LEGAL ALERT

Tax Implications of the Finance Bill, 2023

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The Finance Bill, 2023 ("the **Bill**") was published by the National Assembly on 4th May 2023 detailing the Government of Kenya's proposed tax measures for the 2023-2024 financial year.

The Bill introduces a number of Income Tax, Value Added Tax ("**VAT**") and Excise Duty amendments as well as changes to the administration of taxes in Kenya. We summarise in this Alert the key changes proposed under the Bill.

The Bill is set to undergo public participation and following the conclusion of the law-making process, the proposals in the Bill are due to come into force on 1st July 2023 save for certain amendments earmarked for implementation on 1st September 2023 and 1st January 2024.

1. Income Tax

The Bill proposes to amend the Income Tax Act (Cap. 470) Laws of Kenya ("**ITA**") as follows:

a. Taxing the Digital Economy

i. Digital Asset Tax

With effect from 1st September 2023, Kenya proposes to introduce a digital asset tax applicable on income from the transfer or exchange of digital assets, defined as anything of value that is not tangible such as cryptocurrencies, Non-Fungible Tokens (NFTs), token codes, and any digital representation of value that can be exchanged, stored or transferred electronically.

The proposed digital asset tax rate is 3% of the transfer or exchange value of the digital asset. It is required to be deducted from the recipient of the income by the owner of any platform facilitating the exchange of digital assets and remitted to the Kenya Revenue Authority ("the **KRA**") within 24 hours of the deduction.

As a result, non-resident owners of platforms will be required to register for tax in Kenya. A simplified registration regime is available under the existing Income Tax (Digital Services Tax) Regulation which, in our view, is proposed to be expanded to non-resident platform owners who are subject to the digital asset tax.

This proposal represents an opportunity for the KRA to expand the tax net and bring to tax more players in the digital economy. It is however necessary for the proposed digital asset tax paid by resident persons to be expressly recognised as a tax credit in computing and paying their income tax liability under the ITA given that income earned from digital assets is likely to be subject to annual income tax at 30% (for companies) or at the graduated scale of between 10% and 35% (for individuals).

ii. Taxing Creatives: Withholding Tax on Digital Content

With effect from 1st July 2023, the Bill proposes to subject withholding tax of 15% to payments made to digital content creators who are resident in Kenya.

The amount deducted should be remitted to the KRA within 24 hours of deducting the withholding tax and making payment for the monetised digital content.

What constitutes digital content monetisation under the Bill is any entertainment, social, literal, artistic, educational, or any other material electronically offered for payment through any medium or channel. This includes advertisements, social media promotions, brand endorsements, marketing, subscriptions for online content, licensing digital content, and crowdfunding for content creators.

This proposal is aimed at widening the tax net to include income earned by Kenya's growing digital creative economy. Nonetheless, the proposed withholding tax on monetised digital content is likely to introduce a punitive compliance burden on ordinary Kenyans when making numerous low-value payments or subscriptions for the consumption of digital content from local content creators. In the circumstances, it would be more appropriate to introduce a minimum threshold for payments in order to trigger the withholding tax on monetised digital content. We propose the adoption of the existing threshold for professional, management and training fees where withholding tax is only applicable on payments exceeding KES 24,000 in a month.

b. Revised Tax Rates: Foreign Companies, Resident Individuals, Rental Income Tax, and Turnover Tax

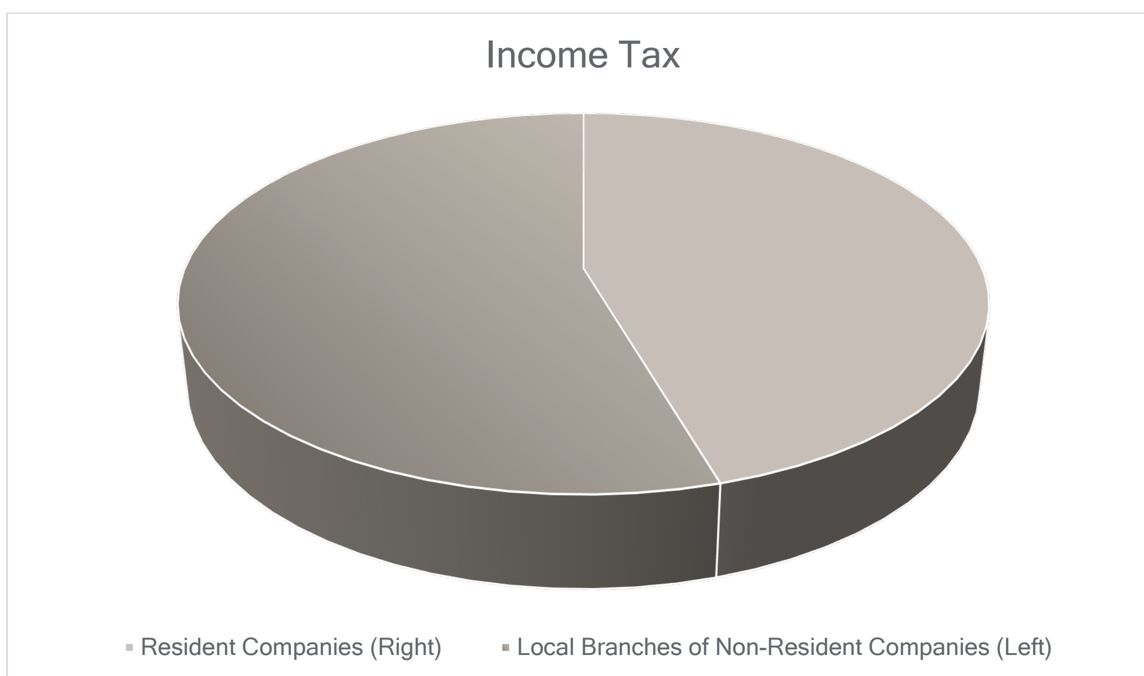
i. New Tax Regime for Foreign Companies

Effective 1st January 2024, local branches (and other permanent establishments) of non-resident companies shall be subject to income tax at a reduced rate of 30% of the total taxable income attributable to them. This is a reduction from the current rate of 37.5% of total taxable income.

Hand in hand with the reduction in the tax rate, a new tax on repatriated income shall apply on income repatriated by branches or other permanent establishments to its non-resident head office. Repatriated income shall be computed on the diminution in the value of the branch's net asset value in the relevant year of income. That is, repatriated income equals the net assets at the beginning of the year less those at the end of the year and adjusted by the profit before tax for the year.

The reduction in the tax rate for foreign companies alongside the introduction of a tax on repatriated income is intended to level the playing-field between the taxation of foreign and local companies in Kenya.

Resident companies are taxed at 25% of their annual taxable income with an additional withholding tax on dividends of between 5% and 15% applicable on profits remitted to shareholders. The new regime for foreign companies will equally apply an income tax of 30% as well as tax on repatriated income on the share of profits to its foreign head office.



However, the Bill appears to have inadvertently failed to specify the rate of tax applicable on the repatriated income. We expect that the rate should be set at between 5% and 15% to promote equitable treatment of non-resident companies.

Additionally, we note that the method for calculating repatriated income, that is, the diminution in asset value of the branch or other permanent establishment may result in unintended over-taxation should a branch suffer a diminution in value of net assets unconnected with a repatriation of income.

ii. New Tax Rate and Thresholds for Turnover Tax

From 1st July 2023, the Bill proposes to increase the turnover tax rate from 1% to 3% of gross receipts. In addition, the threshold for turnover tax has been lowered. Turnover tax currently

applies to businesses whose turnover is between KES 1 million and KES 50 million. This has been reduced to between KES 500,000 to KES 15 million.

As such, businesses with turnover in excess of 15 million must be subject to the corporate income tax rate of 30% on taxable profits whereas businesses with a turnover of between KES 500,000 to KES 15 million may elect to be subject to turnover tax, which is a final tax on income, at a flat rate of 3% on turnover.

iii. Increased Income Tax Rate for Resident Individuals

Effective 1st July 2023, the Bill proposes to increase the tax rates applicable to employment and business income earned by resident individuals. A new tax band is to be introduced to the graduated scale for individual income tax which subjects all income earned above KES 6 million per annum (KES 500,000 per month) to tax at the rate of 35%.

The proposed effective date of 1st July 2023, proposing to change the tax rate in the middle of the 2023 year of income, is likely to result in confusion and administrative challenges in computing and reporting income for 2023. This proposal would be better served to come into force on 1st January 2024.

iv. Reduction in The Tax Rate for Residential Rental Income Tax

From 1st January 2024, the Bill proposes to reduce the residential rental income tax rate from 10% to 7.5% on the gross amount payable.

Additionally, the KRA now proposes to be permitted to appoint agents to deduct and remit tax from residential rental income. This will enhance compliance by landlords as KRA has been facing challenges in collecting residential rental income.

c. Thin Capitalisation and Foreign Exchange Losses

The Finance Act 2022 introduced new thin capitalisation rules under which entities which have a total gross interest paid or payable to related persons and third parties, whether resident or non-resident, in excess of thirty per cent (30%) of earnings before interest, taxes, depreciation and amortization ("**EBITDA**") in any financial year are deemed to be thinly capitalised. Such thinly capitalised entities are subjected to a limitation on the amount of interest they can deduct in computing their annual income tax – only 30% of their interest expense can be deducted in computing tax.

With effect from 1st July 2023, the Bill proposes to amend the thin capitalisation provisions to the effect that entities will be considered thinly capitalised only when the gross interest paid to non-residents is in excess of 30% of EBITDA. The interest restriction will therefore not apply to interest on loans from local banks and resident companies. This will relieve taxpayers whose operations are largely funded through debt from local banks and were faced with disallowing a large proportion of their interest expenses.

Additionally, thinly capitalised entities will be limited in the deduction of realised foreign exchange losses in computing income tax. Previously, an entity would defer such losses until it was no longer thinly capitalised. However, it is now proposed that such realised foreign exchange losses shall only be deferred for not more than 3 years from the date of realisation. Should the entity continue to be thinly capitalised at the end of 3 years, such losses will be lost and cannot be deducted in computing income tax.

d. Changes to Withholding Tax

i. Deductibility of Expenses Subject to Withholding Tax

As of 1st July 2023, the Bill proposes to disallow refunds or deductions against income arising from withholding taxes paid on management, professional fees, royalties, interest and rent, made to a non-resident which have been the subject of an audit adjustment following a KRA audit.

iii. New Withholding Taxes

Effective 1st July 2023 the Bill proposes to introduce withholding tax on payments for sales promotion, marketing, advertising services at the rate of 5% and digital content monetisation at the rate of 15%.

iii. Introduction of 24-hour Timeline for Remitting Withholding Tax

Effective 1st July 2023 the Bill proposes to impose an obligation on taxpayers who deduct withholding tax to remit the withholding tax to the KRA, 24 hours after making this deduction. The taxpayer is equally required to file the appropriate return with the KRA within 24 hours.

This is an extreme change from the longstanding legal requirement to account for and remit withholding tax by the twentieth day of the month following the month in which the deduction was made. It is likely to result in significant compliance challenges for taxpayers given that taxpayers often need to take tax and legal advice on whether withholding tax is applicable on certain transactions and how to account for the same. To expect taxpayers to take such advice and undertake the administrative tasks associated with accounting for and paying withholding tax within 24 hours exerts an unfair burden on taxpayers and their already stretched accounting and finance functions.

e. Capital Gains Tax

Effective 1st July 2023, the following changes have been proposed to Kenya's Capital Gains Tax ("**CGT**"):

i. CGT on Shares

The Bill proposes to subject to tax any capital gains arising from the sale of shares in foreign entities which derive more than 20% of their value directly or indirectly from immovable property situated in Kenya.

CGT would equally be imposed on a non-resident person holding 20% or more of the shareholding of a resident company on disposal of their interest in the company, whether directly or indirectly.

ii. CGT on Group Restructuring

The Bill proposes to restrict the application of CGT exemptions available on group restructuring. For such a CGT exemption to apply, the groups would have to have existed for at least 24 months.

Moreover, in the case of a property transfer during group reorganization exempt from CGT, a taxpayer is currently entitled to rely on the value at which the property was transferred within the group in computing CGT on future transfer or sale of the property to a third person. The

taxpayer's CGT liability on a future third-party transfer is reduced by permitting the taxpayer to use such a re-based value of the property upon group reorganisation.

The Bill now proposed to restrict the taxpayer from relying on the re-based value of the property where the property is subsequently transferred before 5 years have expired after the group reorganisation.

iii. Due date for payment of CGT on property other than investment shares

Effective 1st July 2023, the due date for payment of CGT on property other than investment shares shall be on the earlier date of receipt of the full purchase price for the property by the vendor or registration of the transfer.

f. Capital Allowances And Investment Deductions

i. Capital allowances for industrial buildings and docks

Effective 1st January 2024, the Bill proposes to introduce a capital allowance at the rate of 10% for industrial buildings which are defined to include buildings in use for transport, bridges, tunnels, inland navigation water and electricity or hydraulic power undertaking. A 10% capital allowance is also proposed for docks. This is an incentive that will attract investment in this sector.

ii. Capital Allowances for Telecommunications Equipment

Effective 1st January 2024, the Bill proposes to extend capital expenditure available on civil works at the rate of 10% to earthworks for telecommunication equipment and construction in connection with the installation and maintenance of telecommunications equipment.

g. Taxation of Employees

i. Taxation of Share Ownership Schemes Offered by Start-Ups

From 1st July 2023, the Bill proposes to defer the taxation of company shares offered as emoluments to employees by eligible start-ups to promote the growth of small and medium enterprises. These share-ownership benefits shall be taxed within 30 days of the earlier of:

a) the expiry of 5 years from the end of the year the shares were awarded;
b) disposal of the shares by the employee; or
c) when the employee ceases to be an employee of the start-up.

The value of the share ownership benefit subject to tax will be the fair market value of the shares at the earlier of the above dates. An eligible start-up for the purposes of this benefit is a business incorporated in Kenya whose turnover KES 100 million or less, which has existed for less than 5 years, and which has not been formed as a result of a restructuring of an existing entity. Management, professional or training businesses are also not eligible for the deferral of taxation.

ii. Taxation of Travelling Allowance and Post-retirement Medical Fund Contributions.

Effective, 1st July 2023, the Bill proposes to exempt the portion of travelling allowance granted by to employees that is equivalent to the standard mileage rate approved by the Automobile Association of Kenya from taxation. This proposal provides statutory backing for what has been the prevailing practice recognised by KRA.

Effective 1st January 2024, the Bill also proposes to provide a personal relief to employees equivalent to 15% of the amount contributed by the employee towards a post-retirement medical fund subject to an upper limit of KES 60,000 per annum.

2. Value Added Tax

The Bill proposes to amend the Value Added Tax Act, 2013 ("**VAT Act**") as follows:

a. VAT on Exported Services

The Finance Bill 2022 provided that the supply of exported services shall be subject to VAT at the standard rate (16%) save for the export of business process outsourcing services which were zero rated.

The Bill has now proposed to exempt all exported services from VAT with effect from 1st July 2023.

This is a welcome development given that subjecting exported services to VAT at a standard rate is contrary to international best practices on VAT and increases the cost of services rendered by Kenyan suppliers relative to similar services provided by suppliers from foreign jurisdictions which do not impose VAT on exported services. Nonetheless, it would have been preferable to subject exported services to VAT at zero rate which is the accepted international best practice, instead of exempting them from VAT.

b. VAT on Petroleum Products and Clean Cooking Stoves

With effect from 1st July 2023, the Bill proposes to increase the VAT rate on petroleum products from the reduced VAT rate of 8% to the standard rate of 16%. This proposal is likely to increase the cost of living and the cost of doing business in Kenya.

On a more positive note, the Bill equally proposes to exempt Liquified Petroleum Gas (LPG) from VAT. This will result in reduced costs for consumers of LPG to promote the use of clean sources of energy in Kenyan households.

Surprisingly, the Bill also proposes to impose VAT at the standard rate on clean cooking stoves, contrary to the government's policy to promote clean sources of energy for cooking.

c. VAT Exemption on Transfer of Business as a Going Concern

With effect from 1st July 2023, the Bill proposes to exempt the transfer of a business as a going concern from VAT. The transfer of a business as a going concern was previously exempt from VAT until amendments passed in the Tax Laws (Amendment) Act 2020 subjected such transfers to VAT at the standard rate of 16%.

The return to VAT exemptions on the transfer of a business as a going concern is welcome as it will reduce the costs associated with acquisition of businesses.

d. Restriction on Claiming Input VAT deductions

With effect from 1st July 2023, the Bill proposes to restrict the claiming of input VAT deductions by taxpayers where taxpayers do not possess evidence that the VAT on their purchases has been declared and paid by suppliers of the purchases.

This proposal unfairly increases the compliance burden on taxpayers by requiring them to possess evidence of financial records of third parties which are beyond their control. In essence, failure to have all requirements shall deny a deserving taxpayer from making a claim.

e. VAT on Insurance Compensation

With effect from 1st July 2023, the Bill proposes to subject compensation for the loss of taxable supplies to VAT at the standard rate of 16%.

f. Registration for VAT on the Supply of Imported Digital Service

Effective 1st July 2023, any person providing imported digital service over the internet, an electronic network or through a digital marketplace shall register whether or not they meet the turnover threshold of KES 5 Million.

g. Keeping of Records

It is proposed that effective 1st July 2023, a taxpayer will not be limited to keeping records only in Kenya which recognizes the change in business dynamics where information is stored in different locations globally.

h. Other Changes in VAT

With effect from 1st July 2023, the Bill also proposes the following changes to VAT:

Supply	Previous VAT treatment	Proposed VAT treatment
Taxable goods used the constructing and equipping specialized hospitals of at least 100-bed capacity (subject to ministerial approval).	16%	Exempt
Tea sold for the purpose of value addition before exportation (subject to KRA approval).	16%	Exempt
Agricultural pest control products as well as inputs and raw materials supplied to manufacturers of agricultural pest control products (subject to ministerial approval).	Zero rated	Exempt
Fertilizers as well as inputs and raw materials supplied to manufacturers of fertilizers (subject to ministerial approval).	Zero rated	Exempt
Transportation of sugarcane from farms to milling factories.	Zero rated	Exempt
Inbound international sea freight offered by a registered person.	16%	Zero rated
Maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour by more than ten percent in weight.	Zero rated	16% (Suspended for 6 months from the date of assent of the Bill).

3. Excise Duty

The Bill proposes to amend the Excise Duty Act, 2015 ("**EDA**") as follows:

a. Adjustment for Inflation

Currently, the KRA, with the approval of the Cabinet Secretary for the National Treasury is permitted to adjust the specific rate of excise duty once every year to take into account inflation. The Bill proposes to strip the KRA of this power. The implication of this proposal is that excisable rates will not be pegged on the inflation adjustment formula. This will in turn have the effect of stabilizing prices and encourage manufacturing.

b. Suspension of Licence

The Bill proposes to introduce a set timeline of not less than 14 days within which a licensed person should remedy any deficiencies stated in a notice of suspension of license. Previously notices of suspension of license were open-ended and did not provide for a period of compliance.

c. Offences Related to Excise Stamps

The Bill proposes to create new offences related to the affixation of excise stamps or other markings on excisable goods. The offences created include:

- Defacing or printing over an excise stamp affixed on goods or packages.
- Unauthorized acquisition of excise stamp or an attempt thereof.
- In possession of excisable goods without affixation of the stamp or exemption thereof.

- Creating or printing excise stamps without authority.
- Being in possession of unauthorized printed excise stamps
- Being in possession of goods with counterfeit stamps affixed to them.

The Bill further proposes that the penalty for the above offences shall be a fine not exceeding 5 million shillings or imprisonment for a term not exceeding 3 years, or both.

This proposal is aimed at providing clarity. Currently, the EDA provides for a blanket provision stating that any person who contravenes the section on excise stamps commits an offence. This is proposed to be deleted in order to clarify what actions contravene the said section. This is in line with the principle that a penal clause must be expressively clear to allow one to determine the elements of a crime.

d. Introduction of 24-hour timeline For Remitting Excise Duty on Betting and Gaming

Effective 1st July 2023 the Bill proposes to introduce a 24-hour timeline, running from the close of transactions for the day, to remit excise duty on betting and gaming offered through a platform or other medium.

This timeline has previously been imposed on players in the betting sector without specific legal backing, which is now proposed to be introduced.

4. Tax Administration

The Bill proposes to amend the Tax Appeals Tribunal Act, 2013 ("**TAT Act**") and Tax Procedures Act, 2015 ("**TPA**") as follows:

Tax Appeals Tribunal Act, 2013 ("TAT Act")

a. Documents to be Submitted in lodging an Appeal to the Tax Appeals Tribunal

The Bill proposes to delete in the TAT Act, the existing reference to a tax decision to be submitted when lodging an appeal and instead requires taxpayers to submit the appealable decision in question as one of the documents to be filed at the time of lodging an appeal to the Tax Appeals Tribunal (the "**Tribunal**"). Additionally, the Bill proposes to allow taxpayers to submit any other documents in support of their appeal when lodging an appeal to the Tribunal.

b. Taxpayers to Deposit 20% of Taxes in Dispute Before Appealing to the High Court

With effect from 1st July 2023, the Bill proposes to introduce a requirement for taxpayers to deposit 20% of the taxes in dispute or equivalent security before appealing to the High Court from decisions of the Tribunal under the TAT Act.

Unlike a previous proposal in the Finance Act, 2022 to provide for a 50% deposit prior to lodging an appeal, the current proposal does not place a similar obligation on the KRA to pay a deposit prior to an appeal.

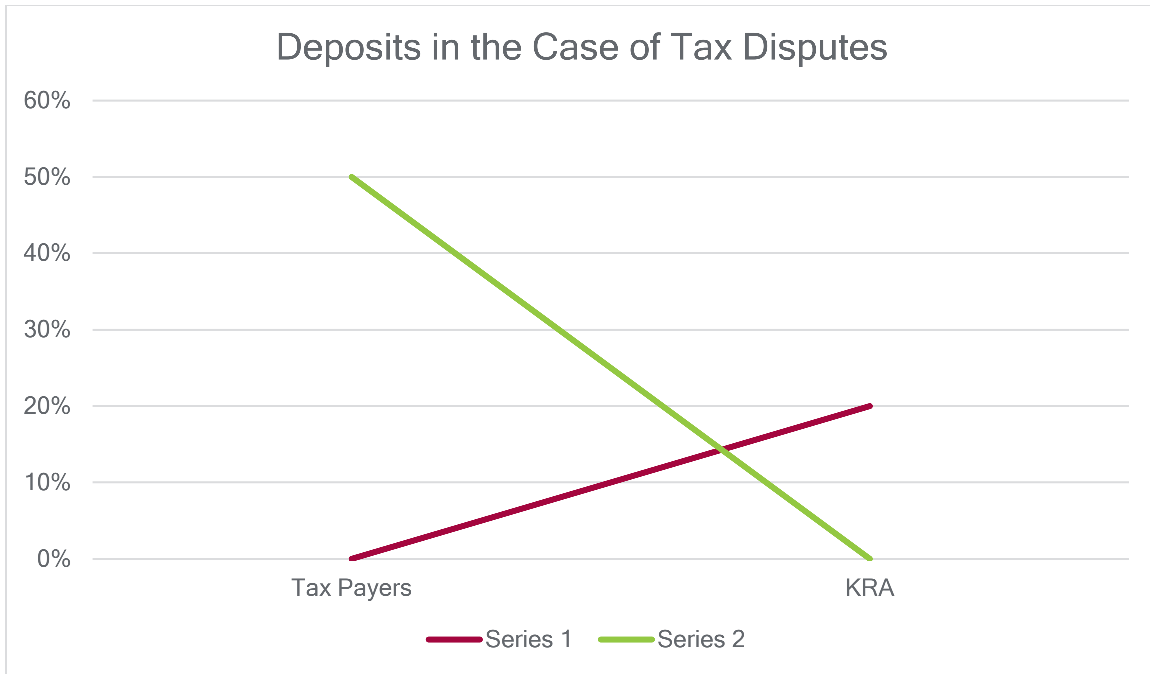
While the proposal intends to aid the KRA in recovering taxes following delivery of judgment by the Tribunal, the proposal is onerous and presents a number of legal and practical problems.

Firstly, the proposal is potentially unconstitutional and contravenes taxpayers' rights to access to justice guaranteed under Article 48 of the Constitution of Kenya. Any fees charged in the course of administering justice must be reasonable and shall not impede access to justice. As such, courts are required to reasonably determine the need for security as well as the modalities of the same before making an order for a deposit pending an appeal. In determining the need for and magnitude of security, courts usually consider various factors such as the taxpayer's tax compliance history, its financial position and the impact the deposit would have on its cashflow and ability to undertake its business operations.

By imposing a statutory requirement for a deposit and arbitrarily setting the deposit amount at 20% of the taxes in dispute, the proposal derogates from the court's discretion to consider the need for and modalities of a deposit. This is in breach of the requirement under Article 48 that fees charged in the course of administering justice must be reasonable and shall not impede access to justice.

Moreover, the KRA's track record in refunding monies to taxpayers presents a further burden to taxpayers. Kenyan courts have previously taken judicial notice of the KRA's undue delay in refunding monies to taxpayers. As such, taxpayers stand to face significant challenges and delays in accessing the proposed deposit should the ultimately succeed on appeal.

The proposal is equally discriminatory to the extent that it does not require the KRA to deposit funds when appealing to the High Court in cases where the taxpayer is seeking a refund of overpaid taxes despite its notoriety for failing to refund taxpayers.



Tax Procedures Act, 2015 (“TPA”)

a. Disputing Tax Refund Decisions

With effect from 1st July 2023, the Bill proposes to amend the TPA to exclude tax refund decisions from the category of tax decisions which are challenged by way of a Notice of Objection to the KRA. Effectively, taxpayers will now directly appeal to the Tribunal from tax refund decisions.

b. Collection of Taxes Under International Tax Agreements

In line with the recent increased cooperation between tax authorities worldwide the Bill proposes to empower the KRA to assist in the recovery of taxes due as contemplated in an international tax agreement. The proposal, however, limits the recovery of taxes from non-residents of the requesting state as provided for in the international tax agreement. This proposed amendment will allow collaboration between the KRA and revenue authorities in other tax jurisdictions in the recovery of taxes and encourage recovery of taxes across jurisdictions within the terms of the international tax agreement.

c. Electronic Tax Invoice Management and Record Keeping

The Bill proposes to introduce an electronic system through which electronic tax invoices may be issued and records of stocks kept. The electronic tax invoice management system will, however, exclude emoluments, imports, investment allowances, interest, and similar payments. This proposal is aimed at reducing the instances of underreporting or overreporting sales volume and ensuring that all transactions are verifiable by the KRA. This will also reduce instances of fraud in invoicing.

The Bill also proposes to impose an obligation on Kenyan resident Trustees to maintain records of both local and foreign registered trusts whether the income is generated in Kenya or not. The records should be availed to the KRA on request. This proposal is intended to report to the KRA all transactions connected to trusts and to ascertain whether there is any taxable income.

d. Collection of Taxes Through Agency Notices

The Bill proposes to expand the circumstances under which the KRA may issue agency notices to collect taxes from a taxpayer's debtors. Under an amendment introduced in the Finance Act 2022, the KRA was restricted to issuing agency notices only where a taxpayer had objected to a tax assessment, the KRA had issued an objection decision, and an appeal to the Tribunal had not been preferred.

In addition to the above circumstances, the proposed amendment will now empower the KRA to issue an Agency Notice where a taxpayer fails to honour tax installments agreed to in a payment plan with the KRA, where it has issued a tax assessment and the taxpayer has not objected to or challenged the assessment within time, and where a taxpayer has filed a tax return but has not paid the taxes due under the return by the due date.

e. Withdrawal of The KRA's Power to Waive Penalties and Interest and to Abandon Recovery of Tax

Currently, the KRA, with approval from the Cabinet Secretary for the National Treasury, is allowed to abandon and refrain from assessing tax or recovering an unpaid tax if it is impossible, unduly difficult or expensive to collect it. The Bill proposes to withdraw this power.

Additionally, the Bill proposes to withdraw the KRA's power to waive penalties and interest on a tax debt. In essence, there will be no opportunity to apply to the KRA for cancellation or remission of any penalty or interest due on a tax.

However, the Bill proposes an automatic amnesty on interest, penalties or fines on principal taxes which had been paid by 31st December 2022. Further, where tax had not been paid by 31st December 2022, a taxpayer may apply for amnesty of interest, penalties or fined and propose a payment plan for payment of outstanding taxes. The amnesty will only apply to interest that has accrued by 31st December 2022 so long as the principal tax in question is paid by 30th June 2024.

The implication of these proposed amendments is that waivers on penalty and interest will no longer be available after the settlement of principal tax save for the restricted amnesty that is proposed to apply so long as the principal tax is paid by 20th June 2024. Should the proposed amnesty not be extended, taxpayers stand to be unfairly burdened where the circumstances resulting in accrual of the penalty and interest are beyond the taxpayers control.

In our view, regulations ought to be enacted to provide guidance on the KRA's exercise of its discretion in considering amnesty applications. Such regulations ought to also prescribe timelines for considering and issuing a decision on the amnesty applications to avoid unreasonable delays.

f. Notification of Security on The Property for Unpaid Tax

The Bill proposes to delete the requirement upon the KRA to notify a taxpayer or any other person with an interest in the property about the notification to the Registrar. This proposed amendment denies a taxpayer or person with interest to raise any challenge to the said notice.

Further, the Bill proposes to extend the timeframe within which a property owner and any other person with an interest in property should be notified after the property has been registered as security for unpaid tax. The time frame is extended from 7 days to 14 days from the date of registration of the notification by the Registrar.

g. Withholding Value Added Tax

The Bill proposes that tax withheld by an appointed withholding tax agent shall be remitted to the KRA within 3 days after the deduction has been made.

This is a change from the longstanding legal requirement to account for and remit withholding tax by the 20th day of the month following the month in which the deduction was made. It is likely to result in significant compliance challenges for taxpayers given that taxpayers often need to take tax and legal advice on whether withholding tax is applicable on certain transactions and how to account for the same. To expect taxpayers to take such advice and undertake the administrative tasks and approvals associated with accounting for and paying withholding tax within 3 days exerts an unfair burden on taxpayers and their already stretched accounting and finance functions.

h. KRA to Appoint Agents to Collect and Remit Rental Income

The Bill proposes to empower the KRA to appoint an agent for the purpose of the collection and remittance of rental income tax.

This proposal will ensure that all rental income is declared, and tax remitted thereon. The collection of rental taxes will be more robust, increasing revenue under this tax head where there has been non-compliance in the past resulting in poor collections.

i. Offset or Refund of Overpaid Tax

The Bill proposes that there will be an offset of overpaid tax against the taxpayer's outstanding tax debts. Currently, such offset is only available to future tax liabilities. The Bill also proposes that the period in which refunds should be paid be reduced from 2 years to 6 months from the date of ascertainment of the refund due. However, failure to make a refund by KRA only leads to the refund being applied to outstanding debts or future tax liabilities.

The Bill also proposed that refund applications be subjected to an audit and the validity of such application be determined within 120 days, failure of which the applications will be deemed allowed.

These proposals are aimed at reducing the delays experienced in processing refund applications. However, in our view, the decision on whether to apply refunds to outstanding debts or future tax liabilities ought to be at the option of the taxpayer and not imposed by statute.

j. Request of Information When the Notice of Objection Is not Validly Lodged

The Bill proposes that where the KRA has identified that the notice of objection is not validly lodged, the taxpayer will have only 7 days to submit the information requested in the notice. This proposal is unfair, especially in circumstances where the kind of information requested is voluminous or difficult to collect and submit within a short period. The proposed timeline should be enhanced to allow compliance.

k. Settlement of Tax Dispute out of Court or the Tribunal

The Bill also proposes that the period for settling tax disputes out of Court or the Tribunal should be extended from 90 days to 120 days. This proposal, if passed into law, would allow parties sufficient time for engagement under the alternative dispute resolution ("**ADR**") process so as to amicably solve disputes without incurring more costs. This is in line with the spirit of promoting ADR as provided under Article 159 of the Constitution.

l. Grounds for Appealing an Appealable Decision

The Bill proposes to strike out the powers of the Tribunal or Court to allow taxpayers to add new grounds of appeal that are not captured in the initial Notice of Objection. The upshot of this proposal is that once all the grounds of objection have been drafted in the Notice of Objection, taxpayers will not be allowed to add any further grounds for the purposes of appealing the objection decision before the Tribunal, High Court or Court of Appeal.

In the event this proposal is passed, Taxpayers must now actively involve lawyers and tax accountants in the initial process of drafting a Notice of Objection to ensure that all grounds of objection are included. However, this proposal is arguably in conflict with Articles 48 and 50 of the Constitution on access to justice and fair hearing.

m. Data Management and Reporting System

The Bill proposes to introduce a new section to provide for data management and reporting systems which will guide the submission of electronic documents to the Commissioner when required.

The implication of this proposal is to provide a platform that is verifiable to provide documents requested by the Commissioner and further avoid requests for unrelated or irrelevant documents.

n. Tax Shortfall Penalty

The Bill proposes to increase the penalty for tax shortfalls. Currently, the tax shortfall penalty attracts 75% of the tax shortfall when the statement or omission was made deliberately. However, this is being increased to double the amount, which translates to an increase of penalty from 75% to 200% of the tax shortfall. Such a hefty penalty is punitive and would serve as a high deterrent. It aims to place serious ramifications for issuing false statements with the aim of paying less tax than you would have otherwise paid. This should have the effect of having a more accurate declaration of tax.

o. Penalty for Failing to Comply With an Electronic Tax System

The Bill proscribes as an offence with a significant penalty for one to fail to comply with the electronic tax system. The offence has been broadened to include failure to comply with the issuance of an electronic tax invoice, submit a tax return in electronic form or pay a tax electronically. The penalty has been increased from KES 100,000 to KES 1 million or an amount equal to 10 times the amount of the tax due, whichever is higher.

p. Impersonation of an Authorized Officer

The Bill proposes to introduce an offence of impersonation of an authorized officer which attracts upon conviction imprisonment for a term not exceeding 3 years.

This proposed amendment now allows for the prosecution of such persons by the KRA.

q. Concurrent Civil and Criminal Proceedings

The Bill proposes to introduce a new section that provides that the existence of a civil or criminal case that is directly or substantially in issue, in either case, will not be grounds for the affected party to obtain a stay, prohibition, or delay in either case.

The implication of this provision is that any subsisting court cases, whether civil or criminal in nature, shall continue concurrently without interruption. In our view, this is an unwarranted fetter to a court’s discretion to conduct its proceedings and administer justice.

5. Miscellaneous Fees & Levies

The Bill proposes to amend the Miscellaneous Fees and Levies Act, 2016 (“**MFLA**”) as follows:

a. Introduction of Export and Investment Promotion Levy

The Bill proposes to introduce an export and investment promotion levy on certain goods specified in the third schedule of the MFLA that are imported into the country for home use. The levy shall be paid by the importer of the goods at the time of entering the goods into the country for home use.

The levy is intended to provide funds to boost manufacturing, increase export, create jobs, save on foreign exchange and promote investments. Funds collected from the levy shall be paid into the fund established and managed in accordance with the Public Finance Management Act, 2012.

Goods originating from the East African Community partner states that meet the East African Community Rules of Origin are exempted from the levy.

b. Changes in Levies Under the MFLA

No item(s)	Tariff Description	Previous levy rate	New proposed rate
4101.20.00	Whole hides and skins, of a weight per skin not exceeding 8 kg. when simply dried, 10 kg. when dry-salted, or 16 kg. when fresh, wet-salted, or otherwise preserved	80% or USD 0.52 per kg	50% or USD 0.32 per kg
4102.21.00	Raw skins of sheep or lambs (pickled, but not tanned, parchment-dressed or further prepared), without wool on whether or not split,	80% or USD 0.52 per kg	50% or USD 0.32 per kg
4102.29.00	Other raw skins of sheep or lamb (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further	80% or USD 0.52 per kg	50% or USD 0.32 per kg

	prepared), with wool on, whether or not split,		
4103.20.00	Other raw hides and skins (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), whether or not debarred or split, other than those excluded by Note 1 (b) or (c) to this Chapter, of reptiles.	80% or USD 0.52 per kg	50% or USD 0.32 per kg
4103.30.00	Other raw hides and skins (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), but not debarred or split, other than those excluded by Note 1 (b) or 1 (c) to this Chapter, of swine	80% or USD 0.52 per kg	50% or USD 0.32 per kg
4103.90.00	Other raw hides and skins other than of reptiles, swine, goats or kids.	80% or USD 0.52 per kg	50% or USD 0.32 per kg
4104.19.00	Other tanned or crust hides and skins of bovine (including buffalo) or equine animals, without hair on, whether or not split, but not further prepared, in the wet state (including wet - blue).	80% or USD 0.52 per kg	50% or USD 0.32 per kg
4101.50.00	Whole hides and skins, of weight exceeding 16 kg.	80% or USD 0.52 per kg	50% or USD 0.32 per kg

4101.90.00	Other, including butts, bends and bellies.	80% or USD 0.52 per kg	50% or USD 0.32 per kg
4102.10.00	Raw skins of sheep or lamb (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), with wool on, whether or not split, other than those excluded by Note 1(c) to Chapter 41.	80% or USD 0.52 per kg	50% or USD 0.32 per kg
4301.10.00	Raw furskins of mink, whole, with or without head, tail or paws	80% or USD 0.52 per kg	50% or USD 0.32 per kg
4301.80.00	Other raw furskins, whole, with or without head, tail or paws.	80% or USD 0.52 per kg	50% or USD 0.32 per kg
4301.90.00	Heads, tail, paws, and other pieces or cuttings, suitable for furriers' use.	80% or USD 0.52 per kg	50% or USD 0.32 per kg
4302.11.00	Whole skins, with or without head, tail or paws, not assembled, of mink.	80% or USD 0.52 per kg	50% or USD 0.32 per kg
4302.19.00	Other whole skins, with or without head, tail or paws, not assembled.	80% or USD 0.52 per kg	50% or USD 0.32 per kg
4302.20.00	Heads, tails, paws and other pieces or cuttings, not assembled.	80% or USD 0.52 per kg	50% or USD 0.32 per kg

c. Addition of New Tariffs and New Levies Under the MFLA

Tariff No.	Tariff Description	Export Levy Rate

8106.10.00	Bismuth & articles thereof including waste and scrap containing more than 99.99% of bismuth by weight.	20%
8106.90.00	Other bismuth and articles thereof including waste and scrap	20%
8105	Cobalt matters and other intermediate products and cobalt metallurgy, cobalt and articles thereof, including waste and scrap	20%
8109.31.00	Waste and scrap of zirconium containing less than 1 part hafnium to 500 parts zirconium by weight	20%
8109.39.00	Other waste and scrap molasses resulting from the extraction or refining of sugar	20%

6. Proposals to Amend Other Acts of Parliament in Relation to Tax

a. Betting, Gaming and Lotteries

As of 1st July 2023, the Bill proposes to have gaming tax, betting tax, lottery tax and prize competition tax, as provided for under the Betting Lotteries and Gaming Act, administered under the provisions of the TPA. This is intended to simplify and standardize the rules for collecting and administering taxes relating to the betting and gaming industry.

b. Employment: Reintroduction of the National Housing Development Fund

The Bill proposes to introduce a National Housing Development Fund ("the **Fund**"), with both employers and employees required to make monthly contributions to the Fund. Employers will

be required to contribute 3% of the employee's monthly basic salary and remit it the Fund together with the employee's contribution, also set at 3% of the employee's monthly basic salary. Contributions to the Fund are capped at KES 5,000.

Contributions are required to be remitted to the Fund on or before the 9th date of the following month. However, the provisions on operation of the Fund and contributions made to it shall only come into force after Regulations are made by the Cabinet Secretary for Housing in consultation with the Cabinet Secretary for the National Treasury.

The reintroduction of mandatory employer and employee contributions to the Fund following its initial introduction in 2018 and subsequent suspension is likely to increase the cost of employment in Kenya, and may result in increased unemployment rates.

For employees who qualify for affordable housing, the contributions will be used to finance the purchase of a home under the affordable housing scheme. For employees who do not qualify under the affordable housing scheme, contributions will be eligible to cash out their contributions at the expiry of 7 years from the date they began contributing. Contributions that are taken out in cash will be subject to income tax. Alternatively, employees may elect to transfer the contributions to a retirement scheme, or any person registered and eligible for affordable housing under the Fund.

c. Statutory Instruments Act

The Bill proposes to amend Statutory Instruments Act, 2013, to remove the mandatory requirement for the review of subsidiary legislation and the expiration of statutory instruments at the end of 10 years after their enactment. As such, going forward, there will be no automatic revocation of statutory instruments or need to extend the operations of the said instruments upon expiry of 10 years after their coming into force.

Disclaimer

This alert is for information purposes only and should not be taken to be or construed as a legal opinion. If you have any queries or need clarification please do not hesitate to contact Lilian Renee Omondi (renee@oraro.co.ke), Elly Obegi (elly@oraro.co.ke), William Ochieng (william@oraro.co.ke) or your usual contact at our firm.

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