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HIGHLIGHTS OF THE FINANCE BILL, 2024

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1. INCOME TAX

Expanded definition of digital content monetisation

Proposed amendment:

The Bill proposes introducing an expanded definition of the term "*digital content monetisation*" to include creative works, the creation or sharing of digital content, or any other material that is not exempt under the Income Tax Act (ITA).

The Bill also proposes to have the withholding tax (WHT) levied on digital content monetisation for non-residents become a final tax.

Implications:

The Finance Act, 2023 introduced WHT on digital content monetisation at a rate of 5% for residents and 20% for non-residents. The scope of services included offering for payment entertainment, social, literal, artistic, educational or any other material electronically through any medium or channel in the form of an advertisement, sponsorship, affiliate marketing, subscription service, commission or fee from crowd funding. The implication of the Bill's proposal is to widen this scope of taxable services to bring into the tax net income generated from the creative industry, which has been experiencing significant growth in the recent past.

From an East African perspective, we note that while Tanzania introduced income tax and value added tax (VAT) on digital services in 2022, the scope of taxable services covered does not include digital content monetisation, and only applies to non-residents. In Uganda, non-residents deriving income from the provision of digital and electronic services are also subject to VAT and income tax. Some of these services include advertising platforms, which are also currently included in Kenya's scope of "*digital content monetisation*".

Proposed effective date: 1 July 2024

Updated definition of a "*related person*"

Proposed amendment:

The Bill intends to clarify the meaning of a "*related person*" in the context of more than two persons to mean any other person who participated directly or indirectly in the management, control or capital of the business of the two persons. According to the Bill, it could also mean an individual who participates directly or indirectly in the management, control or capital of the business of the two persons. It also extends to an individual who is associated with the two persons by marriage, consanguinity or affinity and the two persons participate in the management, control or capital of the business of the individual.

Implications:

The proposal seeks to clean up the ITA by harmonising the multiple definitions of "related person" currently under section 18(6) and the Eighth Schedule to the ITA.

In addition, the current definition of "*related person*" under section 2 of the ITA, and as introduced by the Finance Act, 2023, only covered the case of two persons where one person participates in the management, control or capital of the business of the other person. In the Bill's proposal, the definition will now include third parties and individuals who participate in the management, control or capital of the business of two persons.

Proposed effective date: 1 July 2024

New definition of "*royalty*" to include payments obtained as consideration for the right to use software

Proposed amendment:

The Bill proposes to introduce an expanded definition to the term "*royalty*". The Bill defines it to now include payments received as consideration for the right to use any software, proprietary or off-the-shelf, whether in the form of license, development, training, maintenance or support fees.

Implications:

The proposed definition seeks to classify all software-related payments as "*royalties*" and subject them to WHT. Currently, certain software-related payments, such as license payments made to software providers through distribution and end-user licence agreements, are not subject to WHT in Kenya, on the principle that they do not confer any intellectual property (IP) rights in the software to the payers. This practice, though contested by the Kenya Revenue Authority (KRA), is in line with the High Court's recent judgment in Seven Seas Technologies Limited v Commissioner of Domestic Taxes, Income Tax Appeal No. 8 of 2017, as well as international best practices. If adopted into law, this proposal will signal a shift from international best practices in the taxation of software payments, as captured under Article 12 of the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention, which generally requires that such payments should only be subject to WHT if they are made as consideration for rights to the software's underlying IP rights.

We note that the proposal would also go against the practice in the region, with both Uganda and Tanzania lacking software in their respective tax laws' definition of "*royalty*".

Proposed effective date: 1 July 2024

Removal of the requirement for pension funds to be registered by the Commissioner

Proposed amendment:

The Bill proposes amending the definitions of "*pension fund*", "*provident fund*" and "*individual retirement fund*" to provide that such funds would be deemed to be registered under the ITA if they have been registered with the Retirement Benefits Authority.

Implications:

This proposal will remove the requirement for pension and provident funds to be registered by the Commissioner for tax purposes. Presently, pension and provident funds need to be registered by the Commissioner under the Income Tax (Retirement Benefit) Rules, for them to enjoy certain benefits, including the exemption of their incomes under the First Schedule. If adopted, any fund duly registered by the industry regulator, being the Retirement Benefits Authority, would be deemed to be automatically registered for tax purposes.

The above proposal would also align our regime with our regional counterparts in Uganda and Tanzania, neither of which require retirement funds to register with their respective tax authorities.

Proposed effective date: 1 July 2024

Introduction of a new definition of *"donation"*

Proposed amendment:

The Bill proposes to introduce a definition of "*donation*" to mean a benefit in money in any form, promissory note or a benefit in kind conferred on a person without any consideration.

Implications:

This proposed definition is aimed at clarifying that the donations contemplated under the ITA include both cash and non-cash donations. The proposed definition will also align with the change introduced by the Finance Act, 2022 into section 15(2)(w) of the ITA, which made both cash and non-cash donations made to charitable organisations allowable deductions. To harmonise the law, there may be need for amendments to the current Income Tax (Charitable Donations) Regulations and the draft Income Tax (Donations and Charitable Organisations Exemption) Rules, 2023, which still seem to restrict the donations covered under the ITA to only cash donations.

Proposed effective date: 1 July 2024

Reduction in the period within which deferred realised foreign exchange losses may be claimed

Proposed amendment:

The Bill proposes lessening the period within which a person can claim deferred realised foreign exchange losses from five to three years.

Implications:

Currently, any person whose gross interest expense paid to non-resident persons exceeds 30% of their earnings before interest, taxes, depreciation and amortization is required to defer any realised foreign exchange losses in computing their taxable income. However, such deferred losses can be claimed over a period of not more than five years. If enacted into law, this proposal means that taxpayers will have a shorter timeframe of three years within which they can claim their deferred foreign exchange losses. It also means that their flexibility in managing their tax and financial affairs will be reduced. Businesses with international operations or exposure to foreign currency fluctuations will therefore need to assess the impact of the shortened deferral period on their financial performance and risk management strategies.

Proposed effective date: 1 July 2024

Expansion of the scope of taxable services offered through a digital marketplace

Proposed amendment:

The Bill proposes deleting the definition of "*digital marketplace*" and replacing it with a new definition which lists examples of services that are provided through a digital marketplace. These include ride-hailing services, food delivery services, freelance services, professional services, rental services, task-based services and any other service that is not specifically exempt.

Implications:

The implication of this proposal is that it will expand the scope of services traded or provided through a digital marketplace that are subject to tax, to include services provided as part of the "*gig economy*", including ride-hailing, food delivery, task-based and freelance services. There is, however, need for clarity as to whether the services listed in the proposal, such as professional and rental services, which are already subject to tax under different regimes, would still be regarded as giving rise to income from a digital marketplace.

This proposal mirrors the scope of digital and electronic services subjected to tax in East Africa. In Uganda, for instance, cab hailing services are among the taxable electronic services. Notably, however, such services are only taxable to the extent that they are provided by a non-resident, unlike the Bill's proposal to tax income earned through a digital marketplace on both residents and non-residents.

Proposed effective date: 1 July 2024

Taxation of income received from the supply of goods to a public entity

Proposed amendment:

The Bill proposes treating as taxable income payments received by a person from a public entity for the supply of goods. Withholding tax will be payable on the income earned at the rate of 3% for residents and 5% for non-residents. A "*public entity*" is defined as a ministry, state department, state corporation, county department or agency of the national or county Government.

Implications:

The Government is likely to generate additional revenue from this proposal by gaining higher visibility of the income earned from the supply of goods to public entities. In addition, given the lower margins typically attributable to the supply of goods, it is arguable that withholding tax on suppliers of goods at 3% and 5% is excessive.

The above proposal is not entirely novel, even in the region. In Uganda, public entities which pay any person for a supply of goods or services an amount exceeding UGX 1 million (approximately KES 35,000) is required to deduct WHT at 6% on the gross amount and issue a receipt to the supplier of the goods or services accordingly.

Proposed effective date: 1 July 2024

Changes to the tax-free threshold for per diems paid to employees on official duty

Proposed amendment:

The Bill proposes getting rid of the current KES 2,000 per day tax-free threshold for per diems, and substituting it with an amount not exceeding 5% of the employee's monthly gross earnings. However, the proposed threshold will only be applicable where an employer has a policy on the payment and accounting for subsistence, travelling, entertainment or other allowances.

Implications:

The current threshold of KES 2,000 was introduced in 2006 and has remained unchanged since then. As such, the current proposal is more reflective of macroeconomic factors, including changes in the cost of living and inflation. That said, it is arguable that the use of a flat threshold of 5% is less progressive as it could confer a greater tax benefit to higher income earners.

The above proposal would also represent an innovative change in the taxation of per diems in the region. In Tanzania and Uganda, per diems are non-taxable to the extent that they solely relate to a reimbursement of costs incurred by employees in the course of their employment.

Proposed effective date: 1 July 2024

Changes to the minimum taxable aggregate value of non-cash benefits and meal benefits

Proposed amendment:

Usually, where an employee enjoys a non-cash benefit that is not expressly provided for elsewhere in the ITA, the value of such benefits should be included in the employee's earnings and charged to tax, subject to a minimum taxable aggregate of KES 36,000 per annum (or KES 3,000 per month). The Bill proposes changing this minimum aggregate to KES 48,000 per annum (or KES 4,000 per month).

The Bill also proposes increasing the threshold for tax exemption for meals offered to employees in a canteen or a cafeteria operated by the employer or a third party who is a registered taxpayer from the current KES 48,000 per annum (or KES 4,000 per month) to KES 60,000 per annum (or KES 5,000) per employee.

Implications:

The proposal to increase the minimum taxable value of non-cash benefits has the potential to reduce the total taxable income of employees who benefit from any non-cash benefits whose value is below KES 48,000 per annum. It is a win for employees in the lower income earning brackets as their total taxable income will likely be reduced. The current threshold of KES 36,000 was also introduced in 2006 and is therefore not aligned with changes in the cost of living and inflation.

The proposal to increase the tax-free threshold for meal benefits provided to employees is also a welcome move, as the proposed threshold of KES 5,000 per month will be more reflective of the prevailing macroeconomic factors. However, it is crucial to note that where the value of the non-cash benefit or meal benefit exceeds the minimum taxable threshold, the entire value of the benefit becomes taxable income for the employee.

Proposed effective date: 1 July 2024

Increase in the non-taxable limit for contributions paid into registered retirement schemes

Proposed amendment:

Currently, contributions paid by employers into registered retirement schemes are not taxable on the employees, subject to a limit of KES 240,000 per annum (or KES 20,000 per month). The Bill proposes raising the limit to KES 360,000 per annum (or KES 30,000 per month).

Implications:

This proposal is likely to encourage people to contribute additional funds into their retirement schemes to secure their retirement knowing that a higher portion of these payments will be tax exempt. In addition, changing the threshold from KES 240,000 per annum, which has been in existence since 2005, will also ensure that the benefit is aligned to present economic realities.

It is interesting to note that some of Kenya's neighbouring countries, such as Uganda, do not have an upper limit on the non-taxable contributions to retirement funds. Kenya may choose to adopt this route to further incentivise saving, although such a measure may be prone to abuse as employers and employees seek to reduce their tax liability.

Proposed effective date: 1 July 2024

Increase in the deductible amounts in respect of annual contributions made to a retirement benefit scheme for employers and employees

Proposed amendment:

In addition to the proposed increase of the non-taxable limit for contributions paid into registered retirement schemes, the Bill also intends to increase the deductible amounts in respect of annual contributions made to retirement benefit schemes. Currently, employees and employers can claim a deduction against taxable income in respect of their annual contributions to a Kenya-registered retirement benefit scheme. This relief is limited to the lesser of the sum of the employee's actual contributions during the year or 30% of their pensionable (taxable) income during the year or KES 240,000 per annum (KES 20,000 per month). The Bill proposes changing the latter to KES 360,000 per annum or KES 30,000 per month.

Implications:

The amendment has the potential to incentivise increased contributions by Kenyans into their pension schemes. This is due to the increased amount that can be allowed as expenses for both employers and employees.

Proposed effective date: 1 July 2024

Taxation of payments made by owners or operators of digital platforms or marketplaces

Proposed amendment:

The Bill proposes to categorize, as income accrued in or derived from Kenya, payments received from residents and non-residents who own or operate digital marketplaces or platforms or who make or facilitate payment in respect of digital content monetisation, goods, property or services. The proposal defines a "*platform*" for this purpose as a digital platform or website that facilitates the exchange of a short-term or freelance engagement or the provision of a service between a service provider who is an independent contractor, or a freelancer and a customer.

The Bill proposes taxing such income at the rate of 5% for residents and 20% for non-residents.

Implications:

The proposal has the potential to increase revenue generation, especially in recognition of the fact that the proposal captures both resident and non-resident owners and operators of digital platforms.

The proposal would also introduce a few changes into the current taxation of incomes earned through the digital space, currently achieved through digital service tax (DST). First, DST is currently charged on non-resident persons who earn incomes from the provision of services or business carried out over the internet or electronic networks. The obligation to account for DST is also placed on the earner of the income. Conversely, the proposal imposes a tax on incomes earned by both residents and non-residents from digital platforms. The proposal also imposes the obligation to account for the tax on the payers, being the owners and operators of the platforms, as opposed to the actual earners of the incomes. In essence, therefore, tax on income earned from digital platforms will assume the nature of WHT. While this could plausibly enhance revenue collection from the digital space, which has been a challenge for the Government in the recent past, imposing the obligation to deduct WHT on a non-resident could present enforceability issues.

It may also be prudent to clarify which definition will be applicable in taxing income earned through a digital marketplace or platform, noting that the Bill proposes to introduce a new definition of the term "*digital marketplace*" into section 3 of the Act, as discussed above, and also proposes a new definition of the term "*platform*" in section 10 of the Act.

From an East African perspective, we note that while Tanzania and Uganda also have income tax and VAT on electronic services, it only applies to non-residents and to a smaller scope of services compared to Kenya. The obligation to account for these taxes also lies on the non-resident service providers, who may not necessarily be the owners or operators of the platforms. In our view, this proposal may make Kenya less attractive in its bid to be the region's digital hub.

Proposed effective date: 1 July 2024

Introduction of a significant economic presence tax and removal of the digital service tax

Proposed amendment:

The Bill proposes to do away with the DST and introduce a tax known as significant economic presence (SEP) tax in its place. The SEP tax would be levied on income earned by non-residents from business carried out over a digital marketplace. Just like DST, the SEP tax will not apply to incomes subject to WHT under the ITA, and to incomes earned by non-resident persons with a permanent establishment PE in Kenya.

It is intended that the SEP tax rate will be 30% of the deemed taxable profit. The deemed taxable profit will be 20% of the gross turnover earned by the non-resident person. The proposal also provides that non-residents subject to tax under the provision would be required to submit a return and pay the tax due on or before the twentieth day of each month.

Implications:

The implication of this provision is that it raises the digital tax rate from the current 1,5% of the gross transaction value. It is not clear what threshold will be used to determine whether an entity has sufficiently significant economic presence in Kenya to trigger SEP tax, but we note that the section empowers the Cabinet Secretary to make regulations for its better implementation.

Comparatively, an example of an African country currently imposing SEP tax is Nigeria. The Companies (Significant Economic Presence) Order 2020 (SEP Order) specifies the threshold above which non-resident companies undertaking the specified activities would be subject to the tax.

Under the SEP Order, a foreign company operating in Nigeria will be deemed to have a SEP if:

- It derives a gross turnover or income in excess of NGN 25 million (approximately KES 2,24 million) or its equivalent in other currencies carrying out activities such as the streaming or downloading of digital contents to any person in Nigeria, transmission of data collected about Nigerian users, generated from their use of a digital interface, provision of goods or services directly or indirectly through a digital platform to customers in Nigeria and the provision of intermediation services through digital platforms that link suppliers and customers in Nigeria.
- It uses a Nigerian domain name or registers a website address in Nigeria.
- It has a purposeful and sustained interaction with persons in Nigeria by customising its platform to target persons in Nigeria.

The nature of activities subject to the SEP Order include digital service providers and non-resident companies that provide technical, professional, management or consultancy services to customers in Nigeria.

We also note that the SEP tax is almost similar to the DST currently in existence in other East African Community (EAC) member states. In Uganda, DST at a rate of 5% was introduced in 2023 on income earned by non-residents from the provision of digital services to customers in Uganda. Tanzania also introduced a 2% DST on similar services in 2022. This said, the proposed rate in Kenya would be higher than the ones in these countries.

With the proposed amendments to the taxation of incomes earned from digital marketplaces also affecting non-residents, as discussed above, it may also be prudent to harmonise the changes with the SEP tax rate to prevent the duplication of tax liabilities or obligations. A careful study should be carried out on the effectiveness of digital taxes before Kenya starts on SEP.

Proposed effective date: 1 January 2025

Introduction of a minimum top-up tax

Proposed amendment:

The Bill proposes introducing a tax known as minimum top-up tax payable by resident person(s) or non-residents with a permanent establishment (PE) in Kenya, who are members of a multinational group with a consolidated annual turnover of EUR 750 million at the parent entity level (referred to as "*covered persons*"). The minimum top-up tax will be payable where the combined effective rate (ETR) in respect of that person for a year of income is less than 15%. The combined ETR will be the sum of all the adjusted covered taxes divided by the sum of all the net income or loss for the year of income multiplied by a hundred. *"Adjusted covered taxes"* has been defined within the Bill as taxes recorded in the financial accounts of a constituent entity for the income, profits, or share of the income or profits of a constituent entity where the constituent entity owns an interest, and includes taxes on distributed profits and deemed profit distributions under the ITA subject to such adjustments as may be prescribed.

The amount of tax payable to the KRA under this proposal shall be the difference between 15% of the net income or loss for the year of income of a covered person, and the combined ETR for the year of income multiplied by the excess profit for the covered person. The minimum top-up tax shall not be payable by public entities not engaged in business, persons whose income is exempt under paragraph 10 of the First Schedule to the ITA, pension funds, real estate investment vehicles, non-operating investment holding companies, an investment fund that is an ultimate parent entity, a sovereign wealth fund and intergovernmental organisations.

Implications:

This provision signals Kenya's intent to comply with the Global Anti-Base Erosion (GloBE) rules under the OECD/G20 BEPS Project, and in particular, Pillar 2 of the 2-Pillar Solution under BEPS Action 1, designed to ensure that multinational entities pay a minimum amount of tax at 15% with respect to their global profits. This new provision is expected to enable the Government to collect additional revenue as multinationals operating in Kenya will be subject to this minimum tax, though there is still considerable debate regarding the effectiveness of the GloBE rules and the 2-Pillar Solution for enhancing revenue collection for developing countries.

While this proposal is yet to gain traction regionally or elsewhere on the continent, other countries such as Australia have implemented a domestic minimum tax applicable to multinational groups with an annual revenue of at least EUR 750 million. The proposal may witness greater adoption among other countries, although the recent passing of a resolution by the United Nations (UN) to begin the process of establishing a framework convention on tax at the UN level may hamper the adoption of OECD-related measures.

Proposed effective date: 1 July 2024

Introduction of a motor vehicle tax

Proposed amendment:

The Bill proposes introducing a tax known as a motor vehicle tax payable on each motor vehicle at the time of issuance of an insurance cover. It will be payable at the rate of 2,5% of the value of the motor vehicle, taking into account factors such as the make, model, engine capacity in cubic centimetres, and the year of manufacture of the motor vehicle. However, the amount of tax payable shall be subject to a minimum of KES 5,000 and a maximum of KES 100,000.

The insurer will be responsible for collecting and remitting motor vehicle tax within five working days after issuing motor vehicle insurance cover. Failure to remit the tax will attract a penalty equivalent to 50% of the uncollected tax, as well as the actual amount of unpaid tax. This penalty will be payable by the insurer.

Finally, the motor vehicle tax will not be payable in respect of vehicles owned by the national or country Governments, the disciplined forces, and persons exempt from tax under the Privileges and Immunities Act. The proposal also grants the Commissioner the discretion to prescribe guidelines for purposes of determining the valuation of a motor vehicle.

Implications:

This proposal is in line with the Government's MTRS, under which the Government aimed to introduce an annual tax on all motor vehicles. However, as currently drafted, the proposal offers little certainty on how the value of each motor vehicle will be determined, and who will bear the attendant costs. In addition, while the motor vehicle tax may enable the Government to collect additional revenue, another implication of the introduction of motor vehicle tax is the likelihood of a reduction in the trading volumes within the automobile industry in Kenya.

It appears that the introduction of motor vehicle tax is meant to also combat climate change. In Uganda, there is an environmental levy imposed on used imported vehicles that are eight years or older. In Tanzania, there is a tax payable when a vehicle changes ownership from one person to another.

The introduction of the motor vehicle tax through the ITA, however, appears misplaced because there is no income that is derived by merely owning a vehicle.

Proposed effective date: 1 July 2024

Diminution in value of capital expenditure not enjoying investment allowances

Proposed amendment:

The Bill proposes introducing section 15(2) (gb) into the ITA, to allow for the deductibility of amounts representing the diminution in value of any implement, utensil or article employed in the production of gains or profits, but which does not qualify as plant or machinery enjoying investment allowances under the Second Schedule.

Implications:

This proposal is aimed at correcting a drafting error in the Finance Act, 2023, which deleted a similar provision under section 15(2)(g) of the ITA.

Proposed effective date: 1 July 2024

Contributions to the Social Health Insurance Fund and the Affordable Housing Programme to be tax deductible

Proposed amendment:

The Bill proposes amending section 15(2) into the ITA, to allow for the deductibility of contributions made to the Social Health Insurance Fund (SHIF) and, for employees, the housing levy deducted towards the Affordable Housing Programme. The proposal also aims to allow for the deductibility of contributions to post-retirement medical funds, subject to a limit of KES 10,000 per month.

Implications:

This proposal aims to ensure that employers and employees treat contributions to the recently established SHIF and the Affordable Housing Programme as tax deductible items. This will help in alleviating the tax impact on the contributors to these funds. For employees, the proposal to treat the SHIF and housing levy as tax deductible will result in a relatively lower PAYE since only pension contributions are currently treated as tax deductible expenses.

Proposed effective date: 1 July 2024

Introduction of advance pricing agreements to avoid transfer pricing disputes

Proposed amendment:

The Bill proposes enabling the Commissioner to enter into advance pricing agreements with taxpayers who trade with related entities through relationships that would ordinarily trigger transfer pricing. The arm's length price shall be determined in accordance with the advance pricing agreement entered into with the Commissioner. The agreement shall be valid for a period of five consecutive years.

Implications:

The proposal will provide greater certainty on the nature of the transfer pricing method that should be adopted by entities. It will also mitigate the possibility of disputes and facilitate the financial reporting of potential tax liabilities. We note that this proposal is currently in force in other neighbouring jurisdictions, including Tanzania, which has specific regulations governing advance pricing agreements under its Transfer Pricing Regulations. Similarly, in Uganda, its Transfer Pricing Regulations of 2011 contain detailed provisions on the application, approval and cancellation of advance pricing agreements between taxpayers and the revenue agency. As such, there may be need to enact further regulations, should this proposal be adopted, to ensure that the agreements are properly governed and insulated from abuse.

Proposed effective date: 1 January 2025

Clarification on the taxation of members' clubs and trade associations

Proposed amendment:

The Bill proposes amending section 21 of the ITA by deleting the definition of the phrase "*gross investment receipts*", which are currently defined as a club's or trade association's gross receipts in respect of interest, dividends, royalties, rents, other payments for rights granted for use or occupation of property, or capital gains.

Implications:

The proposal is aimed at cleaning up section 21 to align it with the changes introduced in the taxation of members' clubs and trade associations by the Finance Act, 2023. Specifically, the Finance Act, 2023 provided that members clubs and trade associations would be deemed to be carrying on a business, and their gross receipts would be deemed as business income, save for fees earned from their members, including joining fees, welfare contributions and subscriptions. With this being the current tax treatment, the existing definition of "*gross investment receipts*" is redundant.

From a regional standpoint, clubs and trade associations are also deemed to be carrying on a business in Tanzania. However, where at least 75% of their income is derived from their own members, in the form of payments such as entrance fees and subscriptions, the clubs and associations are exempt from tax. Notably, this was the tax treatment of clubs and trade associations in Kenya before the amendments introduced by the Finance Act, 2023, as mentioned above. However, in our view, the current treatment in Kenya of taxing any income earned by clubs and trade associations, beyond fees earned from their members, presents a simplified approach to computing the taxable income of these entities.

Proposed effective date: 1 July 2024

Applications for adjustments of accounting periods to be deemed allowed where they are not determined within a period of six months

Proposed amendment:

Usually, taxpayers have the discretion to determine their financial year-end, provided it is a 12-month period. However, any changes to this must be determined by the Commissioner with prior approval. The approval is sought by way of a written application which the Commissioner should decide upon within a period of six months. The Bill proposes deeming an application as allowed when it is made by taxpayers and not decided on by the Commissioner within the statutory six-month period.

Implications:

This proposal will promote efficiency for taxpayers and curb instances when they are left stranded on account of the Commissioner's failure to render a determination within the prescribed six-month period.

Proposed effective date: 1 July 2024

Removal of the affordable housing relief

Proposed amendment:

The Bill proposes doing away with the affordable housing relief provided for under section 30A of the ITA.

Implications:

The proposed removal of this relief is to prevent the granting of a double tax relief to taxpayers, with the proposed introduction of affordable housing levy contributions as a tax-deductible expense for employees.

Proposed effective date: 1 July 2024

Contributions made to the National Hospital Insurance Fund do not qualify for relief

Proposed amendment:

The Bill proposes introducing an amendment to section 31 of the ITA by deleting paragraph V of subsection 1, which qualified contributions made to the National Hospital Insurance Fund for insurance relief. Effectively, contributions made to the National Hospital Insurance Fund will not benefit from the insurance relief provided for under the section.

Implications:

The effect of this proposal is that no insurance relief will be applicable in relation to contributions made to the national health insurer, the SHIF, which will replace the defunct National Health Insurance Fund. The proposed removal of this relief is to prevent the granting of a double tax relief to taxpayers, with the proposed introduction of SHIF contributions as a tax-deductible expense for employees.

Proposed effective date: 1 July 2024

Repeal of the penalty for late filing and payment of instalment tax

Proposed amendment:

The Bill proposes repealing section 72C of the ITA, which provides for the penalty for late filing and payment of instalment tax.

Implications:

This proposal is aimed at cleaning up the legal provisions on the imposition of late filing and late payment penalties, which are currently contained under the Tax Procedures Act, 2015 (TPA). The proposed repeal is also a welcome move that would reduce the penalties in relation to instalment taxes from 20% under the ITA to 5% under the TPA.

Proposed effective date: 1 July 2024

Repeal of investment allowances for capital expenditure incurred on bulk storage and handling facilities supporting the Standard Gauge Railway operations

Proposed amendment:

The Bill proposes deleting section 133(6) of the ITA, which currently provides for an extension of the accelerated investment allowance rate of 150% granted under the repealed Second Schedule to the ITA, to capital expenditure incurred on bulk storage and handling facilities supporting Standard Gauge Railway (SGR) operations.

Implications:

The presumed aim of the existing accelerated investment allowance rate was to incentivise investment in bulk storage and handling facilities to support SGR operations. With the intended repeal of this incentive, it is likely that investment in these sectors will be less attractive.

Proposed effective date: 1 July 2024

Repeal of tax exemptions applicable to amateur sporting associations

Proposed amendment:

The Bill proposes doing away with the existing income tax exemption applicable to amateur sporting associations whose sole or main object is to foster and control outdoor sport and whose members consist of only amateurs or affiliated associations whose members are amateurs.

Implications:

This proposal will increase the tax revenue generated from amateur sporting activities in Kenya. On the downside, it will burden amateur sporting organisations as they will be subject to income tax on their earnings. Notably, amateur sporting associations remain tax exempt in other countries in the region, including Uganda.

Proposed effective date: 1 July 2024

Repeal of the tax exemption applicable to registered trust schemes

Proposed amendment:

There is a proposed deletion of the income tax exemption for registered trust schemes, defined within the ITA as a trust scheme for the provision of retirement annuities and which has been registered with the Commissioner as per the method prescribed.

Implications:

The proposal to tax registered trust schemes will no doubt empower the Government to collect additional revenue from income generated by trust schemes. This move will also lower the incentive structure for individuals considering participation in registered trust schemes for retirement planning. Overall, we are of the view that trust schemes may become unattractive given the repealed tax exemption applicable to them.

Proposed effective date: 1 July 2024

Change in the tax rates applicable on disbursement of deemed income to beneficiaries

Proposed amendment:

The Bill proposes deleting the current tax rate applicable to the disbursement of deemed income to beneficiaries of trusts, which is 25%.

Implications:

The removal of the 25% tax rate for deemed income disbursed to beneficiaries means that the applicable rates will likely be the graduated PAYE rates for individuals, which will cushion beneficiaries getting less income from trusts while at the same time resulting in increased revenue collection from high-net-worth individuals.

Proposed effective date: 1 July 2024

Taxation of interest income accruing from infrastructure bonds, notes or similar securities

Proposed amendment:

The Bill proposes getting rid of the exemption currently applicable to interest income accruing from listed bonds, notes or similar securities used to raise funds for infrastructure and other social services that have a maturity of at least three years. According to the Bill, this exemption will only apply to securities that were listed before the date that the provision will come into force, being 1 July 2024. The Bill proposes imposing WHT on such interest income at the rate of 5% for residents.

Implications:

This provision might discourage investments in listed infrastructure bonds, notes or similar securities. It also comes against the backdrop of National Treasury seeking to limit competition between infrastructure bonds, which are currently tax free, and standard bond issuances; as well as the proposal to limit infrastructure bond issuances to retail investors.

We note that the proposal also seeks to tax interest income earned from such bonds at 5% for residents, with no clarity on the tax rate applicable for non-residents. This may be perceived as unfair for resident investors, amidst the Government's stated aim to promote Kenyans' participation in the trading of securities.

The move to impose tax on listed infrastructure bonds in Kenya may also lead to investment in competing economies, such as Uganda, where interest earned from such infrastructure bonds is tax exempt.

Proposed effective date: 1 July 2024

Taxation of interest income accruing from green bonds

Proposed amendment:

The Bill proposes deleting the exemption currently applicable to interest income accruing from green bonds that have a maturity of at least three years. Green bonds refers to listed bonds, notes or similar securities used to raise funds for infrastructure and other social services, as defined under the Green Bonds Standards and Guidelines. According to the Bill, only green bonds that were listed before the date that the provision will come into force, being 1 July 2024, will be exempt from tax.

Implications:

As with the proposed taxation of interest income from infrastructure bonds, this proposal might discourage investments in green bonds.

Proposed effective date: 1 July 2024

Income tax exemption of pension benefits from registered pension providers

Proposed amendment:

Currently, monthly pension payments received by retirees above 65 years of age are exempt from tax. The Bill proposes expanding this exemption to cover the payment of pension benefits provided by registered pension, provident or individual funds and the National Social Security Fund upon attainment of the retirement age. The exemption will also extend to persons who retire prior to attaining the retirement age due to ill health or those who withdraw from the fund after 20 years from the date of registration as a member of the fund.

Implications:

This proposal seeks to incentivise saving in registered pension schemes, by offering the guarantee that upon attaining retirement age, or saving for at least 20 years, the pension benefits withdrawn shall be tax exempt. It also aligns with the Government's goal in the MTRS to exempt withdrawals from pension schemes from tax, in a move that would make contributions, investment income and withdrawals tax exempt.

Regionally, lump sum payments from a retirement fund are tax exempt in Uganda. In Tanzania, retirement payments are deemed to be part of taxable income on individual employees.

Proposed effective date: 1 July 2024

Taxation of incomes of family trusts

Proposed amendment:

The Bill proposes subjecting the income or principal sum of a registered family trust to tax. These incomes are currently tax exempt.

Additionally, transactions involving the transfer of title of immovable property to a family trust are presently CGT-exempt. The Bill however proposes to get rid of this exemption, effectively making such transfers subject to capital gains tax (CGT).

Implications:

The tax exemption of the income of registered family trusts, as well as the transfer of immovable property to family trusts, were introduced by the Finance Act, 2021, with the ostensible aim of incentivising the use of trusts in succession and estate planning.

We note that the existing CGT exemption on the sale of property including investment shares sold for purposes of transferring title or the proceeds therefrom into a registered family trust has been retained. However, in our view the proposal to repeal the exemptions relating to (i) the income or principal sum of a registered family trust; and (ii) CGT arising from the transfer of immovable property to a family trust, may eventually discourage the use of registered family trusts as a vehicle to transfer assets between family generations.

Proposed effective date: 1 July 2024

Taxation of income earned by individuals registered under the Ajira Digital Program

Proposed amendment:

The Bill proposes getting rid of the tax exemption currently applicable to individuals registered under the Ajira Digital Program according to the terms of the ITA. The exemption was meant to cover three years from 1 January 2020.

Implications:

It is an indicator that the programme has come to an end or has not attracted as many young people as initially planned, and hence there is no longer a need for the incentive.

Proposed effective date: 1 July 2024

Taxation of the income of the National Housing Development Fund

Proposed amendment:

The Bill proposes deleting the tax exemption of the National Housing Development Fund's income.

Implications:

With the Affordable Housing Fund now replacing the National Housing Development Fund, the proposal seeks to delete an exemption that is no longer necessary in law.

Proposed effective date: 1 July 2024

Limitations to the income tax exemption for non-residents under projects financed through 100% grant to the Government

Proposed amendment:

The Bill proposes restricting this exemption to just income that is directly related to the project being executed.

Implications:

Currently, non-resident contractors, subcontractors, consultants, or employees involved in the execution of a project entirely financed through a 100% grant under an agreement between the development partner and the Government of Kenya are exempt from tax. This is pursuant to an amendment that was introduced into the ITA by the Finance Act, 2023. This proposal will ensure that the exemption is not taken advantage of and used as a means of evading tax that would ordinarily be payable.

Proposed effective date: 1 July 2024

Exemption of gains on transfer of property within a special economic zone by a licensed developer, enterprise or operator

Proposed amendment:

The Bill proposes amending the existing exemption of gains on transfer of property within a special economic zone (SEZ) to clarify that the exemption shall apply to gains derived from the transfer of property within a SEZ by a licensed special economic zone developer, enterprise or operator.

Implications:

This proposal seeks to clarify that gains on the transfer of property by licensed SEZ developers, enterprises or operators will be tax exempt. The exemption was introduced by the Finance Act, 2023, but contained a drafting error that made it ambiguous.

Regionally, SEZ entities enjoy tax breaks and incentives in countries such as Tanzania. In Nigeria, all approved enterprises operating within a free trade zone are exempt from all federal, state and local government taxes, levies and rates. The exemption of gains on transfer of property in Kenyan SEZs will therefore ensure that Kenya remains competitive in attracting investment in the region. However, whether such incentives will remain in Kenyan law in the near future remains uncertain, with the National Assembly currently undertaking a re-evaluation of the tax incentives granted to SEZ entities, in collaboration with National Treasury and the KRA.

Proposed effective date: 1 July 2024

Investment allowance to be applicable to capital expenditure incurred on spectrum licenses by telecommunication operators

Proposed amendment:

The Bill proposes introducing an investment allowance on the purchase or acquisition of spectrum licenses by a telecommunication operator. Spectrum licenses refer to frequency bands used by companies such as television and radio broadcasters as well as cellular network operators to manage their performance more efficiently. However, where the license is acquired before the effective date, being 1 July 2024, the deduction shall be restricted to the unamortized portion over the remaining useful life of the spectrum license.

Implications:

The granting of an investment allowance on spectrum licenses is an auspicious move for telecommunication operators, and if adopted, should incentivise further investment in such assets. In Nigeria, a wide range of incentives such as capital allowance deductions have been made available for start-ups licensed by the National Information Technology Development Agency. Introducing an investment allowance on capital expenditure incurred on spectrum licenses therefore complements the growing importance of telecommunication, innovation and technology and will potentially position Kenya as a market leader in the sector,

Proposed effective date: 1 July 2024

Deletion of the post-retirement medical fund relief

Proposed amendment:

The Bill proposes doing away with the post-retirement medical fund relief that was introduced by the Finance Act, 2023.

Implications:

The proposed removal of this relief is to prevent the granting of a double tax relief to taxpayers, with the proposed introduction of post-retirement medical fund contributions as a tax-deductible expense for employees.

Proposed effective date: 1 July 2024

Taxation of incomes earned by companies constructing residential units

Proposed amendment:

Currently, companies that have constructed at least 100 residential units annually are subject to a lower corporate tax rate of 15% in that year of income, subject to the approval of the Cabinet Secretary responsible for housing. The Bill proposes doing away with this reduced tax rate.

Implications:

The aim of the reduced tax rate was to incentivise companies to construct residential houses in support of the Government's affordable housing agenda, which was a key pillar of the then-administration's Big Four plan. The proposed removal of the reduced tax rate is therefore seemingly contradictory to the current administration's affordable housing plan. However, the proposal seems to reflect the Government's aim to rationalise tax reliefs and exemptions, as articulated in the MTRS.

Proposed effective date: 1 July 2024

Increased tax rates for non-resident ship owners, charterers or air transport operators where there is no reciprocal arrangement or treaty

Proposed amendment:

The Bill proposes imposing income tax at the rate of 3% on gains made by non-resident ship owners, charterers or air transport operators when they call at any port or airport in Kenya, where there is no reciprocal arrangement or treaty that exempts Kenyan shipowners, charterers or air transport operators. Currently, the rate is 2,5%. Further, the limitation on the existence of a reciprocal treaty does not currently exist.

Implications:

The proposal, in line with the rules of reciprocity, seeks to ensure that non-resident shipowners, charterers or air transport operators are taxed in Kenya, where their country of residence has no agreement extending the exemption of such incomes to Kenyan residents.

Proposed effective date: 1 July 2024

Non-resident withholding tax rate for digital content creators to be a final tax

Proposed amendment:

The Bill proposes making the withholding tax payable by non-resident content creators a final tax.

Implications:

The proposal aligns with the general treatment of withholding tax paid by a non-resident person without PEs in Kenya.

Proposed effective date: 1 July 2024

Removal of withholding tax applicable to withdrawals made from pension funds after 20 years

Proposed amendment:

The Bill proposes doing away with withholding tax applicable to withdrawals made from pension funds 20 years from the date of joining the pension fund. However, the Bill proposes retaining the graduated scale for the taxation of withdrawals made before the expiry of 20 years. Currently, the number of years covered under the ITA is 15 years.

Implications:

This proposal aligns with the Government's plan to encourage savings for retirement.

Proposed effective date: 1 July 2024

Withholding tax on management, professional, training and contractual fees

Proposed amendment:

The Bill proposes doing away with the minimum aggregate value on management, professional, training and contractual fees that triggers withholding tax. Currently, the value is KES 24,000 per month.

Implications:

The removal of KES 24,000 as the minimum value on which withholding tax is payable on payments for management, professional, training and contractual fees will enable the Government to collect additional revenue. However, it will also increase compliance obligations by subjecting even de minimis payments to WHT.

We note that Kenya's neighbours in Tanzania and Uganda do not have thresholds for the imposition of WHT on management or professional fees paid to their residents.

Proposed effective date: 1 July 2024

A 5% CGT rate for entities certified by the Nairobi International Financial Centre Authority as having met the specified criteria

Proposed amendment:

The Bill proposes imposing a CGT rate of 5% on entities, provided that the Nairobi International Financial Centre Authority (NIFCA) certifies that: they have invested at least KES 3 billion in at least one entity incorporated or registered in Kenya within a period of two years; and the transfer of the investment is to be made five years after the date of investment.

Implications:

Currently, the ITA provides that for firms certified by the NIFCA, and which have invested at least KES 5 billion and transfer such investment after five years, the rate of CGT shall be the prevailing rate at the time the investment was made. The Bill proposes amending this position to clarify that the CGT rate applicable for NIFCA-certified firms will be 5%. It also reduces the investment threshold to KES 3 billion.

Such proposals to incentivise investment in the Nairobi International Financial Centre (NIFC) are aimed at making Kenya, and specifically the NIFC, a desired investment destination. The proposed application of a 5% CGT rate will no doubt attract huge investments into the country. If properly implemented, it has the potential to make Kenya the doorway through which to invest in Africa. It further enhances the attractiveness of Nairobi as an investment hub, noting that in Rwanda, angel investors investing a maximum of USD 500,000 in a start-up are exempt from CGT.

Proposed effective date: 1 January 2025

Penalty for export processing zone entities where they delay or do not file returns for the period they are exempt from corporation tax

Proposed amendment:

The Bill proposes doing away with the existing penalty under the ITA as applicable to export processing zone (EPZ) entities that fail to file their returns by the required time or do not file at all.

Implications:

The proposal is aimed at cleaning up the ITA to ensure that the applicable penalty for all entities, including EPZs, is in the TPA, not the ITA. EPZ entities' failure to file returns will be contained in the TPA, 2015. Consequential to this, the Bill also introduces into the TPA a penalty of KES 20,000 per month for each month or part thereof that an EPZ enterprise fails to submit a return as required by the ITA.

Proposed effective date: 1 July 2024

2. VALUE ADDED TAX

Introduction of a definition of "*tax invoice*"

Proposed amendment:

The Bill proposes introducing a new definition of a tax invoice to include an electronic tax invoice issued in accordance with section 23A of the TPA.

Implications:

The discernible purpose of the amendment is to align last year's introduction of the requirement for all business to issue electronic tax invoices through the electronic tax invoice management system (eTIMS), vide section 23A into the TPA, with the current requirement under section 42 of the VAT Act to issue tax invoices. By defining a "*tax invoice*" as an invoice issued under eTIMS, the proposal would in essence make it mandatory to issue an eTIMS invoice under section 42 of the VAT Act.

Proposed effective date: 1 July 2024

Time of supply for exported goods

Proposed amendment:

The Bill proposes setting the time of supply for exported goods as the time when the registered person is in possession of the required export confirmation documents.

Implications:

The implication of the amendment is to shift the time of supply for exported goods from the general rules under section 12(1) to the possession of export documents. The general rules prescribe that the time of supply is the earlier of the invoice date; date of payment; or date of delivery of the goods. While the proposal lacks certainty on what "*export confirmation documents*" refers to, we note that the VAT Regulations, 2017 expound on the documentation required as proof of exportation of goods, including a copy of the invoice, bill of lading, road manifest or airway bill, and certified export or transfer entries.

In our view, this proposal's enactment could have limited impact on VAT payable by exporters, since the exportation of goods is zero-rated under the 2nd Schedule to the VAT Act. Nonetheless, it may create ambiguity for exporters regarding when to declare the exports for VAT purposes in their returns, which would also have an impact regarding their claiming of input VAT.

In East Africa, we note that both Uganda and Tanzania do not have specific rules governing the time of supply for exported goods.

Proposed effective date: 1 July 2024

Refund of excess input VAT

Proposed amendment:

The Bill proposes excluding the following persons from seeking refunds of excess input VAT:

(a) persons with excess input VAT arising from tax withheld by an appointed tax withholding agent, which may be applied against any tax payable or is due for refund under the TPA; and

(b) approved manufacturers in respect of input VAT incurred in making taxable supplies to an official aid funded project.

The Bill also proposes excluding manufacturers from claiming input VAT in respect of taxable supplies made to an official aid funded project.

Implications:

The proposed amendment's impact will be to limit those who can get a refund of excess input VAT to only the registered persons falling under section 17(5)(a) and (b) of the VAT Act. These persons include those with excess input VAT arising from making zero-rated supplies; and those with excess input VAT from tax withheld by appointed withholding agents. As such, every other party will have to bear the excess input VAT as a cost.

For manufacturers making supplies to official aid funded projects, the proposal may increase their cost from a tax perspective. This is because the VAT Act presently exempts from VAT any taxable goods and services supplied to an official aid funded project, with the implication that the suppliers of these goods and services, such as manufacturers, would be unable to claim input VAT.

Proposed effective date: 1 July 2024

Determination of input tax deductible

Proposed amendment:

The Bill proposes deleting the provision that provides for the threshold for the apportionment of deductible input tax, where the input tax is incurred in respect of mixed supplies (i.e. both taxable and exempt supplies). Currently, the provision allows taxpayers to deduct all the input VAT incurred where the taxable supplies are more than 90% of the total mixed supplies.

Implications:

For VAT-registered taxpayers, this proposal would compel them to apportion input tax attributable to mixed supplies using the formula in subsection (6), i.e. only the input VAT attributable to the proportional share of taxable supplies would be deductible. As such, no further reliance would be placed on the current threshold of 90:10, which allows full input VAT deduction where the taxable supplies exceed 90% of the total supplies. We also note that this proposal is in line with the Government's policy objective in the MTRS to limit the abuse of the 90:10 input VAT apportionment threshold.

Regionally, we note that both Uganda and Tanzania have a threshold for the apportionment of input VAT incurred in mixed supplies. In Uganda, the threshold is met where taxable supplies exceed 95% of all supplies, while in Tanzania, the threshold is set at 90%.

Proposed effective date: 1 July 2024

Refund of tax on bad debts

Proposed amendment:

The Finance Act, 2023 amended the VAT Act to require taxpayers to repay the Commissioner any refunded VAT on bad debts, in circumstances where the taxpayer subsequently recovers the debt. The repayment period to the Commissioner is 60 days from the date of recovery, and in default, interest of 2% per month would be payable. The Bill proposes deleting these provisions from the VAT Act.

Implications:

The proposal is aimed at cleaning up the ambiguity introduced by the Finance Act, 2023 into the VAT Act's provisions on refund of VAT on bad debts. The VAT Act already provided for a repayment period of 30 days and interest of 2% per month.

Proposed effective date: 1 July 2024

Increase in VAT registration threshold

Proposed amendment:

The Bill proposes increasing the threshold set for a person to register under the act from, KES 5 million to KES 8 million if, in the course of a business, the value of taxable supplies or services made in a period of 12 months exceeds the threshold.

Implications:

The current threshold of KES 5 million, which was last revised in 2007, has been eroded over time due to inflation. As such, the low threshold has compelled many smaller businesses to register and account for VAT, which has increased compliance costs for taxpayers, and increased tax administration costs for the KRA. Accordingly, increasing the threshold to KES 8 million reduces the number of small businesses required to register for VAT, thus alleviating the compliance burden on smaller enterprises, and enhancing the efficiency of the VAT system.

In East Africa, the VAT registration threshold is TZX 200 million (approximately KES 10,1 million), while that of Uganda is UGX 150 million (approximately KES 5,22 million). Given the comparative sizes of these economies and the strengths of their respective currencies, it is apparent that Kenya's current VAT registration threshold of KES 5 million is quite low, and its upward revision is indeed a welcome move.

Proposed effective date: 1 July 2024

Certain financial services to be standard rated

Proposed amendment:

The Bill proposes excluding the following financial services from VAT exemption:

- Issuing of credit and debit cards.
- Telegraphic money transfer services.
- Foreign exchange transactions, including the supply of foreign drafts and international money orders.
- Cheque handling, processing, clearing and settlement, including special clearance or cancellation of cheques.
- Issuance of securities for money, including bills of exchange, promissory notes, money, and postal orders.
- The assignment of a debt for consideration.
- The provision of the above financial services on behalf of another on a commission basis.

Implications:

Subjecting these financial services to VAT will make them more expensive for the customers of financial institutions, as the additional cost will likely be passed on to the final consumer. The proposal may also be seen as an attempt to tax transactions, which the KRA has been unable to tax due to adverse court decisions, particularly on VAT on interchange fees arising from card transactions.

Regionally, the fact that most financial services would be standard rated, would be in line with the VAT treatment of financial services in some EAC member states. In Tanzania, for example, financial services are taxable at the standard rate, In Uganda, the supply of financial services is VAT exempt, including some of the services in the Bill's proposal, such as transactions involving negotiable instruments and foreign currency transactions.

Proposed effective date: 1 July 2024

Certain insurance services to be standard rated

Proposed amendment:

The Bill proposes limiting the exemption of VAT for insurance services to insurance and reinsurance premiums.

Implications:

The proposal seeks to tax insurance-related services, other than premiums, at a standard rate of 16%. This would result in a higher cost of these services for consumers, as the cost would be passed on to them. However, we expect that insurance agency and brokerage services will remain exempt from VAT, following the High Court's decision of 2021 in Association of Kenya Insurers (AKI) v Kenya Revenue Authority and Two Others; Insurance Regulatory Authority (IRA) and Another (Interested Parties) [2021] eKLR.

In East Africa, both Uganda and Tanzania have only granted VAT exemption to specified insurance services, including health insurance, life insurance, micro-insurance, reinsurance and aircraft insurance. Other insurance-related services are therefore subject to VAT.

Proposed effective date: 1 July 2024

VAT exemption of transfer of business as a going concern

Proposed amendment:

The Bill proposes to exempt from VAT the transfer of business as a going concern (TOGC).

Implications:

The proposal seeks to reduce the cost of business restructuring, as it will eliminate the significant VAT cost currently experienced by entities seeking to restructure their affairs through transactions such as mergers and acquisitions. However, there may be a need to develop regulations or enhance the proposal to help determine what transactions would qualify as TOGC.

The exemption of TOGC would also align Kenya with other EAC member states and therefore enhance its competitiveness, since TOGC is exempt from VAT in Uganda and Tanzania.

Proposed effective date: 1 July 2024

Change in VAT treatment of betting, gaming and lotteries services

Proposed amendment:

The Bill proposes deleting the VAT exemption of betting, gaming and lotteries services.

Implications:

The proposal reflects the recent trend by the Government to tax activities perceived to have negative societal impacts, especially among the youth, such as betting and gambling. However, subjecting betting and gambling to VAT, at 16%, excise duty on the amount staked at 20% and withholding tax on winnings at 20%, could be perceived as excessive, punitive and discriminatory taxation of one sector to the exclusion of others.

Proposed effective date: 1 July 2024

Change in VAT treatment for materials used in packaging and labelling products

Proposed amendment:

The Bill proposes deleting the VAT exemption on;

- Pressure sensitive adhesive of tariff numbers 3506.91.00
- Plain polythene film/LPDE of tariff number 3921.19.10
- Plain polythene film/PE of tariff number 3921.19.10
- PE white 25-40gsm/release paper of tariff number 4811.49.00.

Implications:

The proposal directly affects the businesses engaged in the production of packaging and labelling products, since the imposition of VAT on these materials will likely increase their operational costs. Such businesses would now be forced to seek alternative sources for these materials or adjust procurement strategies to mitigate the impact of VAT on their operations. This comes in the wake of the Government's drive to go green and can be seen as a deterrent to environmental harm.

Proposed effective date: 1 July 2024

Change in VAT treatment for certain materials used in hygiene or absorbent products

Proposed amendment:

The Bill proposes deleting the VAT exemption on ADL 25-40gsm of tariff number 5603.11.00.

Implications:

This proposal has the impact of increasing the cost of procuring these materials, which will affect both manufacturers and consumers alike since the materials are used in products like diapers, sanitary napkins and adult incontinence products.

Proposed effective date: 1 July 2024

Change in VAT treatment for aircraft and aircraft parts

Proposed amendment:

The Bill proposes standard rating the following aircraft and aircraft parts, which are currently exempt from VAT or zero-rated:

- Aeroplanes and other aircraft of tariff heading 8802.30.00 of an unladen weight exceeding 2,000kg but not exceeding 15,000 kg.
- Spacecraft (including satellites) and suborbital and spacecraft launch vehicles of tariff heading 8802.60.00.
- All goods and parts thereof of Chapter 88, which chapter covers aircraft, spacecraft and parts thereof.
- Direction-finding compasses, instruments and appliances for aircraft.
- Hiring, leasing and chartering of aircraft excluding helicopters.

The Bill also proposes exempting parts of aircraft and spacecraft of Chapter 88 from VAT.

Implications:

The implication of these proposals is to subject aircraft and spacecraft to VAT at the standard rate. However, we note that the proposal aims to retain the VAT exemption of parts for aircraft and spacecraft.

The Finance Act, 2023, introduced the exemption of all aircraft, spacecraft and parts thereof from VAT and Railway Development Levy, with the presumed intention of reducing the operational costs for Kenyan-based airlines. With the Bill proposing to standard-rate aircraft and spacecraft just one year later, such airlines will encounter increased importation costs. The proposal also signals policy incoherence and uncertainty in the tax regime.

Proposed effective date: 1 July 2024

Change in VAT treatment of goods and services used by local film producers

Proposed amendment:

The Bill proposes deleting the VAT exemption for goods imported or purchased locally for use by local film producers and filming agents.

The Bill also proposes standard rating services imported or procured locally for use by the local film producers or local film agents.

Implications:

The proposal, if enacted, will subject goods and services used in local film production to tax, thus increasing their cost and the expenses incurred by local film producers. This could potentially disincentivise local film production, despite the Government's stated aim of encouraging areas of artistic expression which could potentially provide a source of living for Kenya's youth.

Proposed effective date: 1 July 2024

Change in VAT treatment of the supply of ordinary bread

Proposed amendment:

The Bill proposes changing the VAT status of the supply of ordinary bread from zero-rated to the standard rate.

Implications:

This proposal has the impact of increasing the price of bread and thus affecting affordability of the good. This could in turn lead to changes in consumption patterns.

Proposed effective date: 1 July 2024

Change in VAT status of the supply of electric buses, electric bicycles and solar and lithium-ion batteries

Proposed amendment:

The Bill proposes changing the supply of electric buses, electric bicycles and solar and lithium-ion batteries from its current zero-rated status to the standard rate.

Implications:

Through the Finance Act, 2023, the Government introduced green incentives that enabled the supply of these goods to be zero-rated. Removing such incentives, a year later, will affect various investments by increasing operation costs and could potentially scare away future investors due to reduced investor confidence, as such changes create uncertainties. In addition, the standard rating of electric vehicles, solar and lithium-ion batteries, is in apparent contradiction to the Government's aim to promote green and more eco-friendly energy use. Notably, these proposals are also contrary to the MTRS, which aims to review tax incentives that promote the use of green energy, including promoting electric vehicles that are environmentally friendly and support the transition to a green economy.

Proposed effective date: 1 July 2024

Change in VAT status for certain goods and services to standard rated

Proposed amendment:

The Bill proposes to change the VAT status of the following items:

GOODS OR SERVICES	CURRENT VAT TREATMENT	PROPOSED VAT TREATMENT
Goods for direct and exclusive use in the construction of tourism facilities, recreational parks of fifty acres or more, convention and conference facilities.	VAT-exempt	Standard rated
Specially designed locally assembled motor vehicles for transportation of tourists, purchased before clearance through Customs by tour operators.	VAT-exempt	Standard rated
Goods for the direct and exclusive use in the construction and equipping of specialized hospitals with a minimum bed capacity of fifty.	VAT-exempt	Standard rated
Plant, machinery and equipment used in the construction of a plastics recycling plant.	VAT-exempt	Standard rated
Musical instruments and other musical equipment, imported or purchased locally, for exclusive use by educational institutions, upon recommendation by the Cabinet Secretary responsible f or Education.	VAT-exempt	Standard rated
Taxable goods supplied to persons that had an agreement or contract with the Government prior to 25th April 2020 and the agreement or contract provided for exemption from VAT.	VAT-exempt	Standard rated
Capital goods the exemption of which the Cabinet Secretary may determine to promote investment in the manufacturing sector, where the investment is at least KES 2 billion.	VAT-exempt	Standard rated
Unleavened and gluten bread.	VAT-exempt	Standard rated
Transportation of sugarcane from farms to milling factories.	Zero-rated	Standard-rated
Inbound international sea freight offered by a registered person.	Zero-rated	Standard-rated
Locally assembled and manufactured mobile phones.	Zero-rated	Standard-rated

Implications:

The standard rating of these goods and services will increase their cost, which will erode the incentives granted to specific sectors and potentially limit their growth. For instance, the standard rating of locally assembled cars for the transportation of tourists, as well as goods used in the construction of tourism facilities, will increase the costs for operators in the tourism sector. Given that this sector has just recently rebounded from the ravages of the COVID-19 pandemic and a global recession, the standard rating of these goods could be ill-advised.

Similarly, the standard rating of the transportation of sugarcane from farms to milling factories, which is currently zero-rated, seems ill-advised and counter to the Government's initiatives to revive the sugar sector.

The standard rating of inbound international sea freight also contravenes international best practices in the taxation of international sea freight, and could result into potential double taxation, since the freight value is included in computing the customs value of imported goods for VAT purposes.

Finally, the fact that most of these changes are happening less than a year since the Finance Act, 2023 either exempted or zero-rated the respective goods or services signals policy incoherence and uncertainty, which does not bode well for Kenya's tax regime.

Proposed effective date: 1 July 2024

Change in VAT status for certain goods and services zero-rated to VAT exempt

Proposed amendment:

The Bill proposes changing the VAT status of the following items fr.om zero-rated to VAT-exempt:

- All inputs and raw materials whether produced locally or imported, supplied to manufacturers of agricultural pest control products upon recommendation by the Cabinet Secretary responsible for agriculture.
- Agricultural pest control products.
- Bioethanol vapour (BEV) stoves classified under HS Code 7321.12.00 (cooking appliances and plate warmers for liquid fuel).
- Electric motorcycles.

Implications:

Changing the status of these items from zero-rated to exempt would preclude the suppliers of these items from claiming and deducting input VAT. This could increase the cost of these items in the market, which would be inauspicious for consumers of items such as agricultural pest control products. The VAT exemption of BEV stoves and electric motorcycles also casts doubt on the Government's aim of promoting green energy use, since the suppliers of these items will shoulder increased input VAT costs.

Proposed effective date: 1 July 2024

VAT-exemption of standard rated goods

Proposed amendment:

The Bill proposes exempting the following goods from VAT, which are currently subject to VAT at the standard rate:

- Inputs and raw materials used in the manufacture of mosquito repellent on recommendation by the Cabinet Secretary responsible for matters relating to health.
- Mosquito repellent.
- Tea packaging material.
- Micronutrients, foliar feeds and bio-stimulants of Chapter 38.

Implications:

The VAT exemption of these items will provide some relief for taxpayers by potentially reducing their cost in the market. The exemption of mosquito repellents and inputs used in their manufacture could also be linked to the recent heavy rains and anticipated mosquito infestation in the affected areas. The exemption of tea packaging material and micronutrients is evidently aimed at incentivising growth in the agricultural sector by targeting reduction in the cost of inputs.

Proposed effective date: 1 July 2024

Clean-up of the First Schedule to the VAT Act in relation to petroleum products

Proposed amendment:

The Bill proposes deleting Section B in Part II of the First Schedule. This section currently provides a list of the petroleum products subject to VAT at 8%.

Implications:

The proposal essentially intends to clean up the VAT Act, since the Finance Act, 2023 amended the VAT rate of petroleum products from 8% to 16%.

Proposed effective date: 1 July 2024

Other amendments

Proposed amendment:

The Bill proposes introducing and defining "*original equipment manufacturer*" as a manufacturer of parts and subassemblies, who owns the intellectual property rights in the parts or subassemblies.

The Bill also proposes limiting the VAT exemption enjoyed by companies engaged in business with the Government under a special operating framework agreement to only those agreements entered into before 1 July 2017.

Implications:

The inclusion of a specific definition of "*original equipment manufacture*r" provides clarity on who will enjoy VAT exemption on locally manufactured passenger motor vehicles, since the exemption is currently limited to manufacturers who acquire at least 30% of their parts from original equipment manufacturers in Kenya.

The limitation of VAT exemption regarding companies under a special operating framework agreement with the Government to only agreements entered into before 1 July 2017 also appears to be discriminatory and without apparent justification.

Proposed effective date: 1 July 2024

3. EXCISE DUTY

Classification of goods

Proposed amendment:

The Bill proposes classifying goods by reference to the tariff codes set out in Annex 1 to the Protocol on the Establishment of the EAC Customs Union and, in interpreting that annex, the general rules of interpretation set out in the annex will apply.

Implications:

By referencing the tariff codes set out in Annex 1 to the Protocol on the Establishment of the EAC Customs Union, the Bill aims to standardise the classification of goods within the region. This can streamline trade procedures by providing a common framework for identifying and categorising of goods.

Proposed effective date: 1 July 2024

Imposition of excise duty on services provided by non-residents through a digital platform

Proposed amendment:

The Bill proposes charging excise duty on excisable services offered in Kenya by a non- resident through a digital platform and mandates the payment to be made by the non-resident person offering the service.

Implications:

Taxing excisable services offered in Kenya by non-resident entities through digital platforms can potentially increase Government revenue as it captures economic activity that was previously not taxed. However, this proposal could be viewed as excessive, particularly for non-residents with no permanent establishment in Kenya, since their services are still subject to tax under other regimes such as WHT, DST and the proposed SEP tax. From an enforceability perspective, the KRA may also struggle to collect excise duty from non-residents due to a lack of visibility, which is a challenge they have encountered with other taxes such as DST and VAT on digital and electronic supplies.

This proposal may also necessitate the amendment of the place of supply and charge to tax provisions of the Excise Duty Act, since they currently provide that excisable services are those supplied from a place of business of a licensed person in Kenya.

We note that the Bill as is does not specify the particular rate that will apply to excisable services offered through a digital platform by non-residents. We therefore expect that the current rates applicable to excisable services will apply.

Proposed effective date: 1 July 2024

Excise duty remission on spirit made from agricultural products grown in Kenya

Proposed amendment:

Currently, the Excise Duty Act empowers the Cabinet Secretary to remit excise duty in respect of beer or wine made from agricultural products grown in Kenya. The Bill proposes expanding this scope of items to include spirits.

Implications:

The expansion of scope of alcoholic products that can enjoy excise duty remission to include spirits is a welcome move for manufacturers and consumers in this sector. It can also help spur the procurement of local agricultural produce needed in the manufacturing of spirits.

Proposed effective date: 1 July 2024

Relief for raw materials used in the manufacture of other excisable goods

Proposed amendment:

The Bill proposes removing the excise duty relief currently afforded to licensed manufacturers, where excise duty paid on raw materials imported or manufactured in Kenya can be offset against the excise duty payable on finished goods.

The Bill also proposes eliminating the relief afforded to the suppliers of internet data services, where such persons can offset the excise duty paid in respect of bulk data purchases from the excise duty payable on internet data services supplied to the final consumer.

Implications:

The proposed removal of this relief is an inauspicious development for manufacturers, suppliers of internet data and final consumers alike. This is because in the absence of the relief, the excise duty incurred by the suppliers will become an extra cost, which will likely be passed on to the consumer, thus increasing the overall cost of the goods and services.

Proposed effective date: 1 July 2024

Timeline for issue of Excise Duty Licenses for manufacturers and suppliers of excisable services

Proposed amendment:

Under the Excise Duty Act, importers, manufacturers and suppliers of excisable goods and services are required to apply for an excise duty license from the Commissioner. The Bill proposes that the Commissioner shall, within 14 days of receipt of all the required valid documents, consider an application for a license on the specified activities and either grant or refuse to grant a license to the applicant.

Implications:

The proposed 14-day timeline does not presently exist in the law. This proposal is therefore welcome as the Commissioner is obligated to consider taxpayers' applications within a definite timeframe. This indicates a time-bound process to expedite the application review.

Proposed effective date: 1 July 2024

Payment of excise duty for manufacturers of alcoholic beverages

Proposed amendment:

The Bill proposes changing the timelines for manufacturers of alcoholic beverages to remit excise duty from 24 hours upon removal of the goods from the stockroom to within five working days.

Implications:

Increasing the payment period from 24 hours to five working days provides licensed manufacturers with a longer timeframe to fulfil their financial obligations to the Commissioner. This adjustment acknowledges the administrative constraints, cashflow problems and practical difficulties that have plagued manufacturers within the shorter timeframe, since its introduction in 2023.

That said, the proposed five working days could still be inadequate as they are likely to result in the same situation that currently exists, where manufacturers are compelled to remit excise duty on products for which they are yet to receive payment. Given that excise duty is a tax that should be borne by the final consumer, and not the manufacturers, it may be prudent to increase the timelines to prevent manufacturers from paying excise duty on unpaid products.

Proposed effective date: 1 July 2024

New excise duty rates for specified goods and services

Proposed amendment:

The Bill proposes the following amendments:

	GOODS OR SERVICES	CURRENT EXCISE DUTY RATE	PROPOSED EXCISE DUTY RATE
a)	Electric motorcycles of tariff 87.11.60.00 other than motorcycle ambulances and locally assembled motorcycles.	KES 12,952.83 per unit	10% of the value or KES 12,952.83 per unit, whichever is higher
b)	Imported sugar confectionary of tariff heading 17.04.	KES 42.91 per kg	KES 257.55 per kg
*c)	Wines including fortified wines, and other alcoholic beverages obtained by fermentation of fruits.	KES 243.43 per litre	KES 22.50 per centilitre of pure alcohol
*d)	Beer, Cider, Perry, Mead, Opaque beer and mixtures of fermented beverages with non-alcoholic beverages and spirituous beverages of alcoholic strength not exceeding 6%.	KES 142.44 per litre	KES 22.50 per centilitre of pure alcohol
*e)	Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 6%.	KES 356.42 per litre	KES 16 per centiliter of pure alcohol
f)	Cigarette with filters (hinge lid and soft cap).	KES 4,067.03 per mille	KES 4,100 per mille
g)	Cigarettes without filters (plain cigarettes).	KES 2,926.41 per mille	KES 4,100 per mille
h)	Products containing nicotine or nicotine substitutes intended for inhalation without combustion or oral application but excluding medicinal products approved by the Cabinet Secretary responsible for matters relating to health and other manufactured tobacco and manufactured tobacco substitutes that have been homogenized and reconstituted tobacco, tobacco extracts and essences.	KES 1,595 per kg	KES 2,000 per kg
i)	Liquid nicotine for electronic cigarettes.	KES 70 per millilitre	KES 100 per millilitre
j)	Coal	Out of scope	5% of the value or KES. 27,000 per metric ton whichever is higher
k)	Vegetable oils of tariff codes 1511,1512,1515 and 1517.	Out of scope	25%
l)	Telephone and internet data services.	15%	20%
m)	Fees charged for money transfer services by banks, money transfer agencies and other financial service providers.	15%	20%
n)	Fees charged for money transfer services by cellular phone service providers.	15%	20%
o)	Betting, gaming, prize competition and lotteries.	12.5%	20%
p)	Fees charged on advertisement on the internet, social media, television, print media, billboards and radio stations on alcoholic beverages, betting, gaming, lotteries and prize competitions.	15%	20%

Implications:

The increased excise duty rates on the excisable services, in particular, money transfer, telephone and internet data services, and betting and gaming, are likely to increase the cost of accessing these services for the final consumers.

Proposed effective date: *1 September 2024; 1 July 2024 for the rest

Exempt excisable goods for official use by the disciplined forces

Proposed amendment:

The Bill proposes exempting the National Intelligence Service (NIS) from payment of excise duty when importing goods for official use.

Implications:

The exemption acknowledges the unique role and requirements of the NIS in safeguarding national security. It ensures that the NIS can access the necessary equipment and resources without financial burdens that might impede their operations.

Proposed effective date: 1 July 2024

Other proposed amendments

Proposed amendments and their implications

- The Bill proposes limiting the scope of motorcycles subject to excise duty to only electric motorcycles of tariff 87.11.60.00 other than motorcycle ambulances and locally assembled motorcycles.
- The implication of this is that it will bring into the tax net electric motorcycles, in anticipation of their increased uptake in Kenya, following active promotion of electric motorcycles and vehicles by the Government.
- The Bill further proposes excluding certain imported goods from excise duty, where such goods originate from an EAC partner state and subject to the EAC Rules of Origin. These include imported cartons, boxes and cases of corrugated paper or paperboard; folding cartons; skitters labels of paper and paper board; as well as imported onions, eggs, potatoes, potato crisps and potato chips.
  This proposal aims to encourage trade within the EAC by reducing trade barriers and facilitating the movement of goods between member states. In addition, this will ensure that the products are available at affordable prices, particularly where Kenya lacks capacity to meet local demand.
- The Bill proposes having all articles of plastic of tariff heading 3923.30.00 and 3923.90.90 at the rate of 10%. These plastics include articles for the conveyance and packing of goods, e.g. bottles and flasks. Currently, only imported plastics of this nature are excisable, but going forward locally manufactured plastics will be subject to duty.
  The implication of this is that taxing plastic materials may serve environmental objectives by discouraging their use and encouraging alternatives that are more environmentally friendly. Plastics are known for their adverse environmental impact, including pollution and harm to wildlife, so taxation can help address these concerns by reducing production and consumption.
- The Bill proposes exempting imported clinker from excise duty.
  The likely impact of this will be to incentivise local cement manufacturers by reducing the tax expenditure they incur in importing clinker, which is a major input for cement manufacturers. However, this proposal may not augur well for local clinker producers, who will likely face increased competition from cheaper imported clinker.
- The Bill also proposes taxing the advertising of alcoholic beverages, betting, gaming, lotteries and prize competitions on the internet and social media platforms. Currently, only advertising on traditional media, such as television, print media, billboards and radio stations, is covered.
  The implication of this will be to subject internet and social media advertisements to excise duty, where the material being promoted relates to gambling or alcoholic beverages,
- Lastly, the Bill proposes defining "*original equipment manufacturer*" as a manufacturer of parts and subassemblies who owns the intellectual property rights to the parts or subassemblies.
  The implication of this is that the inclusion of a specific definition provides legal clarity and can help in ensuring consistent interpretation of the term across different contexts.

Proposed effective rate: 1 July 2024

4. MISCELLANEOUS FEES AND LEVIES

Import declaration fee increased from 2,5% to 3% and a portion of it (20%) to be used in revenue enforcement programmes and initiatives

Proposed amendment:

The Bill proposes increasing the rate of import declaration fees from 2,5% to 3%.

Implications:

While the Government will no doubt collect additional revenue with this proposal, importers will incur additional costs when bringing in goods and will pass the costs down to the consumers, resulting in inflationary pressure on the economy.

Proposed effective date: 1 July 2024

Introduction of the Eco Levy

Proposed amendment:

The Bill proposes introducing the Eco Levy on specific goods such as machinery, telephone sets, broadcasting apparatus, rubber tyres, diapers, batteries or dry cells and plastic packaging material, to ensure that the manufacturers and importers of these goods pay for their negative environmental impact. The rate applicable for each good will be set out within the Fourth Schedule to the Miscellaneous Fees and Levies Act, 2016. The rates for each affected item can be accessed from the link here. We have noted that the levy applicable to items of Tariff Number 8472.90.00 is not clear as the Bill indicates two different applicable rates. We expect clarity on this in the ultimate Act that will be enacted.

In the case of locally manufactured goods, the levy will be paid at the time the goods are removed from the excise stock room and, in the case of imported goods, the levy will be paid at the time of entry of the goods into the country.

The proposal further grants the Cabinet Secretary the discretion to make regulations for the better implementation of the Eco Levy.

Implications:

This move is intended to curb negative externalities on the environment, by making those who manufacture or import *"pollutant"* substances pay for their effect on the environment. This aligns with the 'polluter pays' environmental principle which is the commonly accepted practice where, as a matter of fairness, those who engage in environmental pollution should bear the costs of managing the pollution. An example of an East African country imposing environmental levy is Uganda, which charges it on various items like old cars and machines to lessen pollution and destruction of the environment. In Rwanda, the levy is imposed on imported goods that come packaged in plastic material or single-use plastics. This move therefore aligns Kenya with what its neighbours are doing, over and above the potential it has in promoting environmental sustainability and attainment of net zero.

Proposed effective date: 1 July 2024

Import declaration fees and railways development levy exemption for inputs, raw materials and machinery used in the manufacturing of mosquito repellent

Proposed amendment:

The Bill proposes exempting from import declaration fees and railway development levy inputs, raw materials and machinery used in the manufacture of mosquito repellent.

Implications:

This proposal is aimed at reducing the costs incurred by the manufacturers of mosquito repellents, thereby incentivising their business activities, and potentially reducing the cost of the products in the market. This could also be informed by increased mosquito infestation following the recent heavy rains in the country.

Proposed effective date: 1 July 2024

New rates of export and investment promotion levy

Proposed amendment:

The Bill proposes to amend the Third Schedule to the Miscellaneous Fees and Levies Act by changing the rates of the investment promotion levy and updating the list of goods subject to the levy. Currently, the rates applicable range between 10% and 17,5%. The Bill proposes changing the rate to 3% for a majority of the subject goods, while imposing 10% on cement clinker and billets, and 20% on leather and footwear, as per the table on the next page.

TARIFF DESCRIPTION	CURRENT EXPORT AND INVESTMENT LEVY RATE	PROPOSED EXPORT AND INVESTMENT PROMOTION LEVY RATE
Articles of Leather Chapter 42.	None	20%
Imported footwear Chapter 64.	None	20%
Denatured ethyl alcohol and other spirits -Tariff No. 2207.20.00.	None	3%
Rum and other spirits obtained by distilling Sugar - Tariff No 2208.40.00.	None	3%
Vodka – Tariff No 2208.60.00.	None	3%
Cement clinker - Tariff No 2523.10.00.	17.5%	10%
Organic surface-active products and preparations for washing the skin – Tariff No 3401.30.00.	None	3%
Kraft liner – Tariff No 4804.11.00.	None	3%
Uncoated kraft paper and paperboard, in rolls or sheets, other than that of heading 48.02 or 48.03 – Other – Tariff No 4804.29.00.	10%	3%
Milk and cream of a fat content by weight, exceeding 1% but not exceeding 6%.	None	3%
Ceramic sinks, wash basins, pedestals, baths, bidet, water closet pans, flushing cistern, urinals and similar sanitary fixtures.	None	3%
Billets.	None	10%
Cooking stoves for liquid fuel.	None	3%
Motorcycles with internal combustion engine not exceeding 50cc.	None	3%
Motorcycles with internal combustion engine exceeding 50cc but not exceeding 250cc.	None	3%
Motorcycles with internal combustion engine exceeding 50cc but nit exceeding 250cc.	None	3%
Motorcycles with internal.		
combustion engine exceeding 250cc but not exceeding 500cc.	None	3%
Motorcycles with internal.		
combustion engine exceeding 500cc but not exceeding 800cc.	None	3%
Motorcycles with internal combustion engine exceeding 800cc.	None	3%
Electric motorcycles.	None	3%
Metal furniture of a kind used in offices.	None	3%
Other metal furniture.	None	3%
Wooden furniture for office.	None	3%
Wooden furniture for kitchen.	None	3%
Wooden furniture for bedrooms.	None	3%
Other wooden furniture.	None	3%
Furniture of plastics.	None	3%
Furniture of bamboo.	None	3%
Furniture of rattan.	None	3%
Furniture of cane, osier or similar material.	None	3%
Parts of furniture, of wood.	None	3%
Parts of furniture, not of wood.	None	3%
Mattress supports.	None	3%

Implications:

The reduced rates of the export and investment promotion levy from 17,5% is a welcome move for importers of these items as the previous rate was very high. Importers of articles of leather and footwear will, unfortunately, incur additional tax, in a move possibly intended to stimulate the growth of the local leather and shoe industry.

Proposed effective date: 1 July 2024

5. TAX PROCEDURES

Application for tax agent license

Proposed amendment:

The Bill proposes the establishment of a Tax Agents Committee through regulations under the TPA. The Tax Agents Committee's role will include recommending applicants for registration as tax agents by the Commissioner, as well as recommending the cancellation of a tax agent's license.

Implications:

Currently, the TPA provides no mechanism for the constitution or composition of the Tax Agents Committee. The proposal is therefore a welcome one, as it will provide a framework for the constitution and operation of the committee, through regulations under the TPA. The Tax Agents Committee will likely be composed of individuals with expertise and experience in tax law, accounting and related fields. Their insights and knowledge can contribute to informed decision-making regarding tax agents' license applications and cancellations.

Regionally, Uganda has a similar Tax Agents Registration Committee, comprised of representatives from the fields of accounting, law, economics, finance and taxation. This committee's role is to register tax agents in Uganda, maintain a register of tax agents, and cancel tax agent licenses, where required.

Proposed effective date: 1 July 2024

Electronic tax invoices

Proposed amendment:

The Bill proposes introducing the elements that must be contained in an electronic tax invoice. These include:

- the words "*TAX INVOICE*";
- the name, address, and personal identification number (PIN) of the supplier;
- the name, address, and PIN, if any, of the purchaser;
- the serial number of the tax invoice;
- the date and time which the tax invoice was issued and the date and time which the supply was made if it is different from the date the tax invoice was issued;
- the description of the supply, including quantity of the goods or the type of services;
- the details of any discount allowed at the time of supply;
- the consideration for the supply;
- the tax rate charged, and total tax amount of tax charged; and
- any other prescribed information.

Implications:

By specifying the required elements of an electronic tax invoice, the amendment aims to standardise invoicing practices across taxpayers. This ensures consistency and clarity in the information provided, facilitating compliance with tax regulations. We note that the proposed requirements are a replication of the requirements under the repealed Regulation 9 of the VAT Regulations, 2017, as well as the VAT (Electronic Tax Invoice) Regulations, 2020.

The above requirements, read together with the obligation to issue electronic invoices via eTIMS as introduced by the Finance Act, 2023, have parallels in the region. In Tanzania, the Tax Administration Act, 2015, makes it mandatory for taxpayers, except those specifically excluded by law, to issue fiscal receipts or invoices using electronic fiscal devices. Such fiscal receipts and invoices should contain particulars similar to those under Kenya's proposal, such as the full name and address of the supplier and recipient of the supply, description of the goods or services provided and tax PINs. In Uganda, it is also mandatory for all VAT-registered taxpayers to enrol onto and implement the Electronic Fiscal Receipting and Invoicing Solution, which system transmits transaction data to the revenue authority in real-time and generates electronic receipts and invoices, much like Kenya's eTIMS. The electronic receipts and invoices are also required to have similar details on the supplier, recipient, goods and services supplied and tax PINs.

Proposed effective date: 1 July 2024

Enforcement of agency notices

Proposed amendment:

The Bill proposes introducing a validity period of one year for an agency notice issued by the Commissioner, to a person owing money to a taxpayer, to pay the amount owing/will be owed to the KRA.

The Bill further proposes amending section 42 to allow the Commissioner to issue agency notices where a taxpayer has appealed against an assessment specified in a decision of the Tribunal or court.

Implications:

Introducing a validity period of one year for the notice is an inauspicious development for taxpayers, since having an agency notice be valid for one year may be prone to abuse by the KRA.

Further, the proposal to allow the Commissioner to issue agency notices even where a taxpayer has appealed an adverse court or Tribunal decision is inimical to justice, as the KRA will have the power to enforce a notice in respect of an ongoing tax dispute.

Comparatively, we note that Tanzania has no sunset date on an agency notice, since an agency notice issued by the revenue authority only ceases to have effect once the tax is paid, or upon cancellation by the revenue authority. In addition, both Uganda and Tanzania do not have limitations on circumstances in which the Commissioner can issue an agency notice, unlike in Kenya where an agency notice can only be issued in certain circumstances, such as where a taxpayer has not duly objected to, or appealed against, an assessment or adverse judgement.

Proposed effective date: 1 July 2024

Reinstatement of the abandonment of unpaid tax due to doubt or difficulty in recovery

Proposed amendment:

The Bill proposes re-introducing the Commissioner's discretion to abandon tax liability where there is doubt or difficulty in recovery of the unpaid tax. Under this proposal, once the Commissioner determines that unpaid tax is impossible to recover, they may abandon the tax with the Cabinet Secretary's prior written approval.

The Cabinet Secretary may also direct the Commissioner to take any action as the Cabinet Secretary may deem fit in respect of the unpaid taxes, or obtain the courts' directions in respect of the case. Finally, the Commissioner is mandated to submit an annual report of the unpaid tax abandoned every year to the Cabinet Secretary, which report shall subsequently be submitted to Parliament for scrutiny.

Implications:

This proposal seeks to re-introduce the relief of abandonment of tax, which was deleted from the TPA by the Finance Act, 2023. While this relief is pegged entirely on the discretion of the Commissioner to determine that a tax liability is difficult to recover, as well as on the Cabinet Secretary's approval, it offers some reprieve for taxpayers struggling to settle their liabilities. However, it may also be prudent to reinstate the granting of waivers of penalties and interest on unpaid tax, which was also deleted from the TPA by the Finance Act, 2023.

Repeal of the value added tax withholding exemptions

Proposed amendment:

The Bill proposes removing the VAT withholding exemptions granted to the taxable value of zero-rated supplies, as well as registered manufacturers whose value of investment in the preceding three years from 1 July 2022 is at least KES 3 billion.

Implications:

The proposal to remove the exemption of zero-rated supplies is likely aimed at cleaning up the withholding VAT regime, since from a practical perspective, it is not possible to withhold 2% VAT on a supply whose VAT rate is 0%.

As for the registered manufacturers whose value of investment in the preceding three years from 1 July 2022 is at least KES 3 billion, their exemption's deletion broadens the application of VAT withholding tax. This change ensures consistency in tax treatment across different types of taxpayers and prevents potential loopholes or preferential treatment.

Proposed effective date: 1 July 2024

Offset or refund of overpaid taxes

Proposed amendment:

The Bill proposes a deletion of subsection 1 of section 47 and substituting it with a proviso that enables a taxpayer who has overpaid a tax under any tax law, to apply to the Commissioner in the prescribed form to offset the overpaid tax against the taxpayer's outstanding tax debts and future tax liabilities; or for a refund of the overpaid tax;

- in the case of income tax, within five years from the date on which the tax was overpaid; or
- in the case of any other tax, within six months from the date on which the tax was overpaid.

Implications:

The main implication of this proposal is that for taxes besides income tax, including excise duty, the time limit for refund applications would be limited to six months. Currently, only VAT is limited to six months.

This proposal, if enacted, would be counter to the practice in other comparable countries. In Tanzania, for instance, refund applications can be submitted within three years for all taxes, subject to a few limitations on items such as excess input VAT.

Proposed effective date: 1 July 2024

Objection to a tax decision

Proposed amendment:

The Bill proposes the deletion of section 51(4A) and substitutes it with a provision that seeks to disallow an objection that has not been validly lodged and the taxpayer fails to provide the information specified by the Commissioner within the stated period.

Further the Bill proposes increasing the time period due to the Commissioner, to issue an objection decision from 60 days to 90 days.

Implications:

Increasing the time for the Commissioner to make an objection decision to 90 days provides the KRA with adequate time to thoroughly review objections and consider relevant information before making decisions. This ensures fairness and transparency in the objection process, as decisions are based on comprehensive assessments of the issues involved. However, it is arguable that the granting of an additional 30 days to the Commissioner to issue a decision, while still retaining taxpayers' timelines for lodging objections at 30 days, is unfair to taxpayers.

Comparatively, the timelines for issuing an objection decision are 90 days in Uganda, and six months in Tanzania.

Proposed effective date: 1 July 2024

Integrating with the KRA's data management and reporting systems

Proposed amendment:

The Bill proposes granting the Commissioner, by notice in writing, the ability to compel a person to integrate with the revenue authority's authorised electronic tax system for the purposes of submission of electronic documents including detailed transactional data in a prescribed manner.

The Bill further proposes a penalty of an amount not exceeding KES 2 million for every month, or part thereof, that the failure continues, to a person who fails to comply with this notice.

Implications:

Mandating the integration of an electronic tax system indicates a shift towards modernising tax administration and embracing technology. This transition may require investments in infrastructure, training and technology adoption, impacting both taxpayers and tax authorities.

This proposed amendment further signals the continuing push by the Government to get real-time access to taxpayer data, following the KRA's recent integration with betting companies for real-time excise duty remission, as provided by section 36A of the Excise Duty Act, which was introduced by the Finance Act, 2023. The Government has also recently issued notices to various digital lenders for them to commence integration of their systems with the KRA. That said, we note that the proposal does not specify which party will bear the cost of the integration of systems. This could be applied to mean that taxpayers should shoulder the cost, which would increase the cost of tax compliance, and further dent the efficiency of the tax regime in Kenya.

Proposed effective date: 1 July 2024

Computation of time for the submission of documents and payment of tax

Proposed amendment:

The Bill proposes establishing rules for the computation of time in relation to;

- submitting or lodging a tax return, application, notice, or other document;
- the payment of a tax; or
- taking any other action under a tax law.

Under the proposal, where such actions need to be undertaken within a specific period, the period will not include Saturdays, Sundays or public holidays.

Implications:

Clear and consistent computation periods instil confidence in taxpayers regarding the fairness and predictability of the tax system. The exclusion of Saturdays, Sundays and public holidays ensures uniformity in calculating deadlines and reduces ambiguity regarding compliance requirements.

Proposed effective date: 1 July 2024

Registration for remote employees working outside Kenya

Proposed amendment:

The Bill proposes the introduction of registration of an employee working remotely outside Kenya for an employer in Kenya, as a transaction that requires a KRA PIN.

Implications:

By mandating remote workers to obtain a KRA PIN, the Government aims to maximise revenue collection by ensuring that all individuals deriving income from Kenya contribute their fair share of taxes. Since the income of remote employees is derived from activities in Kenya, collecting tax through the KRA PIN requirement ensures that the tax base accurately reflects the economic activity occurring within the country.

Proposed effective date: 1 July 2024

6. DATA PROTECTION ACT

Disclosure of personal data for tax enforcement purposes

Proposed amendment:

The Bill proposes amending the Data Protection Act, 2019 to exempt its application from the processing of personal data where it is necessary for the assessment, enforcement or collection of any tax or duty under a written law.

Implications:

This provision is aimed at granting the KRA near-unfettered access to taxpayer data, for a complete view of taxpayers' economic transactions through data analysis. It has the potential to enhance compliance as verification of taxpayer affairs will be made easier. However, there are data privacy concerns that would apply if the KRA is exempted from the provisions of the Data Protection Act, 2019.

Proposed effective date: 1 July 2024

7. AFFORDABLE HOUSING ACT

Proposed amendment:

The Bill proposes the deletion of section 54 of the Affordable Housing Act, which provides that a purchaser of an affordable housing unit may not sell their unit by contract, agreement or otherwise, except with the prior written consent of the Affordable Housing Board.

Implications:

If enacted into law, this proposal will allow the owners of affordable housing units to sell their units without any inhibition or control. While it may be viewed as a reinforcement of the freedom to contract and the right to property, this proposal may be prone to abuse.

Proposed effective date: 1 July 2024

8. INDUSTRIAL TRAINING ACT

Proposed amendment:

The Bill proposes amending the Industrial Training Act by including the Tax Procedures Act within section 5B (2).

Implications:

This proposal is intended to empower the Commissioner to exercise the powers conferred upon them by the TPA when it comes to the collection of training levies and any other duty conferred upon them by the Industrial Training Act.

Proposed effective date: 1 July 2024

9. PUBLIC FINANCE MANAGEMENT ACT

Proposed amendment:

The Bill proposes the amendment of section 194 of the Public Finance Management Act by making it a mandate of the Accounting Standards Board to prescribe a framework for the implementation of accrual accounting in Government; and to prescribe a risk management framework. The framework for implementation of accrual accounting is to provide for a three-year transition period from the date of commencement of the Finance Act, 2024.

Implications:

This proposal is aimed at operationalising recent developments to change public sector accounting from the cash to the accrual basis of accounting, with the aim of enhancing fiscal reporting and the recognition of revenues and expenses.

Proposed effective date: 1 July 2024

10. KENYA REVENUE AUTHORITY ACT

Proposed amendment:

The Bill proposes the deletion of the Civil Aviation Act Cap 394 as part of the laws relating to revenue.

Implications:

The implication of this proposal would be to exclude all duties, levies, charges or other monies collected under the Civil Aviation Act from the remit of the KRA, insofar as the assessment, collection and accounting for such amounts is concerned.

Proposed effective date: 1 July 2024

OUR TEAM

For more information about our Tax & Exchange Control practice and services in South Africa and Kenya, please contact:

Emil Brincker
Practice Head & Director:
Tax & Exchange Control
T +27 (0)11 562 1063
E emil.brincker@cdhlegal.com

Gerhard Badenhorst
Director:
Tax & Exchange Control
T +27 (0)11 562 1870
E gerhard.badenhorst@cdhlegal.com

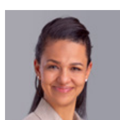
Jerome Brink
Director:
Tax & Exchange Control
T +27 (0)11 562 1484
E jerome.brink@cdhlegal.com

Petr Erasmus
Director:
Tax & Exchange Control
T +27 (0)11 562 1450
E petr.erasmus@cdhlegal.com

Dries Hoek
Director:
Tax & Exchange Control
T +27 (0)11 562 1425
E dries.hoek@cdhlegal.com

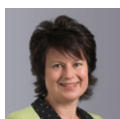
Alex Kanyi
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E alex.kanyi@cdhlegal.com

Heinrich Louw
Director:
Tax & Exchange Control
T +27 (0)11 562 1187
E heinrich.louw@cdhlegal.com



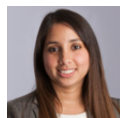
Howmera Parak
Director:
Tax & Exchange Control
T +27 (0)11 562 1467
E howmera.parak@cdhlegal.com

Stephan Spamer
Director:
Tax & Exchange Control
T +27 (0)11 562 1294
E stephan.spamer@cdhlegal.com



Tersia van Schalkwyk
Tax Consultant:
Tax & Exchange Control
T +27 (0)21 481 6404
E tersia.vanschalkwyk@cdhlegal.com

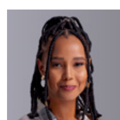
Louis Botha
Senior Associate:
Tax & Exchange Control
T +27 (0)11 562 1408
E louis.botha@cdhlegal.com



Varusha Moodaley
Senior Associate:
Tax & Exchange Control
T +27 (0)21 481 6392
E varusha.moodaley@cdhlegal.com

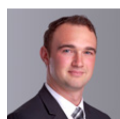
Abednego Mutie
Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E abednego.mutie@cdhlegal.com

Nicholas Carroll
Associate:
Tax & Exchange Control
T +27 (0)21 481 6433
E nicholas.carroll@cdhlegal.com

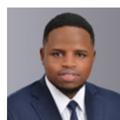


Puleng Mothabeng
Associate:
Tax & Exchange Control
T +27 (0)11 562 1355
E puleng.mothabeng@cdhlegal.com

Brandon Otieno
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E brandon.otieno@cdhlegal.com



Jacques Erasmus
Associate Designate:
Tax & Exchange Control
T +27 (0)11 562 1191
E jacques.erasmus@cdhlegal.com



Nicholas Gathecha
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E nicholas.gathecha@cdhlegal.com

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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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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