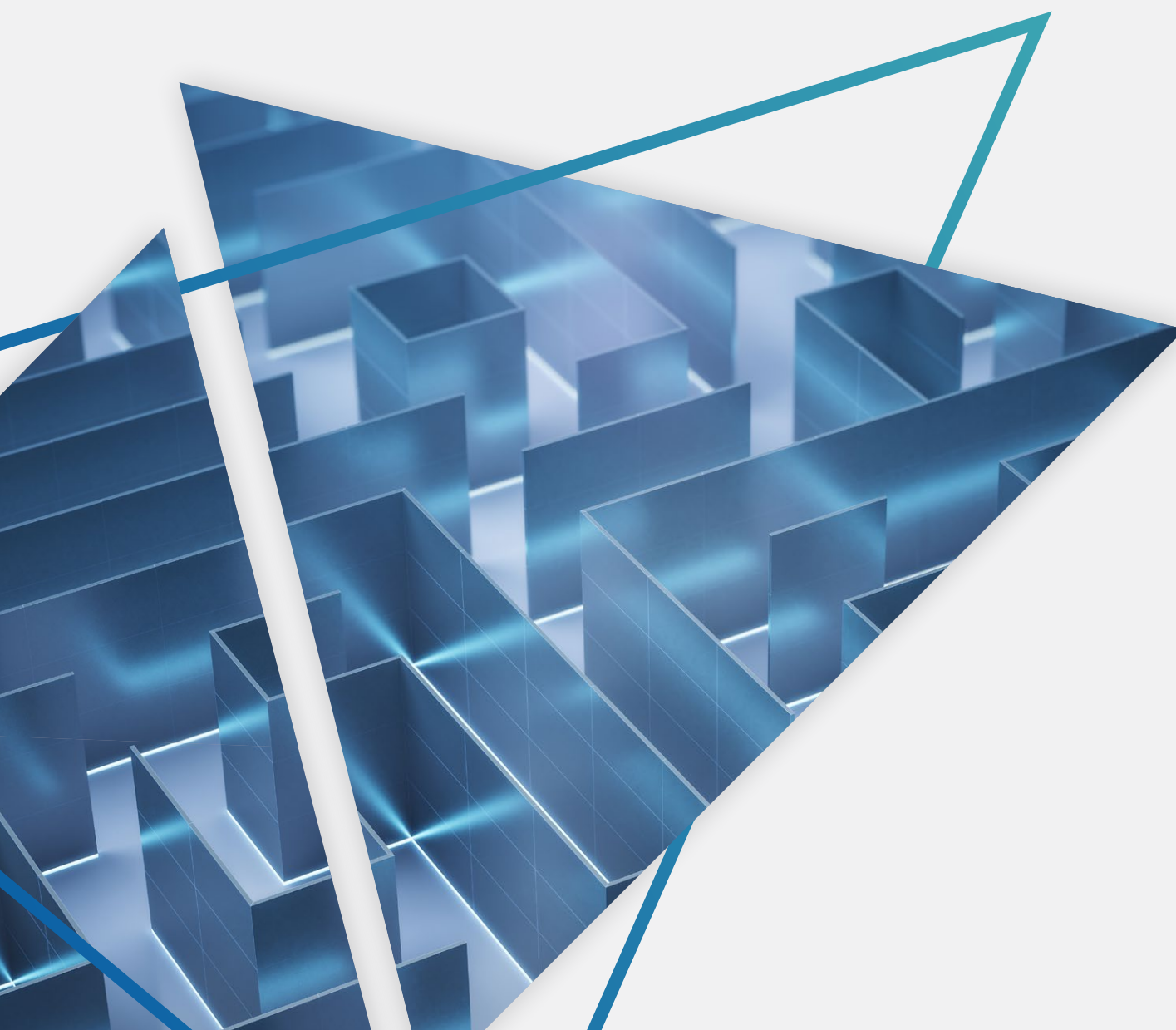


Tax & Exchange Control

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Putting Kenya's New Advance Pricing Agreement Regime in Context

An Advance Pricing Agreement (APA) is a pre-emptive and legally binding contract between a taxpayer and a tax authority to fix the transfer-pricing methodology for specified related-party transactions over a period of time. APAs determine in advance how prices (or margins) between related companies will be set so that the arm's-length principle is satisfied. APAs can be unilateral (between one taxpayer and one tax authority) or bilateral and multilateral (involving two or more jurisdictions under a tax treaty).

Background

Kenya formally introduced APAs through the Finance Act, 2025, through the introduction of Section 18G of the Income Tax Act. This provision which takes effect from 1 January 2026, allows taxpayers to enter into APAs with the Commissioner of Domestic Taxes.

APAs will apply to cross-border transactions between resident and non-resident related parties and to dealings with entities in preferential tax regimes such as Cayman Islands, Guernsey, British Virgin Islands and similar jurisdictions. Once concluded, an APA will be valid for a period of up to five years. However, KRA may declare an APA null and void if it later discovers that the taxpayer misrepresented material facts during the application process. To operationalise the APA regime, the Cabinet Secretary for the National Treasury is expected to issue regulations before 31 December 2025.

The introduction of APAs marks a significant development in Kenya's transfer pricing landscape. By agreeing in advance on pricing methods and critical assumptions, taxpayers will gain certainty and reduce the risk of future transfer-pricing audits and disputes. This is particularly important given the increasing number of transfer pricing cases before the Tax Appeals Tribunal, where disagreements on methodology have often been at the core of disputes.

For instance, in *Beta Healthcare International Ltd v Commissioner of Legal Services and Board Coordination* [2024] KETAT 143 (KLR, the pharmaceutical distributor applied the Transactional Net Margin Method (TNMM) with an operating margin of 5-8% on sales to affiliates. The KRA rejected this approach, insisting on Comparable Uncontrolled Price (CUP) method using internal comparables. The Tax Appeals Tribunal (TAT) ultimately ruled in KRA's favour, noting that Beta had failed to supply sufficient data to support its TNMM benchmark. If an APA had been in place, Beta and KRA would have agreed in advance on the method and margin.

Similarly, in *AVIC International (Beijing EA) Ltd v Commissioner of Domestic Taxes* [2024] KETAT 1601 (KLR), KRA disputed the taxpayer's reliance on TNMM for its intercompany sales, arguing instead that the Resale Price Method (RPM) was more appropriate. The TAT upheld the TNMM, favouring KRA's position while citing deficiencies in AVIC's benchmarking and documentation. An APA would have helped pre-determine the appropriate methodology, mitigating the risk of prolonged litigation.

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Anticipated requirements for the APA process

Whereas no regulations currently exist to guide the effective implementation of APAs, comparative analysis of the global practices suggest that an APA application may require:

- a) Detailed information about the applicant enterprise and all associated enterprises involved in the controlled transactions (i.e. transactions between related companies or enterprises for which an arm's length price is to be established.)
- b) Description of the controlled transactions, including the amounts of intra-group payments and receipts by tax jurisdiction, identification of connected persons and their relationships, copies of agreements, adjustments made for arm's length compliance.
- c) The selection of the proposed transfer pricing method and a clear rationale for its choice.
- d) A comparability analysis detailing the search process, data sources, selection criteria, and reasons for rejecting potential comparables (including internal ones), list and description of selected comparables and records of comparability adjustments made indicating which party's results were adjusted.
- e) Relevant financial information, such as audited financial statements for the taxpayer and other parties to the controlled transaction and segment reports where applicable.

Critical assumptions in APAs

A central feature of any APAs is the set of the critical assumptions, such as the agreed key facts, circumstances or conditions that must hold true for an APA to remain valid.

For example, an APA might assume that the taxpayer will continue to operate the same functions, assets used, and risks assumed or that the relevant geographic market and industry conditions remain stable. A material change in these assumptions could trigger a revision or cancellation of the APA.

Comparative analysis with other jurisdictions

South Africa

South Africa established the legal framework for APAs through the Tax Administration Laws Amendment Act 18 of 2023, providing for both unilateral and bilateral APAs. The regime requires pre-application meetings, fee structures, and compliance requirements. However, as of 2025, the APA program for uniformity is not yet operational. The South African Revenue Service (SARS) has yet to issue public notices to activate the program, with capacity constraints cited as a key challenge.

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Nigeria

Nigeria introduced APA guidelines in November 2024, effective 01 January 2025, to give effect to the provisions of the Income Tax (Transfer Pricing) Regulations, 2018. This regime allows unilateral, bilateral, or multilateral APAs but is limited to large taxpayers; transactions worth at least USD 10 million annually, or groups of related transactions exceeding USD 50 million annually. The application process begins with a mandatory pre-filing meeting, followed by submission of a detailed proposal, analysis, negotiations, and execution of the agreement.

In Nigeria, APAs last up to three years, renewable for a further 3 years. A rollback of up to 3 prior tax years is also allowed. Although covered transactions are protected from transfer pricing audits, the Federal Inland Revenue Service (FIRS) retains the right to audit other aspects of the taxpayer's affairs. Taxpayers are also required to submit annual compliance reports and retain supporting documentation for up to six years.

India

India's APA programme was introduced in 2012 under the Income Tax Act, and is administered by the Central Board of Direct Taxes (CBDT). The regime covers unilateral, bilateral and multilateral APAs for 5 years and allows for rollback of up to 4 prior tax years. Ultimately it allows taxpayers up to 9 years. The applications require a pre-filing consultation followed by submission of a detailed application with supporting functional and financial analyses and are accompanied by a filing fee scaled to the size of the transactions covered.

What this means for MNEs and the KRA

Kenya's adoption of APAs under the Finance Act 2025, marks a significant evolution in its tax landscape. For multinational enterprises (MNEs), APAs promise enhanced certainty and predictability, reduced transfer pricing disputes, while opening more doors for collaborative engagement with the KRA.

That said, the success of the APA regime will hinge on its implementation and administration. Experience from other jurisdictions highlights the importance of institutional capacity, technical expertise and clear service standards. Case in point, in South Africa, the South African Institute of Chartered Accountants (SAICA), has flagged the lack of specialist capacity at SARS as the main impediment to launching a workable APA program.

In developing Kenya's regulations, the Cabinet Secretary should consider lessons from other jurisdictions. The regulations could make a provision for rollback such as in India and Nigeria to incentivise taxpayer uptake. Further, the regulations should adopt fees scaled to the size of the transactions covered to avoid deterring applicants.

For MNEs, APAs make most sense where transactions are large, recurring or inherently contentious. As Kenya's APA framework evolves, early preparation will position MNEs to take advantage of the regime once operational. Accordingly, taxpayers should begin preparing robust functional analyses, comparability documentation, and internal assessments of materiality and litigation risk.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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