8 MAY 2023

Tax & Exchange Control ALERT

IN THIS ISSUE

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

The long-awaited Finance Bill, 2023 (Bill) was finally tabled before the National Assembly on 4 May 2023. The Bill comes after a lot of speculation by taxpayers, lobbying by business associations, and speeches or promises from government officials.

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

The long-awaited Finance Bill, 2023 (Bill) was finally tabled before the National Assembly on 4 May 2023. The Bill comes after a lot of speculation by taxpayers, lobbying by business associations, and speeches or promises from government officials.

We detailed the expectations that taxpayers had in our article here. Some of the proposals that we were expecting made it to the Bill including Value Added Tax (VAT) exemption for liquified petroleum gas, VAT exemption for exported services, shortened time for processing tax refunds, introduction of excise duty on imported fish and furniture and an amnesty program to encourage taxpayers to self-disclose their tax liabilities, settle them and in return enjoy an exemption of penalties and interest.

Our Firm participated in the Finance Bill 2023 process by forwarding proposals to the National Treasury. Among the many proposals that made it to the Bill, we single out the inclusion of the tax amnesty program which was a unique proposal from our Firm. The proposal, if finally adopted in the Finance Act 2023, will be an extension of the success of the ongoing Voluntary Tax Disclosure Program (VTDP). Cumulatively, over **19,021** taxpayers enrolled for the VTDP with an estimated revenue collection of **Kes 10.367 Billion**. As at March 2023, the Kenya Revenue Authority (KRA) had collected Kes 9.329 billion.

The Finance Bill 2023 comes at time when KRA is keen to collect tax within 24 hours if not in real time. There are a couple of amendments in the Bill which will facilitate this such as the codification of electronic tax invoice management system and the requirement to account for Withholding Tax within 24 hours.

We have a few surprises in the Bill including the proposal to tax digital assets such as cryptocurrencies. The proposal for 35% tax on employees earning more than Kes 500,000 per month and the proposal to deposit 20% of the disputed tax with KRA before appeal to the High Court, is debatable but not a surprise.

The Finance Bill will in the next few days be subjected to public participation. We continue to encourage everyone to participate by providing comments to the National Assembly when the time comes. Otherwise, we shall have some provisions in the Finance Act taking effect from 1 July 2023, others from September 2023 and the rest from January 2024.

Below is our detailed analysis of the proposals in Finance Bill, 2023.

Part I: Income Tax

Expanded definition of "*winnings*" to tax the amount staked

Proposed amendment:

The Finance Bill, 2023 (the Bill) proposes to introduce an expanded definition to the term "*winnings*". The Bill defines it as the payout from a betting, gaming, lottery, prize competition, gambling or a similar transaction under the Betting, Lotteries and Gaming Act without a deduction of the amount staked.

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

Implication:

The proposed definition seeks to promote clarity as to what constitutes winnings. It also highlights the fact that the amount staked will be considered as part of winnings. This is likely to impact negatively on those who win prize competitions or engage in gambling or betting activities as withholding tax applies not only on the winnings but also on the amount staked. As an example, if a punter places a bet of Kes 100 and wins Kes 20. He will suffer withholding tax on the whole Kes 120 meaning he takes home Kes 96 after suffering the tax of 20%.

Proposed effective date: 1 July 2023

New definition of "*digital content monetization*" to target social media influencers

Proposed amendment:

The Bill proposes to introduce the definition of the term "*digital content monetization*" to mean offering for payment entertainment, social, literal, artistic, educational or any other material electronically through any medium or channel in various specified forms. Some of the forms of this monetization include advertising on websites, sponsorships where brand owners pay for content creation, affiliate marketing, subscription services for access of content, membership programs for exclusive content and licensing content including photographs and music among others.

The Bill also proposes to amend the Third Schedule of the Income Tax Act by introducing a resident withholding tax of 15% in respect of payments relating to digital content monetization.

Implications:

The implication of this is that the government will add social media influencers to its tax base, and this may result in additional revenue collection especially if it nabs the influencers who were not paying tax on their income.

Proposed effective date: 1 July 2023.

Mileage rate for employee traveling allowances

Proposed amendment.

The Bill proposes to amend Section 5(2) of the Income Tax Act by limiting the tax-free mileage allowance for employees to the rates approved by the Automobile Association (AA) of Kenya.

Implications:

The implication of this proposal is that if an employee is paid a travelling allowance with mileage rates above the ones prescribed by AA then the employee would have to pay or account for tax for the amounts in excess of the AA rates.

Proposed effective date: 1 July 2023.

New tax on repatriated income for branches

Proposed amendment:

The Bill proposes to introduce a new provision that will allow for non-resident persons who carry on business in Kenya through a permanent establishment to be taxed

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

on repatriated income for the year of income. The new provision also stipulates a formula for calculating the repatriated income. The repatriated income is to be computed using the formula $R = A^1 + (P-T) - A^2$

Where; **R** is the repatriated profit, **A^1** is the net assets at the beginning of the year, **P** is the net profit for the year of income calculated in accordance with generally accepted accounting principles, **T** is the tax payable on the chargeable income and **A^2** is the net assets at the end of the year.

Implications:

The government is likely to get additional revenue from this proposal. This income has not ordinarily been subjected to taxation. The government has not however specified the rate for the same. It is thus not clear how this would be effected.

Proposed effective date:
1 January 2024.

Increase in turnover tax

Proposed amendment:

The Bill proposes to amend Section 12C of the Income Tax Act by changing the band of persons eligible to pay turnover tax from Kes 1,000,000 - Kes 50,000,000 to Kes 500,000 – Kes 15,000,000. An additional proposal on turnover tax is to revise its rate to 3% from 1% as stipulated by the Bill.

Implications:

The implication of this amendment is that many small businesses and medium enterprises are likely to fall within the new band. This is likely to give an option to owners of small businesses to review whether to pay turnover tax or be subject to the annual income tax regime. The key difference being that with turnover tax one cannot reduce the tax with expenses in incurred to run the business while with the annual regime one can reduce their tax liability with the expenses but pay a higher rate of 30% on the taxable income.

Proposed effective date:1 July 2023.

Digital Asset Tax

Proposed amendment:

The Bill proposes to introduce a new tax known as the Digital Asset Tax. The tax is to be payable by persons who derive income from the transfer or exchange of digital assets. According to this proposed amendment, the owner of a platform or the person who facilitates the exchange or transfer of a digital asset shall deduct the digital asset tax of 3% (of the income derived from transfer or exchange) and remit it to the Commissioner.

The Bill also stipulates that a non-resident who owns a platform through which the digital assets are exchanged has to register under the simplified tax regime. Regarding the remission of the Digital Asset Tax, the Bill proposes that a person who is required to deduct the digital asset tax has to remit it to the Commissioner within 24 hours after making the deduction together with a return constituting the amount of the payment, the amount of tax deducted and any information required by the Commissioner.

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

For clarity purposes, the Bill defines digital assets to include anything of value that is not tangible, cryptocurrencies, token code, number held in digital form and generated through cryptographic means, non-fungible token (NFT) as well as a digital representation of value that can be transferred, stored and exchanged electronically.

Implications:

Apart from an increase in the revenue for the government, another implication on the introduction of the digital asset tax is the likelihood of a reduction in the trading volumes of digital assets in Kenya. Based on the impacts from other jurisdictions such as India which taxes gains on cryptocurrencies, there is likely to be less enthusiasm and a reduction of investments on digital assets.

Proposed effective date:

The proposed effective dates of this amendment are 1 September 2023 and 1 January 2024. There appears to be an error in drafting of this part of the Bill hence the need for a clean-up.

Requirement to use the electronic invoice management system

Proposed amendment:

The Bill proposes to amend Section 16 of the Income Tax Act by introducing a provision to the effect that no deduction shall be allowed in respect of any expenditure or loss where the invoices are not generated from an electronic invoice management system except where the transactions have been exempted in accordance with the Tax Procedures Act 2015.

Implications:

This proposal emphasizes the Kenya Revenue Authority's resolve to digitize tax systems and minimize any tax leakage that can be attributed to invoicing. The electronic tax invoice management system is also poised to enable the government to have real time information on invoices that are issued through the system and enhance revenue collection.

Proposed effective date: 1 January 2024

Income of members clubs and trade associations

Proposed amendment:

The Bill proposes to amend Section 21(1) of the Income Tax Act by introducing a clause to the effect that welfare contributions of members, joining fees and subscriptions shall be excluded when determining the income of the members club or trade association.

Implications:

This amendment is likely to have positive implications on members clubs and trade associations by increasing membership and activities of such clubs and associations.

Proposed effective date: 1 July 2023.

Agent to collect rental income tax

Proposed amendment:

The Bill introduces a provision empowering the Kenya Revenue Authority (KRA) to deduct tax on rental income of the owner of the premises and remit to KRA.

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

Additionally, the tax is to be remitted within twenty-four hours after the deduction to the Commissioner together with a return in writing of the tax deducted.

Implications:

The appointment of a third party to collect rental income tax on behalf of KRA is likely to assist KRA to collect rental income tax in circumstances where the owner of the premises either refuse to pay rental income tax or is unable to pay the tax for other reasons. The concept of tax remission within twenty-four (24) hours after deduction is in line with the authority's recent objective of collecting taxes as soon as possible. This practice has been tested with betting companies, for example, and found to be feasible.

Proposed effective date: 1 July 2023

Reduced monthly rental income tax rate

Proposed amendment:

The Bill proposes to amend Paragraph 10 of the Third Schedule of the Income Tax Act by reducing the rate of monthly residential rental income tax from 10% of the gross rental receipts to 7.5%.

Implications:

This proposal is likely to be a welcome change for landlords who will pay less tax on rental income.

Proposed effective date: 1 July 2023.

Exemption from income tax for manufacture of human vaccines and others

Proposed amendment:

The Bill proposes to introduce the following new provisions in the First Schedule of the Income Tax Act as part of additional income to be exempt from tax:

(a) royalties paid to a non-resident person by a company undertaking the manufacture of human vaccines.

(b) Interest paid to a resident person or non-resident person by a company undertaking the manufacture of human vaccines.

(c) Investment income from a post-retirement medical fund, whether or not the fund is part of a retirement benefits scheme.

(d) Payment in the form of funds transfer from a post-retirement medical fund to a medical insurance cover provider.

Implications:

The tax exemptions are likely to promote investments in the manufacturing of vaccines. Additionally, the exemption on payment on transfer of funds from post-retirement medical funds is likely to benefit retired people by increasing their access to medical services.

Proposed effective date: 1 July 2023.

Revised investment allowance

Proposed amendment:

The Bill proposes to introduce to the Second Schedule of the Income Tax Act two new items on which if a person incurs capital expenditure then an investment allowance

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

may be deducted in computing gains of profits of the person. The items include an industrial building and dock.

Another proposed amendment to the Second Schedule by the Bill is the introduction of a new paragraph specifying that the investment deduction would be one hundred per cent as shall be restricted to hotel building, building used for manufacture and machinery used for manufacture. In addition, the 100% allowance shall not apply to investments which due to the nature of their business have to be located in places outside Nairobi and Mombasa.

Implications:

The implication of this proposed amendment may be positive to people who incur expenditure on both docks, industrial buildings since the allowances will be deducted when computing gains or profits at the corresponding rates. The restriction of businesses that can enjoy the 100% investment deduction is also welcome because the benefit will serve the purpose it was meant to serve by encouraging businesses to set up outside Nairobi and Mombasa. The term 'nature of their business' should however be defined.

Proposed effective date:1 January 2024.

Post retirement medical fund relief

Proposed amendment:

The Bill proposes to introduce a new form of relief in the Third Schedule of the Income Tax Act known as the post-retirement medical fund relief. The amount of the relief is specified to be 15% of the amount of contribution paid or sixty thousand shillings per annum, whichever is lower.

Implications:

The introduction of this relief is likely to encourage people to contribute towards their post-retirement-medical scheme and promote easy access to healthcare services for members of the society who have retired..

*Proposed effective date:
1 January 2024.*

Increased Pay As You Earn for salaries of Kes 500,000 or more per month

Proposed amendment:

The Bill proposes to introduce an amendment to the Third Schedule of the Income Tax Act by proposing a graduated PAYE of 35% for all income above Kes 500,000 per month.

Implication:

The imposition of the 35% PAYE will undoubtedly impact negatively on those who earn salaries above Kes 500,000 per month especially because the previous rate was lower by 5%.

Proposed effective date: 1 July 2023

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

Reduction of the corporate income tax rate for branches (non -resident companies)

Proposed amendment:

The Bill introduces a corporation tax rate of 30% down from the current rate of 37.5%. This will apply however for income obtained in the year 2024 and every subsequent year of income.

Implications:

The proposed amendments are likely to have both adverse and positive impacts. With the tough economic conditions in the country, people who earn this much may have to brace for more taxation. On the other hand, the corporation tax is likely to be a source of extra revenue for the government.

Proposed effective date:
1 January 2024

Reduced Corporation Tax for companies undertaking manufacture of human vaccines

Proposed amendment:

The Bill proposes to introduce a 10% corporation tax for companies that undertake to manufacture human vaccines. This is introduced through the insertion of a new paragraph under Head B of the Third Schedule of the Income Tax Act.

Implications:

The proposed amendment will also enhance local investments in the manufacturing of vaccines since the companies involved will pay 10% corporation tax as opposed to the standard rate of 30%.

Proposes effective date:
1 January 2024.

Resident withholding tax on marketing, advertising and sales promotion

Proposed amendment:

The Bill proposes to introduce a resident withholding tax at the rate of 5% of the gross amounts in respect to payments for sales promotion, marketing and advertising services whose aggregate value in a month is Kes 24,000 or more.

Implications:

The proposed introduction of the withholding tax on marketing, advertising and sales promotion clarifies that withholding tax actually applies on those services. Initially the Income Tax Act was not clear on whether withholding tax was applicable.

Proposed effective date: 1 July 2023.

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

Requirement to account for withholding tax within 24 hours

Proposed amendment

The Bill intends to reduce the time for accounting from withholding tax from 20 days after the month of the transaction to 24 hours after the transaction.

Implication

This will enable the government to collect withholding tax as quickly as possible and improve on the government's cashflows.

Proposed effective date:1 July 2023

Increase in advance tax

Proposed amendment:

The Bill increases the rate of advance tax for vans, pick-ups, trucks, prime movers, trailers and lorries from Kes 1500 per ton of load capacity per year or Kes 2400 per year to Kes 3000 per ton of load capacity per year or Kes 5000; whichever is higher.

The tax rate is also increased for saloons, station-wagons, minibuses, buses and coaches from Kes 60 per passenger capacity per month or Kes 2400 per year to Kes 100 per passenger capacity or Kes 5000 per year

Implications:

The proposed amendment is a welcome expansion of the tax that the government can collect as advance tax.

Effective date: 1 January 2024.

Capital gains tax on indirect transfers

Proposed amendment:

The Bill proposes to introduce an amendment to the Eight Schedule of the Income Tax Act by deleting the existing provision and specifying the gains under which income is chargeable. The gains outlined in the bill include:

(a) the whole of the gains accrued to a company, an individual or partnership on or after the 1 January 2015 on the transfer of property situated in Kenya, whether or not such property was acquired before that date, or

(b) gains derived from the alienation of shares or comparable interests, including interests in a partnership or trust, if, at any time during one year preceding the alienation, the shares or comparable interests derived more than 20% of their value directly or indirectly from immovable property situated in Kenya, or

(c) gains derived from the alienation of shares of a company resident in Kenya if the alienator, at any time during the one year preceding such alienation held directly or indirectly at least 20% of the capital of that company.

The Bill proposes that a person alienating the shares shall notify the Commissioner (KRA) in writing where there is a change of at least 20% in the underlying ownership of the property.

Implications:

The proposed amendments' implication is to subject transactions to capital gains tax in parent companies outside Kenya whose

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

Kenyan subsidiaries own immovable property in Kenya. The taxman will also be waiting to collect capital gains tax after being notified of a change of ownership.

Proposed effective date: 1 July 2023.

Due date for capital gains tax

Proposed amendment:

The Bill proposes to delete the current provision of Paragraph 11A of the Eighth Schedule that provides for the due date for capital gains tax to be on or before the date of application for transfer of the property at the Lands Office or latest the 20th day after transfer to be either immediately on the receipt of the full purchase price by the vendor or immediately on the registration of the transfer, whichever is earlier.

Implications:

The proposed due date for the tax is in harmony with other changes proposed in the Bill where the government wants to collect tax as soon as possible.

Proposed effective date: 1 July 2023.

Notification on change of ownership for extractive industries

Proposed amendment:

The Bill proposes to increase the threshold upon which licensees or contractors in the extractive industry are supposed to notify the Commissioner on change of underlying ownership. The change being an increase in the threshold from 10% to 20%.

Implications:

This proposed change is likely to have a positive impact on in the industry as contractors and licensees will have an increased threshold in providing the Commissioner with a notification.

Proposed effective date: 1 July 2023.

Part III: Value Added Tax

VAT exemption for liquefied petroleum gas

Proposed Amendment:

The Bill proposes to delete the provision that initially subjected liquefied petroleum gas including propane to a VAT rate of 8%.

Implication:

The proposed removal of the 8% VAT rate on LPG and other levies will be instrumental in reducing the cost of LPG.

Proposed effective date: 1 July 2023.

16% VAT on petroleum goods including kerosene

Proposed amendment:

The Bill also proposes to delete the provision that subjects goods such as petroleum oils and oils obtained from bituminous minerals, crude, aviation spirit, and illuminating kerosene to 8% VAT.

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

Implication:

The removal of the 8% VAT rate on such goods as petroleum oils and illuminating kerosene will consequently subject such goods to the standard VAT rate of 16% as there is no corresponding exemption like the one for LPG. This will therefore increase the cost of such products.

Proposed effective date: 1 July 2023.

Transfer of business as a going concern

Proposed amendment:

The Bill proposes to exempt transfer of business as a going concern from VAT.

Implication:

The exemption of transfer of business as a going concern from VAT will facilitate transactions and will eliminate the burden imposed by the upfront payment of the 16% VAT on acquiring a business as a going concern. This is a move that will encourage transfer of businesses either for restructuring, for profit or for any other reason.

Proposed effective date: 1 July 2023.

VAT on exportation of taxable services

Proposed Amendment

The Bill proposes to include exportation of taxable services as exempt services.

Implication:

Exportation of taxable services was previously zero-rated. The same then moved to categorization of exempt services but only with respect to business process outsourcing. There was confusion on the same and this was further subjected to immense lobbying to the government. The Bill therefore seeks to respond to the same by now wholesomely exempting exportation of taxable services from VAT.

Proposed effective date: 1 July 2023.

VAT on compensation for loss of taxable supplies

Proposed amendments:

Regarding input tax deduction, the Bill proposes to treat compensation for loss of taxable supplies (where a bona fide taxable supplies owner has deducted input tax) as a taxable supply and requires that where such compensation include VAT, it be declared and subsequently remitted to the Commissioner, and where it does not, it also be declared, subjected to value added tax and the tax be remitted to the Commissioner.

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

Implications:

Roping in compensation for loss of taxable supplies to be subjected to VAT will ensure that a person does not benefit twice with regards to such deductions.

Proposed effective date: 1 July 2023.

Unconditional registration requirement for imported digital services suppliers

Proposed amendment:

Initially, persons supplying imported digital services over the internet or an electronic network or through a digital marketplace in respect to a turnover threshold of five million shillings were not bound by the registration requirement under the Act. The Bill however seeks to make it mandatory for any person involved in such businesses to register, notwithstanding the turnover threshold of five million shillings.

Implication:

This will subject persons supplying imported digital services over the internet or an electronic network or through a digital marketplace to a mandatory and unconditional registration obligation.

Proposed effective date: 1 July 2023.

Other proposed VAT exemptions

Proposed amendments and implications:

a) The Bill proposes to exclude milk, specially prepared for infants and bioethanol vapour stoves from the initial VAT exemption. This will now subject the products to the standard VAT rate of 16% thereby occasioning a raise in terms of their costs.

b) Further, the Bill proposes to rope in plant, machinery, and equipment used in the construction of a plastics recycling plant into the VAT liability of 16%. This inclusion may be counter-productive in the long run, owing to the significant role played by such plastic recycling plants regarding the reduction of pollution by such plastics.

c) The VAT Act initially exempted goods for direct and exclusive use in the construction and equipping of specialized hospitals with accommodation facilities from VAT. The Bill has however proposed to only limit such an exemption to such specialized hospitals with a minimum bed capacity of one hundred. This proposal will therefore be instrumental in encouraging the construction of accommodation facilities to hit the one hundred bed capacity mark in order to enjoy the exemption.

However, the Bill will occasion a negative impact by indirectly doing away with input tax deductions for

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

products which were previously zero-rated and are now just exempt from VAT such as:

- all inputs and raw materials, whether produced locally or imported, supplied to manufacturers of agricultural pest control products;
- agricultural pest control products;
- transportation of sugarcane from farms to milling factories;
- fertilizers and inputs or raw materials locally purchased or imported by manufacturers of fertilizer;
- and all tea sold for the purpose of value addition before exportation.

The affected taxpayers may have to include the const on input VAT to their products and this will increase prices of essential goods in this list such as fertilizers and agricultural pest control products. This is against the governments intention to increase agricultural produce and should be revised.

Proposed effective date: 1 July 2023.

Part IV: Tax Appeals

Payment of deposit on appeal to the High Court

Proposed amendment:

The Bill proposes to introduce a requirement under Section 32(1) of the Tax Appeals Tribunal Act for taxpayers who appeal the decision of the tribunal to deposit with the Commissioner 20% of the disputed tax as security before filing an appeal at the High Court. This Commissioner is however exempted from this requirement when appealing such decisions.

The Bill also proposes to introduce a new subsection under Section 32 of the Act that guarantees a credit of the security to the taxpayer by the Commissioner within thirty (30) days in instances where the High Court makes a decision in favour of the taxpayer.

Implications:

This proposal requiring taxpayers to deposit 20% of the disputed tax as security before filing an appeal at the High Court will increase the costs of appeals hence hinder the right of access to justice under Article 48 of the Constitution and make it hard for taxpayers to find recourse in courts when they feel aggrieved by assessments of the Kenya Revenue Authority.

Despite the positive outlook of this proposed amendment on credit of the security by KRA, there is likely to be significant delays by the Commissioner in crediting such amounts back to the taxpayers who win cases at the High Court. This is because the Commissioner has a history of delays especially in tax refunds. The same is likely to replicate in this situation. There term credit should however be replaced with refund to guarantee and facilitate efficient and timely dispatch of money to taxpayers as necessary.

Proposed effective date: 1 July 2023.

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

Part V: Excise Duty

Halting annual inflation adjustments to enhance predictability

Proposed Amendment

The Bill proposes to withdraw the Commissioner's discretion to make annual inflation adjustments for excise duty.

Implications

This reflects the earlier indication by the government that it would make a proposal aimed at making duty more predictable for manufacturers and consumers. This will have a positive impact by ensuring that there is price stability, and the distortion of overall inflation will also be dealt with. Consequently, the predictability will create an opportunity for firms to make decisions regarding long-term investments.

Proposed effective date:1 July 2023.

Stricter regulation of betting and gaming sector that may soon be implemented for other sectors

Proposed amendments:

Compared to the standard payment of excise duty within the twentieth day of the succeeding month in respect of other excisable goods, excise duty on betting and gaming will be required to be remitted to the Commissioner within 24 hours from the closure of the day's transactions, which is the midnight of that day. The Bill also proposes an increased excise duty on betting, gaming, prize competition, and lottery from 7.5% to 20%. In addition, the Bill seeks to introduce a new rate of excise duty on fees charged on advertisement on television, print media, billboards and radio stations on alcoholic beverages, betting, gaming, lotteries, and prize competitions which is now set at the rate of 15%. The Commissioner is further given the discretion to subject any other sector to the same requirement, by notice in the Gazette.

Implication:

Stricter regulations on betting, gaming, and their advertisement together with that of alcoholic beverages places persons involved in such services to heavier tax obligations which will likely have the ripple effect of discouraging such services. Further, the discretion given to the Commissioner to subject other sectors to the 24-hour requirement is welcome however should be implemented progressively.

Proposed effective date: 1 July 2023.

Revised telecommunication and money transfer excise duty rates

Proposed amendments and implications:

The excise duty rates for telephone and internet data services, fees charged for money transfer services by banks, money transfer agencies and other financial service providers are proposed to be reduced by 5% by the Bill from the initial 20% to 15%

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

which is a relief to those respective sectors. However, excise duty on fees charged for money transfer by cellular phone service providers is proposed to be increased from the initial 12% to 15% and the definition of such services will be enlarged to include the payment service providers licensed under the National Payment System Act, 2011. This therefore means that the increase will not only affect persons, companies, or organizations providing the actual payment services, but also those that own or process and store such data on behalf of the payment service providers.

The Bill further proposes to depart from the initial pegging of excise duty solely to be on the fees by digital lenders and subsequently extends the same to include any amount charged in respect of lending. This translates to imposing other charged amounts such as penalties for default to excise duty. As such, digital lenders will now be liable to pay excise duty on whichever amount they charge regarding lending other than the usual fees.

Proposed effective date: 1 July 2023.

Revising excise duty rates and obligations

Proposed amendment:

The Bill proposes to introduce new items including imported fish, powdered juice, sugar that is neither imported nor locally purchased by a registered pharmaceutical manufacturer, human hair, wigs, false beards, eyebrows, eyelashes, artificial nails, imported cement, paints, varnishes, lacquers, test liner, fluting medium, and furniture that is not from East African Community Partner states to form part of the excisable goods.

Implication:

Such items will consequently be more expensive to import because they will be subject to excise duty, which will also have a direct impact on their costs in the country.

Proposed effective date: 1 July 2023.

Penalties for excise stamp offences

Proposed amendment:

The Bill proposes to introduce explicit offences in relation to excise stamps. Consequently, acts such as defacing or printing over an excise stamp affixed on any excisable goods or package, being in possession of non-exempted excisable goods without excise stamps, and trading in unauthorized excise stamps, among others, are considered as offences and upon conviction, attract liability to a fine not exceeding five million shillings or imprisonment for a term not exceeding three years, or to both.

Implication:

The proposal to introduce such offences will be instrumental in holding individuals liable for explicit offences and the consequent penalties. Further, the Excise Duty Act initially imposed the general penalty of payment of two million fine or two years imprisonment or both for offences. Other than the explicit identification of various acts considered as offences, the initial

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

liability will be consequently made heavier. This will enhance compliance with the excise stamp obligations.

Proposed effective date:

The proposed effective date of this amendment is 1 July 2023.

Part VI: Tax Procedures

Enforcing international tax agreements on mutual administrative assistance

Proposed amendment:

The Bill proposes to amend section 6A of the Tax Procedures Act (TPA) by stipulating that a multilateral agreements or treaty entered into by the Government of Kenya relating to mutual administrative assistance in the collection of taxes shall have effect in the manner stipulated in such agreement or treaty.

Separately, the Bill proposes to amend the TPA by introducing a new section which enables the Commissioner to recover or collect a tax claim pursuant to an international tax agreement on mutual administrative assistance in the recovery or collection of tax claims in Kenya. Any such amounts collected by the Commissioner will be deposited into a dedicated account in the Central Bank of Kenya after which the amount shall be remitted to an account specified by the requesting party.

Implications:

The Government will be able to collect taxes from individuals with tax liability in Kenya but located in other jurisdictions through the assistance of tax administrations in those jurisdictions provided that the collection is done in accordance with the agreements on mutual assistance.

Foreign revenue administrations will be also able to recover tax from individuals with tax liability in their jurisdictions but currently located in Kenya with assistance from the Kenya Revenue Authority (KRA).

Proposed effective date:1 July 2023

Record-keeping requirement for trustees

Proposed amendment:

The Bill proposes to amend section 23 of the TPA by requiring a trustee resident in Kenya who administers a trust registered in Kenya or outside Kenya to maintain and avail to the Commissioner records required under a tax law, whether the income generated is subject to tax in Kenya or not.

Implications:

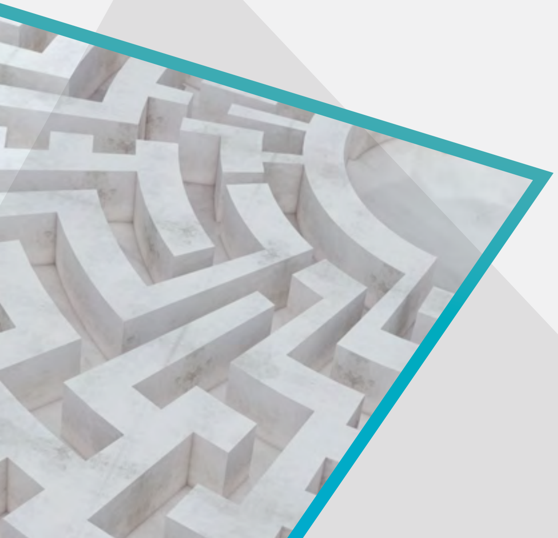
Trustees will be subject to record-keeping requirements which will assist the Government to access information of all trusts whether registered in Kenya or not but administered by a trustee who is resident in Kenya.

Proposed effective date: 1 July 2023

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED



Electronic tax invoices

Proposed amendment:

The Bill proposes to amend section 23 of the TPA by introducing a new section that empowers the Commissioner to establish an electronic tax system through which electronic tax invoices can be issued and records of stocks kept. The electronic tax invoice may exclude emoluments, imports, investment allowances, interest, and similar payments.

Implications:

The proposed amendment will enable the Government to digitize tax invoice and record systems hence minimizing leakage attributed to manual invoicing and record keeping.

The proposed amendment will enable the Government to have real time information on the invoices issued through the system.

Proposed effective date: 1 September 2023

Taking away KRA's power to abandon tax

Proposed amendment:

The Bill proposes to amend the TPA by deleting section 37 in its entirety which enables the Commissioner, with prior written approval of the Cabinet Secretary for finance matters, to refrain from assessing or recovering an unpaid tax where the Commissioner determines that - it may be impossible to recover an unpaid tax; there is undue difficulty or expense in the recovery of an unpaid tax; there is hardship or inequity in relation to the recovery of an unpaid tax; or there is any other reason occasioning inability to recover the unpaid tax.

Implications:

The Commissioner will neither have discretion to determine that it may be impossible or there is undue difficulty or expense in the recovery of an unpaid tax nor refrain from assessing or recovering an unpaid tax. Consequently, no tax liability shall be deemed to be extinguished, abandoned, or remitted under section 37.

Proposed effective date: 1 July 2023

Automatic waiver on interests and penalties on principal tax that accrued and was paid by 31 December 2022

Proposed amendment:

The Bill proposes to amend the TPA by introducing section 37E which requires the Commissioner to refrain from recovering penalties or interest or fines on tax debts where a person had paid all the principal tax due before the 31st of December 2022.

Implications:

The proposed amendment will help to clean up the ledgers for tax payers who had paid the principal tax and were hoping for a waiver of interest and penalties and a clean-up of their tax ledgers by KRA.

Proposed effective date: 01 September 2023

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

Amnesty of interest, penalties, or fines on the unpaid tax where the principal tax had not been paid before 31 December 2022

The Bill proposes to amend the TPA by empowering the Commissioner to provide an amnesty of interest, penalties, or fines on the unpaid tax, and propose a payment plan for the outstanding amount where all the principal tax due had not been paid before the 31st of December 2022. The amnesty shall only be granted if applied for and payment is done not later than 30th June 2024, and upon signing a commitment letter for the settlement of all outstanding taxes.

Implications:

The proposed amendment will encourage taxpayers to engage KRA on the proposed means of payment hence encouraging repayment where all the principal tax due had not been paid before the 31st of December because they will avoid penalties and interests if they pay by June 2024. This follows a successful voluntary program where KRA collected billions of shillings from taxpayers seeking to set their tax records straight and avoid penalties.

Proposed effective date: 01 September 2023

Notification by KRA for security on property for unpaid tax

Proposed amendment:

The Bill proposes to amend section 40 of the TPA by requiring the Commissioner to, within fourteen days after the registration of notification to Registrar of Lands of a restraint of disposal on a defaulting taxpayer's property to inform in a taxpayer and any other person who may have interest in the property identified in the notification. Initially the notification period was seven days.

Implications:

The proposed amendment will provide the taxpayer with more time to be notified by the Commissioner on the restraint on disposition of a taxpayer's property and is thus a welcome move to taxpayers from the previous seven days' period.

Proposed effective date: 01 July 2023

Expanded grounds for issuing agency notices

Proposed amendment:

The Bill proposes to amend the TPA by deleting section 42(14) and substituting therefor with a new provision requiring the Commissioner not to issue a notice to a third party owing money to a tax payer unless – the tax payer has defaulted in paying an instalment; the Commissioner has raised an assessment and the taxpayer has not objected; the tax payer has not appealed against an

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

assessment specified in an objection decision; the taxpayer has made a self-assessment and submitted a return but has not paid the taxes due before the due date lapsed; or the taxpayer has not appealed against an assessment specified in a decision of the Tribunal or court.

Previously, a notice could only be issued where a third party had either confirmed its assessment through an objection decision and the taxpayer had defaulted to appeal at the Tribunal.

Implications:

KRA will not have to wait for issuance of an objection decision before giving a notice to the third-party owing money as it can proceed to issue such notice provided that the taxpayer has the instances contemplated under the proposed amendment are met.

Proposed effective date: 01 July 2023

Shorter time for remitting withholding VAT

Proposed amendment:

The Bill proposes to amend section 42A of the TPA by reducing the time provided for remitting withholding VAT to the Commissioner to three days after the deduction was made. Previously the tax withheld in the section was to be remitted to the Commissioner on or before the twentieth day of the month following the month in which the deduction was made.

Implications:

The proposed amendment has significantly reduced the timeline for remitting withholding VAT which may increase prompt compliance by appointed withholding VAT agents.

Proposed effective date: 01 July 2023

Appointment of rental income tax agents

Proposed amendment:

The Bill proposes to amend the TPA by introducing section 42C which empowers the Commissioner to appoint or revoke an appointment of an agent for the purposes of the collection and remittance of rental income tax to the Commissioner.

Implications:

The proposed amendment will enable Kenya Revenue Authority to collect rental income tax more effectively through the use of rental income tax agents.

Proposed effective date: 01 July 2023

Power to offset tax against outstanding liabilities and shorter time for tax refunds

Proposed amendment:

The Bill proposes to amend section 47 of the TPA by requiring a taxpayer who has overpaid taxes to apply to the

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

Commissioner to offset the overpaid tax against the taxpayers outstanding debt and future tax liabilities. Initially, it applied to future tax liabilities.

It proposes to reduce the time that KRA will refund an overpaid tax from 2 years to 6 months. However, this is subject to an audit and ascertainment of the refund.

It also requires the Commissioner to ascertain and determine the application for refund was made within one hundred- and twenty-days (120). The time limit for an audit to determine an overpaid tax was not provided in the Act.

Implications:

The proposed amendment is a welcome move to taxpayers as it will enable the KRA to expedite the refund of the overpaid taxes within 6 months after verifying the refund within a maximum period of 120 days.

Proposed effective date: 01 July 2023

Timeline for KRA to request for information and issue the objection decision where the objection is not validly lodged

Proposed amendment:

The Bill proposes to amend section 51 of the TPA by enabling the Commissioner to request a taxpayer to submit supporting information within seven days after notifying the taxpayer that the objection has not been validly lodged.

It also seeks to amend the TPA by empowering the Commissioner to make an objection decision within sixty days after notifying a taxpayer that the objection is not validly lodged.

Implications:

The proposed amendment will fast track dispute resolution settlement for objections by empowering the Commissioner to render his decision in a case where the objecting taxpayer who did not validly lodge an objection and has not provided the required information after receiving a notice from KRA.

The Bill should be amended to give sufficient notice to provide information .The 7 days' notice is short and should be increased to thirty (30) days

Proposed effective date: 01 July 2023

Increased time for settlement of disputes out of Court or Tribunal

Proposed amendment:

The Bill proposes to amend the section 55 of the TPA by extending the time for out of court settlement from ninety (90) to one hundred and twenty (120) days from the date the Court or Tribunal permits the settlement.

Implications:

This will allow parties to a tax dispute to have more time to settle the dispute out of tribunal or court.

Proposed effective date: 01 July 2023

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

Attempt to remove the Court's discretion to allow the taxpayer to introduce new grounds of appeal

Proposed amendment:

The Bill proposes to amend section 56 of the TPA by removing the Tribunal's, High Court's, or Court of Appeal's discretion to allow an appellant taxpayer to rely on new grounds of appeal.

Implications:

This proposed amendment will bind taxpayers to the grounds relied on at the Tribunal, High Court, or Court of Appeal at the onset.

The discretion should be maintained where there is sufficient reasons for new grounds to be introduced based on new evidence on the decision of the Court or Tribunal. The proposed amendment seeks to fetter this discretion binding the taxpayer to grounds relied on in the first instance of the dispute. This may limit the taxpayers right to a fair hearing.

Proposed effective date: 01 July 2023

Data management and reporting system to support the electronic tax invoice management system

Proposed amendment:

The Bill proposes to amend section the TPA by introducing section 59A which empowers the Commissioner to establish a data management and reporting system for the submission of electronic documents including detailed transactional relating to those documents. The electronic documents include electronic invoice returns of payments made by a person in the ordinary course of business where goods/services were exchanged or anticipated to be exchanged for consideration by a person not employed in the business.

Implications:

The proposed amendment will enable KRA to access transactional documents such as invoices amongst others on real time hence increasing accountability for taxes due from a taxpayer.

Proposed effective date:
01 September 2023

Increase in the tax shortfall penalty

Proposed amendment:

The Bill proposes to amend section 84(2)(a) of the TPA by increasing the tax shortfall penalty for a person who deliberately issues a statement that is false or from seventy-five (75%) of the tax shortfall to double the amount.

Implications:

The proposed amendment to increase the shortfall penalty will impose a harsh penalty, hence increasing compliance.

Proposed effective date:
01 September 2023

Penalty for failing to comply with electronic tax system

Proposed amendment:

The Bill proposes to amend the TPA by repealing section 86 and substituting it with a new section empowering the Commissioner to issue a notice in writing to a taxpayer who fails to comply with a tax law

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

requiring them to issue an electronic tax invoice. If reasons given are unsatisfactory, the amendment asserts that a taxpayer shall be liable to a penalty of one (1) million shillings or an amount equal to ten times the amount of the tax due, whichever is higher. Previously the penalty was one hundred thousand shillings (KES 100,000)

Implications:

The implication of the foregoing will be to increase taxpayers' compliance to use of electronic tax invoice where required by a tax law to avoid the penalty for non-compliance.

Proposed effective date: 01 September 2023

Concurrent civil and criminal proceedings

Proposed amendment:

The Bill proposes to amend the TPA by introducing section 108A which requires the fact that a dispute under a tax law in any ongoing criminal case and pending in any civil case not to be used a s a ground for stay, prohibition or delay of either the criminal or civil case.

Implications:

The proposed amendment is likely to abuse dispute resolution process and KRA should wait for one proceeding to be finalized before proceeding with another.

Proposed effective date: 01 July 2023

Part VII: Miscellaneous Fees and Levies: the give and take in importation levy liability

Reduced import declaration fee

Proposed Amendment:

The Bill proposes to reduce the import declaration fee on goods imported into the country for home use from 3.5% to 2.5%.

Implication:

The proposal to reduce the fee on the outlined goods will reduce the aggregate cost of importation of such goods thereby occasioning a reduction in the final cost of the goods.

Proposed effective date: 01 July 2023.

Introduction of export and investment promotion levy

Proposed amendment:

The Bill further proposes to introduce an export and investment promotion levy which is a levy to be paid on specified goods such as cement clinkers, specified iron bars and rods, sacks and bags, among others, which are imported into the country for home use. The obligation to pay this type of levy, which is set at 10% of the customs value, will be on the importer of the goods, and its purpose will be to boost manufacturing, increase exports, create jobs, save on foreign exchange, and promote investments.

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

Goods from the East African Community partner states that meet the EAC rules of origin will however be exempted from this levy.

Implication:

While the proposal is designed to result in the creation of a local positive impact in the long run, it will expose the importers of the goods that are subject to the export and investment promotion levy to greater tax liability. In addition , it may be counterproductive where the local market is not able to meet the demand for such goods thereby forcing consumers to still import at higher costs.

Proposed effective date: 01 September 2023.

Reduced railway development levy

Proposed amendment:

On the other hand, the Bill proposes to reduce counterpart railway development levy, from 2% to 1.5%. This levy affects all goods that are imported into the country for home use.

Implication:

The reduced railway development levy on the items imported for home use will reduce the importation cost of such goods.

Proposed effective date: 01 July 2023.

Part VIII: Miscellaneous

KRA's power to collect and enforce collection of taxes under the Betting Act

Proposed amendment:

The Bill proposes to amend the Betting, Gaming and Lotteries Act (Betting Act) by introducing section 69AA by requiring betting tax, lottery tax, and prize competition tax be collected in accordance with the provisions of the TPA.

Implications:

The proposed amendment will allow the Commissioner to apply the procedures, powers, and discretion explicated under the TPA when collecting betting tax, lottery tax, and prize competition tax. This will eliminate any ambiguities the Commissioner's role in collecting betting tax, lottery tax, and prize competition tax under the Betting Act.

Proposed effective date: 01 July 2023

Deductions into the National Housing Development Fund

Proposed amendment:

The Bill proposes to amend the Employment Act, 2007 by introducing section 31B requiring an employer and employee to contribute to the National Housing Development Fund ("***NDHF***") established under section 7 of the Housing Act.

The proposed employer's contribution is three percent (3%) of the employee's basic salary and the employee's contribution is three percent (3%) of the employee's monthly basic salary. Nonetheless the sum of the employer's and employee's contribution should not exceed five

KENYA

Finance Bill, 2023 : An analysis of the major tax proposals

CONTINUED

thousand shillings per month.

The Bill also proposes the contributions to either be used to finance the purchase of a home under the affordable housing scheme for employees who qualify for affordable housing.

Contributions from employees who are not eligible for affordable housing can have their contributions transferred to a retirement benefits or pension scheme, to any person registered and eligible for the NDHF, to a spouse or dependent children after seven years. Alternatively, the contributor can opt to receive their contributions after the seven years in cash. However, such cash received shall be subject to tax at the prevailing tax rates.

All contributions to the NDHF can earn a return from the investments made by this fund.

Implications:

The proposed amendment shall lead to increase in statutory deductions by an employer to an employee's wages. The proposed amendment however may be painful for small scale earners who do not have sufficient disposable income. The proposed contribution to NDHF should not be made mandatory for all employees.

Proposed effective date:
01 July 2023

Claimant's discretion to designate a person to receive a claim on assets

Proposed amendment:

The Bill proposes to amend section 28(5) of the Unclaimed Financial Assets Act by allowing an approved claim to be paid or delivered to any other person that a claimant may designate.

Implications:

The proposed amendment will allow some discretion to a claimant to designate any other person that they may wish repaid or delivered to an asset subject to a successful claim.

Proposed effective date:
01 July 2023

Removing the automatic expiry of statutory instruments

Proposed amendment:

The Bill proposes to amend section 20 of the Statutory Instruments Act 2013 by removing the automatic expiry of statutory instruments.

Implications:

The proposed amendment will allow flexibility to regulation- making authorities to review laws less frequently and also guard against some of the statutory instruments expiring without authorities noticing.

Effective date: 01 July 2023

Alex Kanyi, Brandon Otieno,
Billy Oloo and Joseph Macharia

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

Sammy Ndolo
Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com

Mark Linington
Director:
Tax & Exchange Control
T +27 (0)11 562 1667
E mark.linington@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

Esther Ooko
Associate Designate:
Tax & Exchange Control
T +27 (0) 11 562 1778
E esther.ooko@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.

PLEASE NOTE

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

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA