

# Tax & Exchange Control

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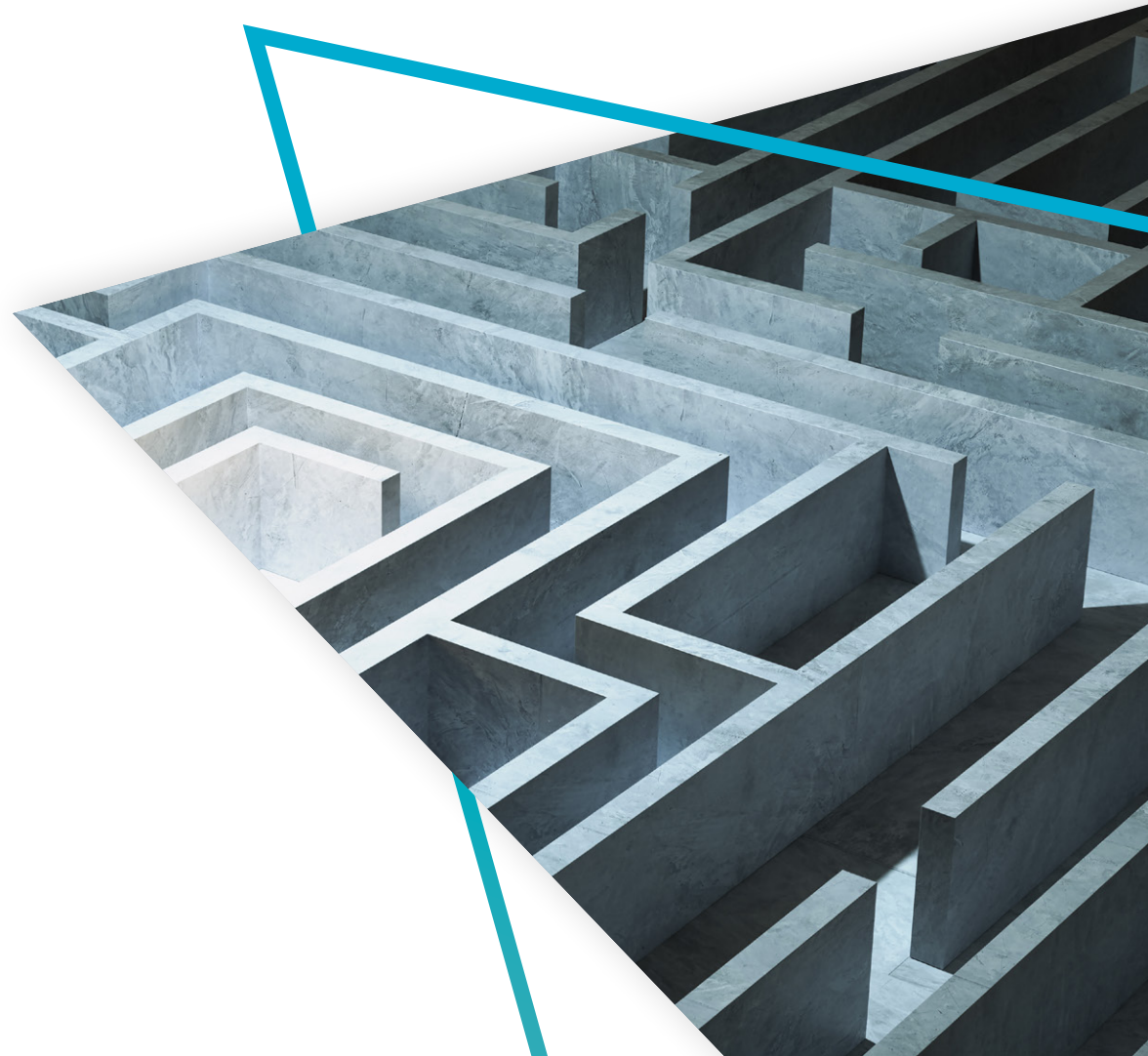
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**TAX & EXCHANGE CONTROL  
ALERT**

## Tax by agreement? Demystifying the myth of contractually transferring tax liability

Picture this: You are contracted for a major infrastructure project involving a National Government facility. The Government issues an undertaking, in writing, that it will bear the tax obligation for certain elements of the project. You factor this into your budget proposal and proceed to import materials and go ahead with the project with the legitimate expectation that the Government will handle any payable taxes. Everything seems on track until completion, when a tax demand is issued to you and, not to National Treasury, which had promised to settle the taxes.

This is precisely the situation faced by Cale Infrastructure Construction Company Limited during the Nairobi Expressway construction project, despite having a clear undertaking from National Treasury that it would settle some taxes tied to the imported materials for the project.

In this alert, we examine whether a taxpayer in Kenya can transfer or assign their tax obligation to another party.

### Background

On 31 July 2025, in the case of *Cale Infrastructure Construction Company Limited v Commissioner, Customs and Border Control and Another* [2025] KEHC 11263 (KLR) the High Court of Kenya ruled that the Kenya Revenue Authority (KRA) was entitled to recover the tax due from

Cale Infrastructure Construction Company Limited (taxpayer) despite the fact that National Treasury had undertaken to pay various taxes, including value-added tax, import duty and excise duty on all materials, with the exception of fuel and lubricants, imported or purchased locally for the purpose of the construction of the Nairobi Expressway.

### Brief facts and analysis of the case

The taxpayer was subcontracted to undertake pre-construction works for the Nairobi Expressway. Under the Nairobi Expressway Project Agreement, National Treasury agreed to take care of some of the tax obligations on behalf of the taxpayer. However, the KRA carried out an audit of the taxpayer's operations and issued a demand of taxes of KES 5,698,971,927 on materials consumed in the project, notwithstanding the Government's express undertaking to settle that liability.

The High Court agreed with the Tax Appeals Tribunal that the legal obligation to pay the taxes rested with the taxpayer. Additionally, since the KRA was not a party to the agreement between the taxpayer and National Treasury, it was under no obligation to enforce the undertaking or wait for National Treasury to fulfil its promise.

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### Commentary

This judgment underscores the risk that arises when government contractual assurances meet the hard limits of tax laws, which require the KRA to recover taxes from the legally liable party. It raises the critical question of whether the private sector can safely take at face value government promises on tax treatment and concessions. Should the KRA, as an agent of National Treasury, be bound by commitments made by National Treasury?

In this regard, a proper understanding of tax obligations is critical. Tax obligation in Kenya is a legal obligation to a taxpayer. As such, it is important to understand that contracts that shift the tax burden to a different party do not transfer the legal obligation of the party liable to pay the tax due. The KRA shall hold the taxpayer liable in spite of evidence of a third party's undertaking or agreement to bear the tax obligation.

The Tax Procedures Act allows the KRA Commissioner to transfer tax liabilities in limited circumstances. For instance, where a business or its assets are transferred to a related party (the transferee). However, this does not prevent the KRA from recovering the tax from the original taxpayer (the transferor).

This case is a cautionary tale: even with a written government undertaking, the KRA will pursue the taxpayer with whom the legal obligation lies for enforcement. The question begs, how should parties to a contract deal with the intention to transfer tax liabilities?

While the law still holds the taxpayer responsible, an indemnity or other contractual protections that ensure reimbursement in the contract can help shift the financial burden. In practice, this means the taxpayer may have to pay the KRA first, then recover the amount from the other party under the contract.

On a separate note, it is important that we have the 'whole of Government approach' to dealing with tax exemptions for infrastructure projects. The KRA Act aptly provides that the KRA shall under the general supervision of the Cabinet Secretary, National Treasury, be an agency of the Government for the collection and receipt of all revenue. The principal, National Treasury, and the agent, the KRA, should work together to provide the certainty and confidence that is required by contractors and investors in infrastructure projects.

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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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