LEGAL NOTICE NO. _________ OF 2023

THE INCOME TAX ACT

(CAP. 470)

THE INCOME TAX (TRANSFER PRICING) RULES, 2023

THE INCOME TAX ACT		
(Cap. 470)		
IN EXERCISE of the powers conferred by Section 18(8) as read with Section 130 of the Income Tax Act, the Cabinet Secretary for National Treasury and Economic Planning makes the following Rules -		
1.	**Citation.**	These Rules may be cited as the Income Tax (Transfer Pricing) Rules, 2023
2.	**Interpretation.**	In these Rules, unless the context otherwise requires– "arm's length price" means the price payable in a transaction between independent enterprises; "commodities" includes agricultural produce, fisheries products, solid or liquid or gas minerals, hydrocarbons and derivatives thereof, other products or natural minerals or mineraloids obtained from the land or waters, and, in general, goods where publicly quoted price as described in rule 7, exists. "comparable transactions" means transactions between which there are no material differences, or in which reasonably accurate adjustments can be made to eliminate material differences; "controlled transaction" means any transaction between related enterprises; "related enterprises" means any two enterprises which meet any of the conditions outlined in Section 18, 18A, 18B, 18C, 18D, 18E and 18F of the Act.
3.	**Purpose of Rules.**	The purposes of these Rules are – (a) to provide guidelines to be applied by related enterprises, in determining the arm's length prices of goods and services in transactions involving them, and

		(b) to provide administrative regulations, including the types of records and documentation to be submitted to the Commissioner by persons involved in controlled transactions.
4.	**Person to choose method.**	The taxpayer may choose the most appropriate transfer pricing method to employ in determining the arm's length price from among the methods set out in rule 7.
5.	**Scope of guidelines.**	The guidelines referred to in rule 3 shall apply to the following sections; 18, 18A, 18B, 18C, 18D, 18E and 18F.
6.	**Transactions subject to Rules.**	The transactions subject to adjustment of prices under these Rules shall include– (a) the purchase, sale, transfer, lease or use of tangible property; (b) the purchase, sale, transfer, lease or use of intangible property; (c) the provision of services; (d) financing transactions, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business; (e) insurance and re-insurance transactions; (f) a transaction of business restructuring or reorganisation entered into by a person with an associated person, irrespective of the fact that it has bearing on the profit, income, losses or assets of such persons at the time of the transaction or at any future date; (g) Cost contribution arrangements; (h) Transactions involving derivatives; (i) any other transactions which may affect the profit or loss of the enterprise involved.
7.	**Methods**.	(1) The methods referred to in rule 4 are the following – (a) the comparable uncontrolled price (CUP) method, in which the transfer price in a

controlled transaction is compared with the prices in an uncontrolled transaction and accurate adjustments made to eliminate material price differences;

(b) the resale price method, in which the transfer price of the produce is compared with the resale price at which the product is sold to an independent enterprise;

Provided that in the application of this method the resale price shall be reduced by the resale price margin (the profit margin indicated by the reseller);

(c) the cost plus method, in which costs are assessed using the costs incurred by the supplier of a product in a controlled transaction, with a mark-up added to make an appropriate profit in light of the functions performed, and the assets used and risks assumed by the supplier;

(d) the profit split method, in which the profits earned in very closely interrelated controlled transactions are split among the related enterprises depending on the functions performed by each enterprise in relation to the transaction, and compared with a profit split among independent enterprises in a joint venture;

(e) the transactional net margin method, in which the net profit margin attained by a multinational enterprise in a controlled transaction is compared to the net profit margin that would have been earned in comparable transactions by an independent enterprise;

(f) such other method as may be prescribed by the Commissioner from time to time, where in the opinion of the Commissioner and in view of the nature of the transactions, the arm's length

		price cannot be determined using any of the methods contained in these guidelines. Provided that for the purpose of rule (a) and rule (f) – (i) any export or import of commodities, where prices can be obtained at the date of the transaction from an international or domestic commodity exchange market, or from recognised and transparent price reporting or statistical agencies, or from governmental price-setting agencies, or from any other index that is used as a reference by unrelated persons to determine prices in transactions between them (hereinafter referred to as the publicly quoted price) that quoted price on the date on which the goods are shipped, regardless of the means of transport, shall be, without considering the price that was agreed upon with the related person, the sale price used for the purposes of computing the taxable income of that person unless the person provides all of the evidence needed to show that adjustments are appropriate to that quoted price to be consistent with the arm's length principle. (ii) the quoted price shall be determined by taking an average of the prices five days before and after the shipping date as evidenced by relevant shipping documents.
		(2) Notwithstanding sub Rule (1), where the price agreed upon between a person and a non-related person is higher (for exports) or lower (for imports) than the quoted price at the above-mentioned date, the agreed price in this case will be considered as the sale price or purchase price for the purposes of computing the seller's taxable income in Kenya.
8.		(1) The methods set out in rule 7 shall be applied in determining the price payable for goods and services in

	Application of methods.	transactions referred to under section 18, 18A, 18B, 18C, 18D, 18E & 18F of the Act.
		(2) A person shall apply the method most appropriate for his enterprise, having regard to the nature of the transaction, or class of transaction, or class of related persons or function performed by such persons in relation to the transaction.
		(3) The Commissioner may issue guidelines specifying conditions and procedures to guide the application of the methods set out in rule 7.
9.	**Power of Commissioner to request for information.**	(1) The Commissioner may, where necessary, request a person to whom these Rules apply for information, including books of accounts and other documents relating to transactions where the transfer pricing is applied. (2) The documents referred to in sub rule (1) shall include documents relating to - (a) the selection of the transfer pricing method and the reasons for the selection; (b) the application of the method, including the calculations made and price adjustment factors considered; (c) the global organization structure of the enterprise; (d) the details of the transaction under consideration; (e) the assumptions, strategies, and policies applied in selecting the method; (f) For each category of controlled transaction in which the taxpayer is involved, the following information shall be provided – (i) detailed description of the controlled transactions stating parties involved, timing, transaction value, settlement currency, contractual terms and conditions, trading models of the controlled transactions as well as explanations of how

		they are similar to or different from that of uncontrolled transactions; (ii) the amount of intra-group payments and receipts for each category of controlled transactions involving the taxpayer broken down by tax jurisdiction of the foreign payer or recipient; (iii) identification of the connected persons involved in each category of controlled transactions, and the relationship amongst them; (iv) copies of contracts or agreements relating to the controlled transactions and their execution; (v) detailed functional analysis showing the functions performed, risks assumed and assets used by the taxpayer and its connected persons for each category of controlled transactions; (vi) detailed comparability analysis in respect of each category of the controlled transaction with potential uncontrolled comparable transactions including the search process for comparables, data source, selection criteria and rationale for rejecting potential comparables including any potential internal comparables; (vii) list and description of selected comparable uncontrolled transactions, if any, and the relevant information of those comparables including financial data, and agreements in case of license fees; (viii) explanation of the selection of most appropriate transfer pricing method(s); (ix) explanation of the selection of the appropriate tested party, where relevant; (x) key factors affecting the pricing of controlled transactions, including

		intangibles involved in the transactions and their impact on pricing, as well as location specific factors such as cost savings and market premium etc; (xi) a summary of the important assumptions made in applying the transfer pricing methodology; (xii) if applicable, an explanation of the reasons for performing a multi-year analysis; (xiii) detail of any industry analysis, economic analysis, budgets or projections relied on; (xiv) description of any comparability adjustments performed, and an indication of whether adjustments have been to the results of the tested party, the comparable uncontrolled transaction, or both; (xv) a conclusion as to the consistency of the conditions of the controlled transactions with the arm's length principle, including details of any adjustment made to ensure compliance; (xvi) details of any advance pricing agreements or similar arrangements in other countries that are applicable to the controlled transactions; (xvii) in case of transactions involving commodities where the commodity is exported to a connected person who subsequently sells the commodity to unconnected persons, the third party agreements and sales invoices relating to that sale; and (xviii) any other documentation or information that is necessary for determination of the taxpayer's compliance with the arm's length principle with respect to the controlled transactions.

		(g) The following financial information shall be provided by the taxpayer - (i) audited financial statements of the taxpayer for each accounting year; (ii) financial statements for the parties to the controlled transaction including where the tested party has been selected as a party outside the country; (iii) Where the controlled transactions relate to a part of the overall business of the tested party, the segment reports showing turnover, costs and expenses including details of selection of the appropriate allocation keys and the rationale of selecting those allocation keys; (iv) A summary of the financial information used in applying the transfer pricing methodology; (v) information and allocation schedules showing how the financial data used in applying the transfer pricing method may be tied to the annual financial statements; and (vi) summary schedules of relevant financial data for comparables used in the analysis and the sources from which that data was obtained; and (h) such other background information as may be necessary regarding the transaction.
		(3) The Commissioner may, where necessary, request a person to whom these Rules apply for information other than or in addition to the information already provided under sub rule 1.
		(4) The books of accounts and other documents shall be prepared in, or be translated into, the English language, at the time the transfer price is arrived at.

10.	**Application of arm's length pricing.**	Where a person avers the application of arm's length pricing, such person shall – (a) develop an appropriate transfer pricing policy; (b) determine the arm's length price as prescribed under the guidelines provided under these Rules; and (c) avail documentation to evidence their analysis upon request by the Commissioner.
11.	**Certain provisions of Tax Procedures Act 2015 to apply.**	The provisions of the Tax Procedures Act 2015 relating to fraud, failure to furnish returns and underpayment of tax shall apply with respect to transfer pricing.
12.	**Unpaid tax to be deemed additional tax.**	Any tax due and unpaid in a transfer pricing arrangement shall be deemed to be additional tax for purposes of section 38 of the Tax Procedures Act, 2015.
13.	**Revocation** **L.N. 67 /2006**	The Income Tax (Transfer Pricing) Rules, 2006 are revoked.

Made on the _____________ 2023

NJUGUNA NDUNGU
Cabinet Secretary for the
National Treasury and Economic Planning.