Executive summary

In the spirit of inspiring foreign direct investment and positioning Kenya as a prominent business hub in the region, the President of Kenya assented to the Special Economic Zones Act, 2015 (SEZA or the Act) on 11 September 2015. The Act which will come into operation on 15 December 2015 provides for the establishment of special economic zones (SEZs). Entities licensed under SEZA are entitled to various benefits among them exemption from value added tax, income tax, custom and excise duties, stamp duty and work permit quotas.

By notice in the Gazette, the Cabinet Secretary (the Secretary) in charge of Industrialization is empowered to declare any area as a SEZ upon recommendation by the Special Economic Zones Authority (the Authority) and is also charged with the responsibility of implementation of the Act. Currently, Kenya has in place Export Processing Zones (EPZ) managed by the Export Processing Zone Authority under the Export Processing Zone Act (EPZA). The main objective of an EPZ is to attract, promote or increase the manufacture of goods or provision of services for export only. This makes the SEZ as currently constituted a broader concept than EPZ. Given that EPZA has not been repealed, it is likely that the EPZs will remain applicable and implemented alongside the SEZs. It will, however, be interesting to see if new licenses issued under EPZA.
Upon a recommendation by the Authority, the Secretary is empowered to make regulations in respect of any matter required to be prescribed under the Act. Such regulation may include but is not limited to determination of the criteria for designation and gazetting of all SEZs, determination of the application process, criteria, conditions, terms and procedures for designation of SEZs and licensing under the Act. The investment rules for SEZs, the fees to be levied under the Act are also expected under the regulations. To date, the regulations have not been gazetted.

Detailed discussion

Declaration of SEZs
The Secretary in charge of Industrialization shall, on recommendation by the Authority, and in consultation with the Secretary responsible for matters relating to finance declare, by notice in the Gazette, any area as SEZ. Such areas include but are not limited to regional headquarters, business process outsourcing centers, management consulting and advisory services and other associated services. Such declaration will define the limits of the zone and will remain in force until revoked by an order in the Gazette by the Secretary and on recommendation by the Authority.

Types of SEZs
The types of SEZs established under the Act will include, among others: business service parks (e.g., regional headquarters), free port zones, free trade zones, industrial parks, information communication technology parks, science and technology parks, agricultural zones, livestock zones and tourist and recreation zones.

Establishment of the Authority
The Act establishes a body to be known as the Special Economic Zones Authority (the Authority) which shall be a body corporate with perpetual succession and a common seal. The Authority shall be administered by a board of directors whose chairperson is to be appointed by the President. The Authority shall be responsible for the establishment, operation and regulation of SEZs as well as assist in implementing the policies and programs of the Government with regard to SEZs.

Application for a SEZ License
A person intending to carry on business as SEZ developer, operator or enterprise shall apply to the Authority for an appropriate license. Such a license may be issued by the Authority on recommendation of the Commissioner of Customs and payment of the prescribed fee within 30 days of receiving the application together with the relevant supporting documents.

To qualify for an SEZ license, the applicant must bel, in addition to such other criteria and requirements as may be prescribed:

- Be a company incorporated in Kenya for the purpose of undertaking SEZ activities
- Have financial capacity, technical and managerial capacity, and associated track record of relevant development or operational projects required for developing or operating the SEZ
- Own or lease land or premises within the special economic zone as stipulated under the Special Economic Zones (Land Use) Regulations to be enacted within 180 days of the coming into force of the Act

Benefits under the SEZA

Tax Benefits
Under the Act, all licensed special economic zone enterprises, developers and operators shall be granted exemption from all taxes and duties payable under all the domestic tax legislations including the East African Community Customs Management Act. The benefits apply on all special economic zone transactions.

However, the Finance Act 2015, which was assented to on the same day as the SEZA appears to limit the tax incentives by amending the Income Tax Act and the Value Added Tax (VAT) as follows:

- SEZ enterprises, developers and operators will be subjected to reduced corporate rates of 10% for the first 10 years of operation and 15% for the next 10 years
- Dividends received by licensed SEZ enterprises, developers and operators are exempt
- Withholding tax on professional services and interest (other than dividends) by a SEZ enterprise, developer and operator to nonresidents to apply at 10%
- The supply of taxable goods to special economic zones enterprises, developers and operators licensed under the SEZA are exempt from VAT
In effect, the above amendments appear to be inconsistent with SEZA which offers unlimited exemption on all taxes. It would be paramount that the inconsistency is addressed prior to the issuance of the licenses under the Act.

Work permits
The licensed special economic zone enterprises, developers and operators shall be entitled to work permits of up to 20% of their full-time employees. However, on the recommendation of the Authority additional work permits may be obtained for specialized sectors.

Other exemptions
- Stamp duty on the execution of any instrument relating to the business activities of special economic zone enterprises, developers and operators
- Provisions of the Foreign Investments and Protection Act relating to certificate for approved enterprise
- Provisions of the Statistics Act
- Payment of advertisement fees and business service permit fees levied by the respective County Governments’ finance Acts
- General liquor license and hotel liquor license under the Alcoholic Drinks Control Act, 2010
- Manufacturing license under the Tea Act
- License to trade in unwrought precious metal under the Trading in Unwrought Precious Metals Act
- Filming license under the Films and Stages Plays Act
- Rent or tenancy controls under the Landlord and Tenant (Shops, Hotels and Catering establishments) Act
- Any other exemption as may be granted under the SEZA in consultation with the Cabinet Secretary for that matter, by notice in the Gazette

Rights of SEZ Enterprises
- Under the Act, a licensed SEZ enterprise shall enjoy certain rights such as, profit and capital repatriation, the full protection of its property rights against all risks of nationalization or expropriation and industrial and intellectual property among others.

Regulatory provisions
The Secretary shall publish in the Kenya Gazette all approved applications to establish a SEZ and within 180 days of the Act coming into force, publish regulations on the application, issuance, suspension, revocation and appeal process on licensing of SEZs.

Impact
As one of the flagship projects under the economic pillar of Kenya’s Vision 2030, the enactment of the Act reaffirms to investors that Kenya is still on the path towards achieving vision 2030. The Act creates a favorable environment for both global and local investors.
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