training fees;
  - Commissions;
  - Amounts withdrawn from registered pension or provident fund;
  - Payments to residents/non-residents for the use or occupation of property.

## Income Tax Act (ITA)

- ✓ Paragraph 3 and 5 of the Third Schedule to the ITA detail the rates applicable for WHT
- ✓ The WHT Rules 2001 provide further clarification on the administration of WHT
- ✓ “Paid” is defined in Section 2 to include distributed, credited, dealt with or deemed to have been paid.
- ✓ In Fintel v KRA the judge clarified the definition of paid as not to include accrual

It is the **Responsibility** of the person making payment of income subject to WHT to:

- **Compute and deduct** the tax at the relevant rate;
- **Remit the tax** so deducted by the 20th day of the month following that in which tax is deducted

Incase of dispute between the payer and payee:

- payer should furnish the payee with a written statement showing the WHT deducted;
- Payee may give a notice of objection in writing to the Commissioner within 30 days after receiving the written statement showing the WHT deducted

### Do you have a PIN?

Enter PIN/User ID \*

Continue

### Do you want to apply for a PIN?



New PIN Registration  
To get a new PIN, Click Here

[Guidelines for PIN Registration](#)

- **W.E.F. 1 August 2015**, all taxpayers are required to pay WHT via the iTax platform
- **All taxpayers including government agencies are required to obtain a Payment Requisition Number (PRN) from iTax and use this as an Eslip for paying WHT**
- **iTax automatically generates a WHT certificate and sends this to the supplier on the iTax platform**



# Withholding tax rates





# WHT rates for payments made



Nature of payment	Rate
<b>Management or professional fees: (&gt; 24,000)</b> - Managerial, technical, agency, consultancy fees and Training fees	5%
<b>Contractual fees: (&gt;24,000)</b> - Building, civil and engineering works	3%
<b>Royalties</b> - Software license	5%
<b>Interest*:</b>	
Bank interest and other sources	15%
<b>Bearer instruments</b>	
- 2 years;	25%
- Beyond 10 years w.e.f 12.06.09	10%
<b>Dividends:</b> EA citizens (Uganda and Tanzania) are now considered Kenyan residents for purposes of WHT on dividends	5%

\*Interest paid to financial institutions is exempt from WHT as per Sec 35(3)(b) of the ITA






# With rates for payments made to non-



Nature of payment	Rate (%)
Management or professional fees:	20
Royalties - e.g. software licenses	20
Dividends	10
Contractual fees (building /civil/engineering)	20
Rents: Real estate	30
Lease of equipment	15
Interest	15
Interest on bearer instrument	25
Commissions - brokers	20
Commissions – agents and others	20

Nature of payment	UK %	Germany & Canada %	Denmark, Norway Sweden Zambia %	India %	France %	South Africa % *
Management or professional fees	12.5	15	20	17.5	As business profits	
Royalties	15	15	20	20	10	10
Dividends	10	10	10	10	10	10
Interest	15	15	15	15	12	10
Pension	5	5	5	5	5	-
Entertainment sport and promotion	20	20	20	20	20	-
Rent(real estate)	30	30	30	30	30	-
Rent(Others	15	15	15	15	15	

# Limitation of Clause



What is the LOB clause?

- ❖ Business profits - Amount is taxed as business profit in the contracting state.
- ❖ Effective 1 January 2015.
- ❖ Purpose? To prevent companies from treaty shopping for countries with favorable tax rates.
- ❖ The parent company of the recipient must be a resident of the receiving country and own at least 50% of the company receiving the service subject to WHT.
- ❖ Underlying ownership? Includes direct and indirect ownership by individuals through interposed companies.

## Unregistered schemes:

- ✓ No further tax is deductible on withdrawals

## Registered schemes:

- ✓ Withdrawals are taxable
- ✓ WHT ordinarily deductible at PAYE rates
- ✓ Wider brackets apply



# Withdrawal from pension schemes

Special withdrawals (KShs)	Ordinary withdrawals (KShs)	Rate
First KShs 300,000		Exempt
First 400,000 after the exemption	121,968	10%
Next 400,000	114,912	15%
Next 400,000	114,912	20%
Next 400,000	114,912	25%
Over 1.6 M	Over 466,704	30%

Special withdrawals	Ordinary withdrawals
Payment made after the expiry of fifteen years after joining the fund	Before expiry of 15 years after joining the fund
Attainment of the age of 50 years	
Early retirement on grounds of sickness	

- ✓ Where payment is to be made net of tax, the payer is required to gross up the WHT base amounts against the foreign suppliers' invoices when paying WHT
- ✓ The WHT is calculated on the grossed up amount
- ✓ Alternatively, the payer could include the element of tax when negotiating its contracts





# Examples

## Contract with a UK firm

Detail (WHT at 12.5%)	Amount (KShs)
Management Fee	100,000
Disbursements (Meals and Accommodation)	50,000
Total	150,000
WHT tax (@ 12.5%)	(18,750)
Amount paid	131,250
Total cash outflow	150,000

NB: The amount paid to the supplier will be **KShs 131,250** The company deducts the WHT and remits the same to the KRA

## Contract with a UK firm net of Tax

Detail (WHT at 12.5%)	Amount (KShs)
Management Fee (net of WHT )	150,000
WHT @12.5% (deem fee to be 87.5%)	21,429
Actual expense amount (inclusive of WHT)	171,429
Amount paid to supplier	150,000
Total cash outflow	171,429

NB: The amount paid to the supplier will be **KShs 150,000** The company bears the WHT of **KShs 21,429** paid to KRA

# Non-compliance with WHT rules and obligations





- ✓ Late payment penalty of **10%**;
- ✓ Interest at **1%** per month on the outstanding tax, until payment in full;
- ✓ Other general offences under withholding tax e.g. failure to submit annual return (up to a maximum of fine KShs 100,000 or six months imprisonment or both);
- ✓ W.E.F 13 June 2008 - In duplum rule applies to interest on tax

# Case laws and recent court rulings





## Local Committee Ruling on Tsavo Power Company Limited Vs Kenya Revenue Authority

### THE FACTS

- ✓ KRA Audit conducted established that Tsavo was not charging WHT on miscellaneous expenses (hotel accommodation, travel and transport)
- ✓ It was held that disbursements are subject to WHT unless tax payer can prove there is no margin on the disbursement
- ✓ Definition of management and professional fees “however calculated” to include disbursements

## **Fintel Limited Vs Kenya Revenue Authority** **A High Court case challenged the definition of “paid” under** **Section 2 of the ITA**


### **THE FACTS**

- ✓ Fintel entered into a contract for the construction of a rental building and experienced difficulties in settling outstanding fees
- ✓ KRA conducted an audit and demanded WHT on interest liability accrued for failure to settle fees
- ✓ Accrual of an expense in the audited accounts did not amount to the same expense being “paid” as defined under Section 2 of the ITA

## **Fintel Limited Vs Kenya Revenue Authority** **A High Court case challenged the definition of “paid” under** **Section 2 of the ITA**

### **THE FACTS**

- ✓ Additionally, under the provisions of Section 35, tax is only withheld “upon payment” and therefore payment is a prerequisite for WHT to apply
- ✓ As a result, WHT was not applicable on the interests accrued in the audited accounts by Fintel as it had not made any “payments”

A large, empty conference room with a long, polished wooden table and rows of chairs. A person in a suit stands by the large windows at the far end of the room, looking out. The room has a high ceiling with recessed lighting and large windows on the left and right sides. A yellow rectangular box is overlaid on the left side of the image, containing the text "Emerging Issues".

# Emerging Issues



- ❑ The **2015 and 2016 Finance Acts** have given KRA the authority to implement a WHT regime for rental income.
- ❑ The WHT agents shall be required to deduct and remit WHT on gross rent paid to the resident landlords
- ❑ Applicable for **both residential and commercial property**
- ❑ Effective date – **1 January 2017**

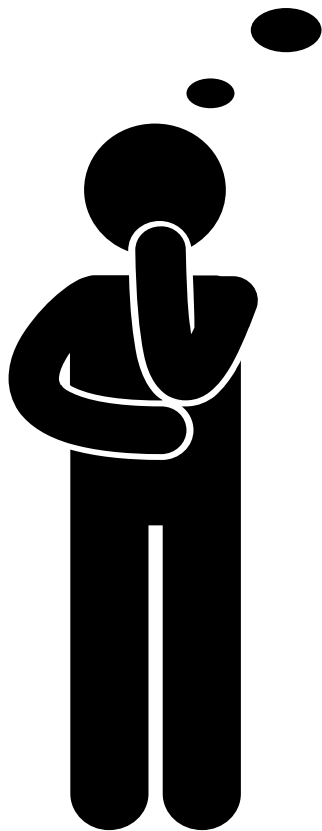


## Who can be an agent?

Any person paying rent to a resident landlord including:

- a) Private institutions;
- b) Public institutions; and
- c) Others: property/estate agents





- ☐ Appointed agents shall withhold tax on rental income at a flat rate of **10% of gross rent** payable (excluding VAT in cases of commercial rent).
- ☐ Withheld tax should be **paid by the 20th day of the subsequent month**
- ☐ A WHT Certificate will be generated automatically by iTax and sent to the landlord once tax due is paid.
- ☐ The landlord shall claim credit for WHT deducted in their tax return **for the period** using the WHT certificate.

## Exemptions?

- ☐ No withholding agent/ tenant shall withhold tax unless they are duly appointed by the Commissioner
- ☐ Rental income of exempt persons shall not be subjected to withholding tax
- ☐ Non-resident landlords – subject to WHT at 30% on their gross rent earned

A company is being provided with the following services. Identify which ones are subject to WHT:

Service	Service
Installation of operating software	Rent paid to a non-resident person
Supply of mobile phones to Base Titanium	Construction services
Subscription fees for Oracle software	Rent paid to a resident person
Tax advisory fees	Dividends paid to shareholders
Monthly salary to employee	Safaricom telephone bills

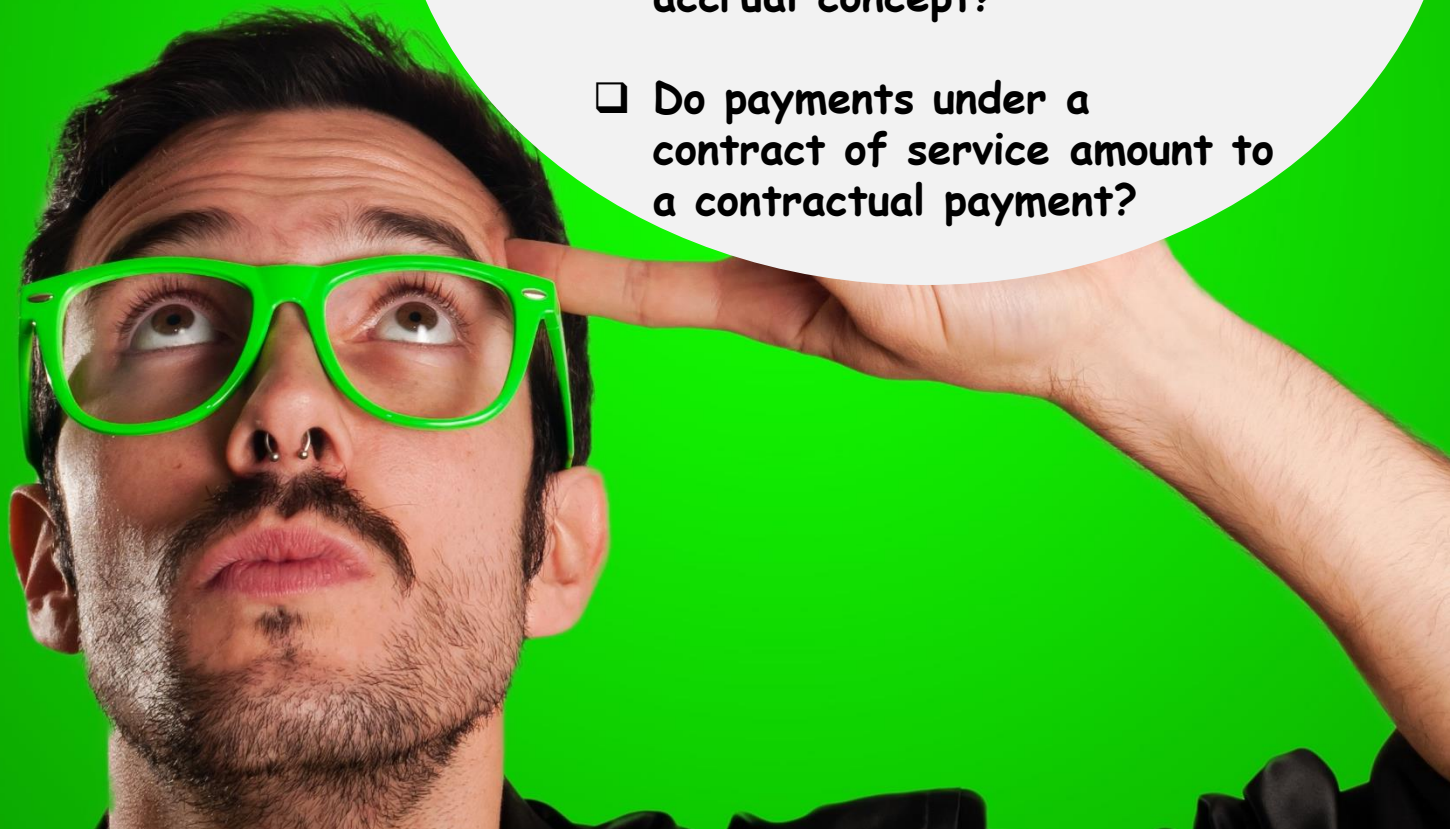
## Services that are subject to WHT upon making payment

Service		Service	
Installation of operating software	✓	Rent paid to a non-resident person	✓
Supply of mobile phones to your organisation	x	Construction services	✓
Subscription fees for Oracle software	✓	Rent paid to a resident person	x/✓
Tax advisory fees	✓	Dividends paid to shareholders	✓
Monthly salary to employee	x	Safaricom telephone bills	x

# Think

About it...

- ☐ If you are paying tax on behalf of the other party, why should KRA treat it as your tax and still demand the tax and penalties on non-payment?
- ☐ What happens in case you overpay WHT based on the accrual concept?
- ☐ Do payments under a contract of service amount to a contractual payment?



# Q & A Session

