

LEGAL ALERT:

TAX IMPLICATIONS OF THE FINANCE ACT, 2023

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The Finance Act, 2023 (“the **Act**”) was assented to by the President of the Republic of Kenya on 26th June 2023 and came into force on 1st July 2023 save for certain amendments earmarked for implementation on 1st September 2023 and 1st January 2024 respectively.

The Act makes a number of changes to Kenya’s Income Tax, Value Added Tax (“**VAT**”) and Excise Duty regime as well as changes to the administration of taxes in Kenya to implement the Government of Kenya’s budgetary and fiscal measures for the 2023-2024 financial year.

We summarise in this Alert the key changes that are now in force and those set to come into force under the Act.

1. INCOME TAX

The Act has amended 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, a digital asset tax is now 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 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 five working days 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 new tax represents an opportunity for the KRA to expand its tax base into the digital economy. There however remains uncertainty on whether the digital asset tax paid is 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

Effective 1st July 2023, withholding tax is now applicable on payments made by resident persons to both resident and non-resident digital content creators which are



deemed to be income accrued in or derived from Kenya. The resident withholding tax rate will be 5% whereas the payments made to non-resident digital content creators will attract withholding tax at 20%.

The amount deducted must be remitted to the KRA within five working days of deducting the withholding tax and making payment for the monetised digital content.

What constitutes digital content monetisation under the Act 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, affiliate marketing, subscriptions for online content, licensing digital content, and commissions earned by creatives from crowdfunding.

This new withholding tax has widened the tax base to include income earned by Kenya's growing digital creative economy. However, the revised remittance timelines are 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 content creators.

b. Revised Tax Rates: Foreign Companies, Resident Individuals, Turnover Tax, Rental Income Tax, and Advance 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 at the rate of 15% on repatriated income shall apply on income repatriated by branches or other permanent establishments to their non-resident head offices. 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 a tax on repatriated income at 15% on the share of profits to its foreign head office.



ii. New tax rate and thresholds for turnover tax

From 1st July 2023, the Act makes changes to the operation of turnover tax, the simplified income tax regime for small and medium enterprises. The turnover tax rate will increase from 1% to 3% of gross receipts. In addition, the threshold for turnover tax has been revised. Turnover tax currently applies to businesses whose turnover is between KES 1 million and KES 50 million. This has been revised to between KES 1 million to KES 25 million.

As such, businesses with turnover in excess of KES 25 million must be subject to the regular income tax rate of 30% on taxable profits whereas businesses with a turnover of between KES 1 million and KES 25 million may elect to be subject to the simplified turnover tax regime, which operates as 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, new tax rates now apply on employment and business income earned by resident individuals. New tax bands have been introduced to the graduated scale for individual income tax which subject all income earned between KES 6 million and KES 9.6 million per annum (KES 500,000 - KES 800,000 per month) to tax at the rate of 32.5% and all annual income above KES 9.6 million (KES 800,000 per month) to tax at the rate of 35%.

The highest tax band for individuals has now risen from 30% applicable to incomes above KES 32,333 per month to 35% applicable to incomes above KES 800,000 per month. This change is aimed at increasing the tax contribution of high-earning individuals in line with the principles of progressive taxation. However, the effective date of 1st July 2023, means that the tax rate has been changed in the middle of the 2023 year of income, this is likely to result in confusion and administrative challenges for individuals computing and reporting their tax affairs for 2023.



iv. Reduction in the tax rate for residential rental income tax

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

Additionally, the KRA will now 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 tax.

v. Advance tax on commercial vehicles

Effective 1st January 2024, advance tax payable on vans, pickups, trucks, prime-movers, trailers and lorries (excluding agricultural tractors and trailers) has increased to KES 2,500 per tonne of load capacity per year subject to a minimum of KES 5,000 per year. Previously the rate was KES 1,500 per tonne of load capacity per year subject to a minimum of KES 2,400 per year.

Similarly, advance tax payable on saloons, station wagons, mini-buses, buses and coaches has increased to KES 100 per passenger capacity per month subject to a minimum of KES 5,000 per year. Previously the rate was KES 60 per passenger capacity per month subject to a minimum of KES 2,400 per year.

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 amortisation (“**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. Notably, even interest on loans from local commercial banks was restricted from deduction.

With effect from 1st July 2023, the thin capitalisation provisions have been amended to exclude local loans. Entities will now 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 and then take the benefit of such losses in computing its tax liability. However, such realised foreign exchange losses shall now only be deferred for not more than 5 years from the date of realisation. In the event an entity continues to be thinly capitalised at the end of 5 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 Act provides for disallowing of refunds or deductions against income arising from withholding taxes paid on management, professional fees, royalties, interest and rent, made to a non-resident which has been the subject of an audit adjustment following a KRA audit.

ii. New withholding taxes

Effective 1st July 2023 withholding tax is now applicable on payments for sales promotion, marketing and advertising services at the rate of 5% and on digital content monetisation at the rate of 5% for payments made to resident creatives and 20% for payments to non-resident creatives.

iii. Introduction of 5-day timeline for remitting withholding tax

Effective 1st July 2023 the Act imposes an obligation on taxpayers who deduct withholding tax to remit the withholding tax to the KRA within 5 working days after making the deduction. The taxpayer is equally required to file the appropriate return with the KRA within 5 working days.

The extension of this timeline to 5 days from the initially proposed 24-hours is a welcome relief for taxpayers, however, even this 5-day timeline is likely to cause compliance and administrative challenges for taxpayers by imposing a rolling compliance obligation through the month as opposed to the previous regime where WHT was computed and paid on a monthly basis after the end of the monthly period in question.

e. Capital Gains Tax

Effective 1st July 2023, Kenya's Capital Gains Tax ("**CGT**") regime has changed as follows:

i. CGT on shares

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 will now be subject to CGT in Kenya.

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

ii. CGT on group restructuring

The Act now restricts 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 reorganisation exempt from CGT, a taxpayer was 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 was reduced by permitting the taxpayer to use such a re-based value of the property upon group reorganisation.

Taxpayers are now restricted 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, a capital allowance at the rate of 10% has been introduced 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 has also been introduced for docks. These incentives are aimed at promoting investment in transport sector infrastructure.

ii. Capital allowances for telecommunications equipment

Effective 1st January 2024, allowances on capital expenditure for civil works at the rate of 10% will be extended 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 January 2024, the taxation of company shares as emoluments to employees by eligible start-ups will be deferred in order 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 portion of travelling allowance granted by to employees that is equivalent to the standard mileage rate approved by the Automobile Association of Kenya will be exempt from taxation. This proposal provides statutory backing for what has been the prevailing practice recognised by KRA.

Further, as from 1st January 2024, a new personal relief will be available 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 Act has amended the Value Added Tax Act, 2013 (“**VAT Act**”) as follows:

a. VAT on Exported Services

Effective 1st July 2023, exportation of services will once again be zero rated for VAT purposes. While exported services were zero rated for a long time, amendments in



2021 exempted exportation of services from VAT. A further amendment in the Finance Act, 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 Finance Act, 2023 has now reverted to zero rating of all exported services. 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. Kenyan services will now be able to compete favourably in the global marketplace.

b. Time of Supply of Goods and Services

Section 12 of the VAT Act has been amended by introducing a new sub-section 12(1A) which was not part of the proposed amendments in the Finance Bill 2023. Effective 1st July 2023 the time of supply relating to the national carrier shall be the date on which the goods are delivered, or services are provided.

c. VAT on Petroleum Products

With effect from 1st July 2023, the VAT rate on petroleum products has been increased from 8% to 16%. This is likely to increase the cost of living and the cost of doing business in Kenya.

On a more positive note, the Finance Act, 2023 exempts Liquified Petroleum Gas from VAT and also zero-rates bioethanol vapour stoves to promote the use of clean energy sources in Kenyan households.

d. Restriction on Claiming Input VAT Deductions

With effect from 1st July 2023, the Finance Act restricts 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 will not be allowed. Taxpayers must therefore ensure that they have all supporting documentation on a transaction before they can claim input VAT.

This amendment 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 an input VAT deduction.

e. VAT on Insurance Compensation

With effect from 1st July 2023, the compensation for the loss of taxable supplies is now subject 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 be required to register for VAT whether or not they meet the turnover threshold of KES 5 million.



g. Keeping of Records

Effective 1st July 2023, a taxpayer will not be limited to only keeping records in Kenya. This recognises developments in business practices with information being stored in multiple locations around the globe.

h. Refund of Tax on Bad Debts

The Act has introduced an amendment to section 31(1) of the VAT Act on refund of bad debts where a registered person has accounted for and paid tax on a supply but has not recovered the payment. This amendment was not part of the proposals presented in the Finance Bill, 2023.

Effective 1st July 2023, the Act has increased the period within which a refund application can be made from four years to ten years. The taxpayer will be allowed to offset any overpaid tax against other taxes owed or the amount may be credited to the taxpayer's record for use against future VAT liabilities.

Where the bad debt is subsequently recovered, the amendment further extends the timeline within which to refund the Commissioner the tax refund paid to sixty days from the date the recovery was made. Previously the taxpayer was required to refund the tax within thirty days. In the event a taxpayer fails to pay back the refund paid, interest will accrue at two per cent per month provided that the interest shall not exceed one hundred per cent of the refunded amount.

i. Other Changes in VAT

With effect from 1st July 2023, the Act has also made the following changes to VAT:

Supply	Previous VAT treatment	New VAT treatment
Taxable goods used in the constructing and equipping specialised 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 Act).
Taxable supplies made to or by a school feeding programme recognised by the Cabinet Secretary responsible for matters relating to education	16%	Exempt

3. EXCISE DUTY

The Act 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 Act has stripped the KRA of this power. As such, excisable rates will not be pegged on the inflation adjustment formula. This will in turn stabilising retail prices and encourage manufacturing.

b. Suspension of Licence

The Act introduces 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 Act creates 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.
- Unauthorised 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 unauthorised printed excise stamps
- Being in possession of goods with counterfeit stamps affixed to them.

Consequently, effective 1st July 2023, any person found guilty of the above offences shall be liable to pay a fine not exceeding 5 million shillings or be imprisoned 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. The amendment clarifies the exact conduct that constitutes and offence in line with the principle that penal provisions must be clear and express to enable members of the public to know in advance exactly what conduct is prohibited.



d. Payment of Excise Duty on Alcoholic Beverages

The Act has with effect from 1st July 2023 introduced a new section 36A to the EDA requiring licensed manufacturers of alcoholic beverages to pay excise duty within twenty-four hours upon removal of goods from the stockroom.

This is a new amendment introduced in parliamentary debate that was not initially proposed in the Finance Bill, 2023.

e. Payment of Excise Duty on Betting and Gaming

Effective 1st July 2023 the Act introduces 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 has now been introduced.



4. TAX ADMINISTRATION

The Act has amended 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 Act amends section 13 of the TAT Act by deleting 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,



taxpayers are now allowed to submit any other documents in support of their appeal when lodging an appeal to the Tribunal.

b. Parliament Withdraws the Proposal to Require a Deposit of 20% of Disputed Taxes before Appealing to the High Court

The Finance Bill, 2023 had proposed that effective 1st July 2023, taxpayers would be required 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.

However, following vehement opposition to the proposal during the public participation exercise undertaken by Parliament, which received numerous objections, this proposal has been withdrawn.

While the proposal intended to aid the KRA in recovering taxes following delivery of judgment by the Tribunal, it was onerous and presented a number of legal and practical problems.

Notably, the proposal was potentially unconstitutional and in contravention of taxpayers' rights to access to justice guaranteed under Article 48 of the Constitution of Kenya. The proposal was equally discriminatory to the extent that it did 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 Act has amended 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 Act has empowered the KRA to assist in the recovery of taxes due as contemplated in an international tax agreement. However, KRA is limited in the recovery of taxes from non-residents of the requesting state as provided for in the international tax agreement. We expect increased collaboration between the KRA and revenue authorities in other tax jurisdictions in the recovery of taxes within the terms of international tax agreements entered into by Kenya.

c. Electronic Tax Invoice Management and Record Keeping

The Act has introduced 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, airline passenger ticketing and similar payments. This is aimed at reducing the instances of underreporting or overreporting sales volume and ensuring that all



transactions are verifiable by the KRA as well as reducing instances of fraud in invoicing.

Effective 1st July 2023 all trustees who are resident in Kenya are required to maintain records required under any tax law and avail the same to the Commissioner on request. This obligation applies to both trustees of locally registered trusts as well as non-resident trusts and also applies regardless of whether or not the trust's income is subject to tax in Kenya. This increased compliance burden is likely to make the appointment of Kenyan trustees less attractive for non-resident trusts.

d. Collection of Taxes through Agency Notices

The Act has expanded 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 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

Previously, the KRA, with approval from the Cabinet Secretary for the National Treasury, was allowed to abandon and refrain from assessing tax or recovering an unpaid tax if it is impossible, unduly difficult or expensive to collect. Additionally, the KRA's had power to waive penalties and interest on a tax debt. The Finance Act, 2023 has withdrawn both of these powers with effect from 1st July 2023.

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, effective 1st September 2023, a new amnesty on interest, penalties or fines on principal taxes which had been paid by 31st December 2022 has been introduced. Further, where tax had not been paid by 31st December 2022, a taxpayer may apply for amnesty of interest, penalties or fines 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 the 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 the accrual of the penalty and interest are beyond the taxpayers control.



We expect that regulations will 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. Withholding Value Added Tax

The Act provides that tax withheld by an appointed withholding tax agent shall be remitted to the KRA within 5 working days after the deduction has been made.

The extension of this timeline to 5 days from the initially proposed 3 days is a welcome relief for taxpayers, however, even the 5 day timeline is likely to cause compliance and administrative challenges for taxpayers by imposing a rolling compliance obligation through the month as opposed to the previous regime where withholding VAT was computed and paid on a monthly basis after the end of the monthly period in question.

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

The KRA is now empowered to appoint an agent for the purpose of the collection and remittance of rental income tax.

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

h. Offset or Refund of Overpaid Tax

The Act provides for an offset of overpaid tax against the taxpayer's outstanding tax debts. Currently, such an offset is only available against future tax liabilities. Similarly, the period in which tax refunds should be paid has been reduced from 2 years to 6 months from the date of ascertainment of the refund due. However, failure to make a refund by the Commissioner only leads to the refund being applied to outstanding debts or future tax liabilities.

Additionally, refund applications will be subjected to an audit and the validity of such applications shall be determined within 120 days, failure of which the applications will be deemed allowed by operation of law.

The cumulative effect of these amendments is to reduce 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.

i. Request for Information When a Notice of Objection is Not Validly Lodged

The Act has amended section 51 of the TPA to provide 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 amendment is likely to result in compliance challenges and further disputes with the KRA, especially in



circumstances where the kind of information requested is voluminous or difficult to collect and submit within a short period.

j. Settlement of Tax Disputes out of Court or the Tribunal

Effective 1st July 2023, the period for settling tax disputes out of Court or the Tribunal is extended from 90 days to 120 days. This now allows parties sufficient time for engagement under the alternative dispute resolution (“**ADR**”) process so as to amicably solve disputes without incurring additional costs. This is in line with the spirit of promoting ADR as provided under Article 159 of the Constitution.

k. Grounds for Appealing an Appealable Decision

The Bill had proposed 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 was that once all the grounds of objection have been drafted in the Notice of Objection, taxpayers would not have been allowed to add any further grounds for the purposes of appealing the objection decision before the Tribunal, High Court, or Court of Appeal.

Parliament has, however, considered public outcry against this proposal and withdrawn the same. The Tribunal and Courts will continue to have the discretion to admit new grounds of appeal where it is in the interest of justice or a fair hearing to do so.

l. Data Management and Reporting System

Effective 1st September 2023, the KRA will be required to introduce a data management and reporting systems which will guide the submission of electronic documents to the KRA when required.

This amendment will enable the KRA to set up a centralized secure platform for the provision of documents requested by the KRA and further minimize requests for unrelated or irrelevant documents.

m. Tax Shortfall Penalty

The Bill had proposed to increase the tax shortfall penalty under section 84 of the TPA. The tax shortfall penalty attracts 75% of the tax shortfall when a false statement or omission was made deliberately to the KRA. This was proposed to be increased to double the amount of tax shortfall (i.e., to 200%).

Parliament has withdrawn the proposed amendment and the tax shortfall penalty will continue to be imposed at 75% of the tax shortfall.

n. Penalty for Failing to Comply with an Electronic Tax System

The Bill had created the offence of failure to comply with an electronic tax system which imposed a penalty of the higher of KES 1 million or 10 times the tax due for failure to comply with the issuance of an electronic tax invoice, submit a tax return in electronic form or pay a tax electronically.



Following conclusion of the legislative process, the offence has now become law with effect from 1st September 2023, however, the penalty for this offence has now been reduced to 2 times the tax due.

o. Impersonation of an Authorised Officer

The Act introduces an offence of impersonation of an authorised officer which attracts a penalty of imprisonment for a term not exceeding 3 years.

p. Concurrent Civil and Criminal Proceedings

The Bill had proposed to introduce a new section to the TPA to provide 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.

However, Parliament has withdrawn this proposed amendment following opposition during public participation. The decision on whether or not to stay one of the proceedings where parallel civil and criminal proceedings are commenced against a taxpayer will now lie with the Tribunal or Court handling such proceedings.



5. MISCELLANEOUS FEES & LEVIES

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

a. Introduction of Export and Investment Promotion Levy

The Act introduces 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 rate	New rate
4101.20.00	Whole unsplit 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 0.55 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 0.55 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 prepared), with wool on, whether or not split,	80% or USD 0.55 per kg	50% or USD 0.32 per kg
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 0.55 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 0.55 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 0.55 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 0.55 per kg	50% or USD 0.32 per kg
4101.50.00	Whole hides and skins, of weight exceeding 16 kg.	80% or USD 0.55 per kg	50% or USD 0.32 per kg
4101.90.00	Other, including butts, bends and bellies.	80% or USD 0.55 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 0.55 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 0.55 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 0.55 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 0.55 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 0.55 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 0.55 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 0.55 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 mattes 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%
1703	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, gaming tax, betting tax, lottery tax and prize competition tax, as provided for under the Betting Lotteries and Gaming Act, shall be administered under the provisions of the TPA. This simplifies and standardizes the rules for collecting and administering taxes relating to the betting and gaming industry.

b. Employment: Introduction of the Affordable Housing Levy

Effective 1st July 2023, the Finance Act has introduced an Affordable Housing Levy (“the **Levy**”), with both employers and employees required to make monthly payments. Employers will be required to deduct 1.5% of each employee’s monthly gross salary and remit the same to the Government together with the employer’s payment of the Levy, also set at 1.5% of the employee’s monthly gross salary.



The employer must remit the said sum failure to which, the employer shall be liable to payment of a penalty equivalent to 2% of the unpaid funds for every month the same remains unpaid.

Notably, unlike the National Housing Development Fund (“**NHDF**”) initially proposed in the Finance Bill, the Levy is now structured as a tax and employees are not eligible for a refund of the levy deducted as earlier proposed. Similarly, the Levy is not capped at KES 5,000 as was the case with the proposed NHDF Contributions.

The purpose of the Levy is to fund the development of affordable housing and associated social and physical infrastructure as well as the provision of affordable home financing to Kenyans.

The introduction of the mandatory employer and employee Levy will increase the cost of employment in Kenya and may result in increased unemployment rates. Further, there is no clarity under the Act on which government body is mandated to receive the remittance from the employers. Given the foregoing, the implementation and utilization of the Levy is likely to come under considerable public scrutiny.



c. Retirement Benefits Act 1997

The Act has relaxed the local ownership requirements for the registration of Retirement Scheme Administrators. Effective 1st July 2023, only 30% local shareholding is required for registration as a scheme administrator as opposed to 60% shareholding that was previously required. This amendment will promote foreign investment in the sector.

d. Statutory Instruments Act

The Act has amended the 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 AND IMPORTANT NOTE

This Alert is for information purposes only and should not be taken to be or construed as a legal opinion. Please note that the coming into force of the Finance Act, 2023 was temporarily suspended by way of a Conservatory Order issued by the High Court (Thande J) on 30th June 2023 in HCCHR Petition No. E181 of 2023 (“**the Court Order**”). We note to keep you updated on developments with respect to the Court Order.

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