Tax & Exchange Control

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ALERT

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Finance Act, 2023 Analysis

PART 1: FORWARD

The Finance Act, 2023 (the Act) was assented to by the President on 26 June 2023. The Act comes after a lot of intense discussions, public participation, and criticism from not just taxpayers but also other relevant stakeholders such as business associations. Against this backdrop, is an economy caught up in various setbacks such as rising inflation, high debt obligation and a depreciating Kenya shilling.

When the Finance Bill, 2023 (the Bill) was published, we detailed a comprehensive analysis on the possible implicationit would have on taxpayers in our alert here. Some of the proposals from the Bill that generated considerable interest include the housing levy, the increase of Value Added Tax (VAT) on petroleum products and withholding tax on payments made to digital content creators.

Earlier this year, CDH's Tax & Exchange Control practice had participated in the process leading to the Act by forwarding proposals to the National Treasury. Among the many proposals that made it to the Bill and finally into the Act, the practice singled out the inclusion of the tax amnesty program which was a unique proposal from our Firm. The proposal which has finally been adopted in the Act, 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**. Further, we subsequently submitted comments to the Departmental Committee on Finance and National Planning of the National Assembly on the Bill and some of these were adopted in the Act

The Act comes at a time when the government is looking to finance an ambitious budget of Kes 3.68 trillion with a targeted tax revenue of Kes 2,5 trillion. In the previous financial year 2022/2023, the government had a budget of Kes 3.3 trillion and a tax revenue target of Kes 2,1 trillion. However as of May 2023, the government according to the Statement of Revenue & Exchequer Expenditure had only collected a tax revenue of Kes 1,7 trillion. This indicates that the government is struggling to raise tax revenue in a depressed economy. Only time will tell whether the Act will be the magic bullet to Kes 2.5 trillion tax revenue target. We examine the provisions of the Act below.

Finance Act, 2023 Analysis *...continued*

PART 2: INCOME TAX

Definition of "*winnings*"

Enacted Provision

The Act has defined the term "*winnings*". It defines it to mean the payout from a betting, gaming, lottery, prize competition, gambling or a similar transaction under the Betting, Lotteries and Gaming Act, excluding the amount staked or wagered in that transaction.

Implication

The definition seeks to promote clarity as to what constitutes winnings. It also highlights the fact that the amount staked will be excluded from the winnings. In the Bill, the amount staked had been included in the winnings. This would have negatively impacted on those who win prize competitions or engage in gambling or betting activities as tax would have applied not only on the winnings but also on the amount staked. It is thus a win for the betting industry and for punters. As an example, if a punter places a bet of Kes 100 and wins Kes 20, they will not suffer tax on the whole Kes 120 as was proposed in the Bill.

Effective date: 1 July 2023.

Definition and introduction of tax on "*digital content monetization*"

Enacted Provision

The Act introduces a definition to 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

Finance Act, 2023 Analysis*...continued*

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.

Implication

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. The withholding tax rate of 5% for residents is fair as it is similar to the rate charged on professional services.A withholding tax rate of 20% for non-residents for digital content monetization has also been introduced by the Act.

Effective date: 1 July 2023.

Mileage rate for employee traveling allowances

Enacted provision

The Act amends 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.

Implication

The implication of this provision 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.

Effective date: 1 July 2023.

New tax on repatriated income and new tax rate for branches

Enacted Provision

The Act amends the Income Tax Act by allowing for non-resident persons who carry on business in Kenya through a permanent establishment to be taxed on repatriated income for the year of income. The rate of this tax is set at 15%. 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.

The Act further amends the corporation tax rate for branches from 37.5% to 30%.

Implication

The government is likely to get additional revenue from this amendment to tax repatriated income. This income has not ordinarily been subjected to taxation. The new tax on repatriated income for branches is also consistent with the current provisions of the revised draft national tax policy. On the other note the reduction of the corporate income tax rate for branches from 37.5% to 30% is welcome as it aligns with the tax rate for resident companies which is also at 30%.

Effective date: 1 January 2024.

Increase in turnover tax

Enacted Provision

The Act amends section 12C of the Income Tax Act by changing the band of persons eligible to pay turnover tax to Kes 1,000,000 – Kes 25,000,000. An additional amendment by the Act is on turnover tax rate which has been increased from the rate of 1% to 3%.

Finance Act, 2023 Analysis*...continued*

Implication

While further changes were made to the band, the implication of this amendment is that many small businesses and medium enterprises are still 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.

Effective date: 1 July 2023.

Digital Asset Tax

Enacted Provision

The Act introduces 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 provision, 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 Act further stipulates that a non-resident who owns a platform through which the digital assets are exchanged must register under the simplified tax regime. Regarding the remission of the Digital Asset Tax, the Act provides that a person who is required to deduct the digital asset tax has to remit it to the Commissioner within five (5) working days 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.

For clarity purposes, the Act 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.

Finance Act, 2023 Analysis*...continued*

Implication

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. There is likely to be confusion in the implementation of this tax too since digital assets are currently not regulated by any law in Kenya.

Effective date:

The effective date of this amendment is 1 September 2023.

Requirement to use the electronic invoice management system

Enacted Provision

The Act amends 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.

Implication

This amendment emphasises the Kenya Revenue Authority's resolve to digitise tax systems and minimise 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.

Effective date: 1 January 2024.

Income of members clubs and trade associations

Enacted Provision

The Act amends 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.

Implication

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

Effective date: 1 July 2023.

Special tax rate for specified investments

Enacted Provision

The Act amends section 28A of the Income Tax Act by clarifying that a company may enjoy special tax rates under an agreement with the government if the company is incorporated for manufacture of human vaccines or other manufacturing activities including refining and whose capital investment is at lease Kes 10 billion.

Implication

The provision provides a route for the government to negotiate critical investments into the country by offering special tax rates to investors in the manufacturing sector provided the capital investment is Kes 10 billion.

Effective date: 1 July 2023.

Finance Act, 2023 Analysis*...continued*

Withholding tax on sales promotion, marketing and advertising services by non-residents

Enacted Provision

The Act seeks to introduce withholding tax on sales promotion, marketing and advertising services on payment to non-residents. The rate is 20%. Previously the Act was not clear on whether withholding tax applied to sales promotion, marketing and advertising services that were being provided by non-residents. Even though the rate of 20% was provided in the Third Schedule to the Income Tax Act, there was no charging section.

Implication

The amendment brought through the Act will clearly subject sales promotion, marketing and advertising services by non- residents at the rate of 20%.

Effective date: 1 July 2023.

Agent to collect rental income tax

Enacted Provision

The Act introduces a provision empowering the Kenya Revenue Authority (KRA) to appoint a rental income agent and require the agent to withhold a portion of the rental income and remit to KRA. Additionally, the withheld tax is to be remitted within five working days after the deduction to the Commissioner together with a return in writing of the tax deducted and any other information that the Commissioner may require.

Implication

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. In the Bill, it had been proposed for the tax to be remitted within twenty-four (24) hours after deduction in line with the authority's objective of collecting taxes as soon as possible. This was however changed to five (5) working days to address stakeholder concerns on the short time for compliance.

Effective date: 1 July 2023.

Income tax exemption for projects financed through 100% grant to the government

Enacted provision

The Act has introduced income tax exemption for income earned by a non-resident contractor, sub-contractor, consultant or employee involved in the implementation of a project financed through a 100% grant under an agreement between the government and the development partner to the extent provided in the agreement.

Implication

The new tax exemption for projects financed through grants comes at a time when the government is looking for grants to bridge the deficit that it has to finance its budget. Non-resident contractors and employees who are involved in such projects will be exempt from income tax in return.

Effective date: 1 July 2023.

Finance Act, 2023 Analysis...*continued*

Income tax exemption for Special Economic Zones (SEZ)

Enacted provision

The Act has exempted from income tax gains made on transfer of property between a SEZ enterprise, developer and operator. The Act further exempts from income tax the royalties, interest, management fees, professional fees, training fees, consultancy fee, agency or contractual fees paid by a SEZ developer, operator or enterprise in the first 10 years of its establishment to a non-resident person.

Implication

The new income tax exemptions for SEZ enterprises, developers or operators will incentivise investors to trade or acquire businesses in the SEZ and trigger growth in the SEZs.

Effective date: 1 July 2023.

Reduced monthly rental income tax rate

Enacted Provision

The Act amends 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%.

Implication

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

Effective date: 1 July 2023.

Exemption from income tax for manufacture of human vaccines and others

Enacted Provision

The Act amends the Income Tax Act by introducing the following new provisions in the First Schedule as part of additional income to be exempt from tax:

- royalties paid to a non-resident person by a company undertaking the manufacture of human vaccines.
- Interest paid to a resident person or non-resident person by a company undertaking the manufacture of human vaccines.
- Investment income from a post-retirement medical fund, whether or not the fund is part of a retirement benefits scheme.
- Payment in the form of funds transfer from a post-retirement medical fund to a medical insurance cover provider.

Implication

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.

Effective date:1 July 2023.

Revised investment allowance

Enacted Provision

The Act amends the Income Tax Act by introducing to the Second Schedule two new items on which if a person incurs capital expenditure, then an investment allowance may be deducted in computing gains or profits of the person at the rates specified in the Schedule. The items include an industrial building and dock.

Finance Act, 2023 Analysis*...continued*

The Act further extends the definition of civil works to include earthworks for telecommunication equipment and constructions works undertaken in connection with the installation and maintenance of telecommunication equipment and related structures.

Implication

The implication of this provision will be positive to people who incur expenditure on both docks and industrial buildings since the allowances will be deducted when computing gains or profits at the corresponding rates. Further the extended definition of civil works to include earthwork for telecommunication, installation , equipment and related structures is a valuable addition to owners of commercial buildings or building used for manufacture as they can claim an investment allowance for such telecommunication civil works at the prevailing rates.

Effective date:1 January 2024.

Post retirement medical fund relief

Enacted Provision

The Act amends the Income Tax Act by introducing a new form of relief in the Third Schedule 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.

Implication

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 society who have retired.

Effective date: 1 January 2024.

Increased Pay as You Earn (PAYE)

Enacted Provision

The Act introduces an amendment to the Third Schedule of the Income Tax Act of 32.5% PAYE for incomes between Kes 500,000 – Kes 800,000 and 35% for incomes above Kes 800,000 per month.

Implication

The imposition of these new rates of PAYE will undoubtedly impact negatively on those who earn salaries above Kes 500,000 per month by reducing their net income.

Effective date: 1 July 2023.

Reduced Corporation Tax for companies undertaking manufacture of human vaccines

Enacted Provision

The Act introduces 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.

Implication

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

Effective date: 1 January 2024.

Finance Act, 2023 Analysis*...continued*

New conditions for reduced corporation tax rate for motor vehicle assemblers

Enacted provision

The Income Tax Act currently provides for a reduced corporation tax rate of 15% for motor vehicle assemblers in their first 5 years of their operations. The reduced rate can be extended for a further term of 5 years where the assembler meets local content requirements. Local content is now defined through the Act to mean parts designed and manufactured in Kenya by an original equipment manufacturer operating in Kenya.

Implication

The implication of the definition of local content is meant to encourage assemblers to source some of their requirements from local companies and in turn promote the growth of such companies.

Resident withholding tax on marketing, advertising and sales promotion

Enacted Provision

The Act introduces 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.

Implication

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

Effective date: 1 July 2023.

Requirement to account for withholding tax within five working days

Enacted provision

The Act amends the Income Tax Act to reduce the time for accounting from withholding tax from 20 days after the month of the transaction to five (5) working days after the transaction.

Implication

This will enable the government to collect withholding tax as quickly as possible and improve the government's cashflows. The Bill had proposed remission of this tax within 24 hours, but the Committee agreed with stakeholders during the public consultation exercise that such a timeline would be too short and would impose unnecessary administrative burdens on taxpayers.

Effective date:1 July 2023.

Increase in advance tax

Enacted Provision

The Act 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 2500 per ton of load capacity per year or Kes 5000 per year; 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.

Implication

The provision is a welcome expansion of the tax revenue that the government can collect as advance tax.

Effective date: 1 January 2024.

Finance Act, 2023 Analysis*...continued*

Capital gains tax on indirect transfers

Enacted Provision

The Act introduces an amendment to the Eighth 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 Act include:

- 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
- gains derived from the alienation of shares or comparable interests, including interests in a partnership or trust, if, at any time for 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
- 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 Act provides that a person alienating the shares shall notify the Commissioner in writing where there is a change of at least 20% in the underlying ownership of the property.

Implication

The implication of this provision is to subject transactions to capital gains tax in parent companies outside Kenya whose Kenyan subsidiaries own immovable property in Kenya. The taxman will also be waiting to collect capital gains tax after being notified of a 20% change of ownership.

Effective date: 1 July 2023.

Capital gains on subsequent transfer of property not initially subject to capital gains tax

Enacted Provision

The Act seeks to amend the Income Tax Act by seeking to define the adjusted cost of transfer to mean the original cost of transfer if one transfers the property initially exempt from capital gains tax to another person within a period of 5 years of acquiring the property.

Implication

The new provision is likely to result to increased capital gains tax revenue for the government in situations such as inheritance where the beneficiaries dispose of the property in less than 5 years. In such a case, the government will seek to limit the cost of acquiring the property to the original cost (likely to be minimal) therefore increasing the gain from the transfer and the resultant capital gains tax.

Finance Act, 2023 Analysis*...continued*

Effective date: 1 July 2023

Due date for capital gains tax

Enacted Provision

The Act amend the Income Tax Act by deleting the current provision of Paragraph 11A of the Eighth Schedule, which 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.

Implication

The amended due date for the tax is in harmony with other changes in the Act that show the government's determination to collect tax as soon as possible.

Effective date: 1 July 2023.

Notification on change of ownership for extractive industries

Enacted Provision

The Act amends in the Income Tax Act in the Ninth Schedule by increasing 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%.

Implication

The Act reduces the threshold for reporting a change in ownership in the extractive sector therefore reducing the administrative costs of such notifications where the change of ownership is not significant..

Effective date: 1 July 2023.

Finance Act, 2023 Analysis *...continued*

PART 3: VALUE ADDED TAX

VAT exemption for liquefied petroleum (LPG)

Enacted Provision

The Act deletes the provision that initially subjected LPG including propane to a VAT rate of 8%. The Act provides for a zero-rate VAT instead.

Implication

The zero-rating of LPG will have the positive impact of reducing its cost and therefore making it more affordable for Kenyans who rely on it as an energy source. Since LPG is also environmentally friendly, this is a positive move in the fight against adverse climate change effects.

Effective date: 1 July 2023.

16% VAT on petroleum products

Enacted Provision

The Act deletes the provision that subjects goods such as petroleum products to 8% VAT.

Implication

The removal of the 8% VAT rate on such goods as petroleum oils and illuminating kerosene will consequently subject such goods to the higher standard VAT rate of 16%. This will therefore increase the cost of such products. This will subsequently impact the cost of living since petroleum products are instrumental not just in manufacturing but also in the transportation sector.

Effective date: 1 July 2023.

VAT on compensation for loss of taxable supplies

Enacted Provisions

The Act amends the VAT Act to subject compensation for loss of taxable supplies to VAT. This applies where the owner of the taxable supplies had already deducted the input tax for the taxable supply.

Implication

The provision is meant to ensure that a taxpayer does not benefit from the VAT deduction twice i.e., on purchase and on being compensated. However, subjecting the compensation to VAT where the compensation did not have VAT in the first place appears to be misplaced. This may require taxpayers to renegotiate their insurance contracts to ensure that they are also reimbursed for VAT.

Effective date: 1 July 2023.

Finance Act, 2023 Analysis*...continued*

Unconditional registration requirement for imported digital services suppliers

Enacted Provision

Initially, persons supplying imported digital services over the internet or an electronic network or through a digital marketplace with a turnover below the threshold of five million shillings were not required to register for VAT. The Act 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.

Effective date: 1 July 2023.

VAT refund for bad debts

Enacted provision

A registered person that has made a supply and accounted for and paid VAT on that supply but has not received payment can now apply for a refund of the VAT from KRA within a period of 3 years or earlier if the debtor has been placed under statutory management through the appointment of an administrator receiver or liquidator. The registered person in this case has to apply for a refund within 10 years from the date of the supply. The refund is subject to audit just like other applications for refunds. Upon approval of the refund, the registered person can utilise the amounts as a credit against future VAT liabilities.

Implication

VAT is due the earlier of receiving payment or the supply of service or raising an invoice. There are instances where a registered person could pay the VAT before receiving the actual payment from the debtor. The new provision on refunds of VAT for bad debts is a welcome move because it provides leeway for the supplier to claim the VAT where the supplier has accounted for the VAT but not received payment.

Effective date: 1 July 2023.

Green VAT initiatives

Enacted provisions

The Act amends the VAT Act by classifying the following supplies as zero-rated in the Second Schedule:

- Liquified Petroleum Gas;
- the supply of motorcycles of tariff heading 8711.60.00 (i.e., electric motorcycles)
- the supply of electric bicycles;
- the supply of solar and lithium-ion batteries;
- the supply of electric buses of tariff heading 87.02; and
- bioethanol vapour (BEV) stoves classified under HS Code 7321.12.00 (cooking appliances and plate warmers for liquid fuel).

Finance Act, 2023 Analysis*...continued*

Implication

The zero-rating of the above supplies is likely to have a positive impact on the climate as the incentives are meant to encourage use of LPG and bioethanol vapour as opposed to other harmful sources of energy for cooking. The incentives are also meant to encourage adoption of electric cars, buses, bicycles and motorcycles and shun vehicles that use fuel products. This move will result in lower carbon emissions.

Effective date: 1 July 2023.

Zero rate VAT on exported services

Enacted Provision

Finally, the Act has amended the description of exported services that are zero rated for VAT from "*exportation of taxable services in respect of business process outsourcing*" to "*exportation of taxable services*".

Implication

Previously the term business process outsourcing was not defined in the VAT Act. As a result, it was not clear which services could be categorised as exported services therefore zero rated for VAT purposes. The deletion of "*business process outsourcing*" means that going forward all exported taxable services will be zero-rated.

Finance Act, 2023 Analysis*...continued*

PART 4: EXCISE DUTY

Halting annual inflation adjustments to enhance predictability

Enacted Provision

The Act repeals section 10 of the Excise Duty Act to withdraw the Commissioner's discretion to make annual inflation adjustments for excise duty.

Implication

This reflects the earlier indication by the government that it would make excise duty more predictable for manufacturers and consumers. The move is consistent with the spirit of the revised draft national tax policy. Consequently, the predictability will create an opportunity for firms to make decisions regarding long-term investments.

Effective date:1 July 2023.

Stricter regulation of betting and gaming sector

Enacted Provisions

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 Commissioner is further given the discretion to subject any other sector to the same requirement, by notice in the Gazette. The Act also introduces an increased excise duty on betting, gaming, prize competition, and lottery from 7.5% to 12.5%.

In addition, the Act introduces 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%.

Implication

The stricter regulations on betting, gaming, and their advertisement together with that of alcoholic beverages will subject businesses involved in such services to heavier tax obligations which will likely have the ripple effect of discouraging such services. While the intention may be to discourage the harmful effects of betting and alcohol consumption, it will be interesting to see whether this is achieved. Further, the discretion given to the Commissioner to subject other sectors to the 24-hour requirement is welcome, however should be implemented progressively.

Effective date: 1 July 2023.

Revised telecommunication and money transfer excise duty rates

Enacted provisions and Implication

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 have been reduced by 5% by the Act from the initial 20% to 15% which is a relief to those respective sectors.

However, excise duty on fees charged for money transfer by cellular phone service providers has been increased from the initial 12% to 15% and the definition of such services will be enlarged to include money transfer services offered by payment service providers (PSPs) licensed under the National Payment System Act, 2011. The increase in excise duty on money transfer services by telcos and PSPs will result increase in the cost of such transfers as the cost will be borne by the affected consumers.

Effective date: 1 July 2023.

Finance Act, 2023 Analysis...*continued*

Revising excise duty rates and obligations

Enacted Provision

The Act introduces Excise Duty on the following new items:

	Item	Rate
1	Imported fish	10%
2	Powdered juice	Kes 25 per kg
3	Imported sugar excluding imported sugar purchased by a registered pharmaceutical manufacturer	Kes 5 per kg
4	Imported cement	10% of the value or Kes 1.50 per kg, whichever is higher.
5	Imported furniture of tariff heading 9403 excluding furniture originating from East African Community Partner States that meet the East African Community Rules of Origin	30%
6	Imported cellular phones (separately the Act has exempted disassembled or unassembled kits for local assembly or manufacture of mobile phones from Excise Duty)	10%
7	Imported paints, varnishes and lacquers of heading 3208, 3209 and 3210	15%
8	Imported non-virgin test liner of heading 4805.24.00	25%
9	Imported cartons, boxes and cases of corrugated paper or paper board and imported folding cartons, boxes and case of non-corrugated paper or paper board and imported skillsets, free-hinge lid packets of tariff heading 4819.10.00, 4819.20.10 and 4819.20.90	25%
i.	Imported plastic of tariff heading 3919.90.90, 3920.10.90, 3920.43.90, 3962.90 and 3921.19.90	25%
ii.	Imported paper or paper board, labels of all kinds whether or not printed of tariff heading 4821.10.00 and 4821.90.00	25%

Implication

The main objective of introducing Excise Duty on the items listed above is to protect the businesses of local producers or manufacturers. A careful analysis should however be done of the capacity of locals to meet the demand of the imported products before subjecting the new items to Excise Duty.

Effective date: 1 July 2023.

Finance Act, 2023 Analysis*...continued*

Penalties for excise stamp offences

Enacted Provision

The Act introduces explicit offences in relation to excise stamps. Consequently, acts such as knowingly defacing or printing over an excise stamp affixed on any excisable goods or package, knowingly being in possession of non-exempted excisable goods without excise stamps, and knowingly trading in unauthorised 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 introduction of these offences will be instrumental in holding individuals liable for explicit offences and the consequent penalties. This will enhance compliance with the excise stamp obligations.

Effective date: 1 July 2023.

Finance Act, 2023 Analysis*...continued*

PART 6: TAX PROCEDURES

Enforcing international tax agreements on mutual administrative assistance

Enacted Provision

The Act amends section 6A of the Tax Procedures Act (TPA) by stipulating that multilateral agreements or treaties 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 Act amends 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 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 country.

Implication

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).

Effective date:1 July 2023

Record-keeping requirement for trustees

Enacted Provision

The Act amends 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.

Implication

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 whether the treaty is administered by a trustee who is resident in Kenya.

Effective date: 1 July 2023.

Electronic tax invoices

Enacted Provision

The Act repeals section 86 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.

Implication

This provision will enable the Government to digitise tax invoice and record systems hence minimising leakage attributed to manual invoicing and record keeping. It will also enable the Government to have real time information on the invoices issued through the system.

Effective date: 1 September 2023.

Finance Act, 2023 Analysis*...continued*

Taking away KRA's power to abandon tax

Enacted Provision

The Act amends the TPA by deleting section 37 in its entirety, The provision enabled 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.

Implication

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.

Effective date: 1 July 2023.

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

Enacted Provision

The Act amends 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 31 December 2022.

Implication

This provision will help to clean up the ledgers for taxpayers 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.

Effective date: 01 September 2023.

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

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

Implication

This provision will encourage taxpayers to engage KRA to request for waiver of penalties and interest for tax liabilities that crystallised before 31 December 2022 provided the taxpayers pay the principal tax by June 2024. This follows a successful voluntary tax disclosure program where KRA collected billions of shillings from taxpayers seeking to set their tax records straight and avoid penalties.

Effective date: 1 September 2023.

Finance Act, 2023 Analysis*...continued*

Expanded grounds for issuing agency notices

Enacted Provision

The Act amends the TPA by deleting section 42(14) and substituting it 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 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 KRA had either confirmed its assessment through an objection decision and the taxpayer had defaulted to appeal to the Tribunal.

Implication

KRA will not have to wait for issuance of an objection decision before giving an agency notice to the third-party as it can proceed to issue such a notice provided that the conditions in the enacted provision are met.

Effective date: 01 July 2023.

Shorter time for remitting withholding VAT

Enacted Provision

The Act amends section 42A of the TPA by reducing the time provided for remitting Withholding VAT to the Commissioner to five (5) working 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.

Implication

This provision has significantly reduced the timeline for remitting Withholding VAT which may increase prompt compliance by appointed Withholding VAT agents.

Effective date: 01 July 2023.

Appointment of rental income tax agents

Enacted Provision

The Act amends 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.

Implication

This provision will enable Kenya Revenue Authority to collect rental income tax more effectively through the use of rental income tax agents.

Effective date: 01 July 2023.

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

Enacted Provision

The Act amends section 47 of the TPA by requiring a taxpayer who has overpaid taxes to apply to the Commissioner to offset the overpaid tax against the taxpayers outstanding debt and future tax liabilities. Initially, overpaid tax could only be offset against future tax liabilities.

It also reduces 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 which has to be done within 120 days (4 months). This therefore reduces the total time for a refund from 2 years to 10 months.

Finance Act, 2023 Analysis *...continued*

Implication

This provision is a welcome move to taxpayers as it will enable the KRA to expedite the refund of the overpaid taxes a maximum period of 10 months.

Effective date: 01 July 2023.

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

Enacted Provision

The Act amends 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.

Implication

This provision will fast track dispute resolution settlement for objections by empowering the Commissioner to render his decision in a case where the objecting taxpayer does not validly lodge an objection and fails to provide the required information after receiving a notice from KRA.

Effective date: 01 July 2023.

Increased time for settlement of disputes out of Court or Tribunal

Enacted Provision

The Act amends 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.

Implication

This is a welcome move as it will allow parties to a tax dispute to have more time to settle the dispute out of tribunal or court.

Effective date: 01 July 2023.

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

Enacted Provision

The Act amends 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.

Implication

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

Effective date: 01 September 2023.

Penalty for failing to comply with electronic tax system

Enacted Provision

The Act amends 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 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 two times the tax due.

Implication

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.

Effective date: 01 September 2023.

Finance Act, 2023 Analysis*...continued*

PART 7: MISCELLANEOUS FEES AND LEVIES: THE GIVE AND TAKE IN IMPORTATION LEVY LIABILITY

Reduced import declaration fee

Enacted Provision

The Act reduces the import declaration fee on goods imported into the country for home use from 3.5% to 2.5%.

Implication

This provision is a welcome change as it will help reduce the fee on the outlined goods and will reduce the aggregate cost of importation of such goods thereby occasioning a reduction in the final cost of the goods.

Effective date: 01 July 2023.

Introduction of export and investment promotion levy

Enacted Provision

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

The Act introduces a Third Schedule to the Miscellaneous Fees and Levies Act, 2016 which specifies the rates of the export and investment promotion levy depending on different goods. For goods such as cement clinkers, semi-finished products of iron, bars and rods of iron or non-alloy steel, the rate is 17.5%.

For goods such as uncoated kraft paper and paperboard, kraft liner, sack kraft paper unbleached, sacks and bags, the rate is at 10% of the customs value.

While this amendment 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.

Effective date: 01 September 2023.

Reduced railway development levy

Enacted Provision

The Act reduces the 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.

Effective date: 01 July 2023.

Further green initiatives for liquified petroleum gas and bioethanol vapour

Enacted provision

The Act exempts liquified petroleum gas (LPG) and bioethanol vapour from railway development levy (RDL) and import declaration fee (IDF)

Implication

The above exemptions will encourage the use of LPG and bioethanol vapour as alternatives for energy therefore enhancing the government's green agenda.

Finance Act, 2023 Analysis*...continued*

PART 8: MISCELLANEOUS

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

Enacted Provision

The Act amends 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.

Implication

This provision will allow the Commissioner to apply the procedures, powers, and discretion under the TPA when collecting betting tax, lottery tax, and prize competition tax. This will eliminate ambiguity the Commissioner's role in collecting betting tax, lottery tax, and prize competition tax under the Betting Act.

Effective date: 01 July 2023.

Introduction of the Affordable Housing Levy

Enacted Provision

The Act amends the Employment Act, 2007 by introducing section 31B requiring an employer and employee to pay a monthly levy known as the Affordable Housing Levy. The purpose of this shall be to provide funds for the development of affordable housing and associated social and physical infrastructure as well as the provision of affordable home financing to Kenyans.

The Act states that the levy shall be payable by employers at the rate of 1.5% of the employee's monthly gross salary and by employees at the rate of 1.5% of the employee's gross monthly salary.

The obligations of the employer in respect to this levy as provided by the Act includes deducting the employee's monthly payment in respect to the levy and accounting for the same not late than nine (9) working days after the end of the month in which the payments are due.

Implication

This provision shall lead to increase in statutory deductions by an employer to an employee's wages. It will also be painful for salaried earners because their disposable income will be reduced.

Effective date: 01 July 2023.

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

Enacted Provision

The Act amends 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.

Implication

This provision 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.

Effective date: 01 July 2023.

Removing the automatic expiry of statutory instruments

Enacted Provision

The Act amends section 21 of the Statutory Instruments Act, 2013 which provides for the automatic expiry of statutory instruments.

Implication

This provision 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.

Finance Act, 2023 Analysis*...continued*

Reduced import duty on importing goods from Export Processing Zones (EPZ) and Special Economic Zones (SEZ).

Enacted Provision

The Act provides that goods whose content originates from the EPZ or SEZ customs territory will be exempt from import duty when the goods are imported by a person outside the customs territory. The Act further provides that for goods whose content partially originates from the EPZ or SEZ territory the importer will pay import duty only on the non-originating component.

Implication

The above provision will seek to promote trade between businesses that are set up within a SEZ or EPZ customs territory and eventually lead to lower costs of importing goods from the SEZ or EPZ.

Effective date: 1 July 2023.

CDH Kenya's Tax & Exchange Control Practice

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

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