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Tax Alert

The Finance Bill 2011
A Dilemma?

There is a lot of confusion surrounding the application of the amendments introduced by the Finance Bill 2011, following Parliament's failure to pass the Bill by 31 December 2011 as required by law.

Two questions arise:

- What amendments will apply post December 2011 to the items on which the Finance Bill proposed to vary; and
- What happens to the excess taxes that have already been paid by tax payers between the period June 2011 and December 2011?

As one would expect the debate on the subject is raging, and the prevailing view on the first question seems to be that the amendments are no longer legally binding, and as such, the law will be applied as it stood before the reading of the Budget speech 2011. We would agree with this view.

The **Provisional Collection of Taxes and Duties Act, CAP 415 of the Laws of Kenya (''the Act''),** is the law that provides the basis for which amendments introduced by the Finance Bill shall be implemented prior to the Bill being passed into law. However, the Act provides that the amendments shall cease to have effect if the National Assembly does not pass or fails to pass the Finance Bill within six months of its publishing. That said, under the Act, the Minister for Finance may with the approval of the National Assembly extend the period during which the amendments shall remain in force.

It would therefore follow that unless the Bill is passed into law, or the Minister for Finance extends the enforcement period, tax payers should revert to the provisions of the law as they were prior to the Finance Bill 2011, as failure to do so would mean that they would be effecting amendments which do not have any legal basis or standing. It is therefore advisable for tax payers to be on the look-out for any extensions by the Minister prior to reverting to the position as it was prior to June 2011.

On the second question of taxes paid during the six month period referred to above, the general feeling seems to be that tax payers are entitled to a refund of any excess tax payments made based on increments proposed by the Finance Bill and effected in that period. The argument advanced for this is that since the Bill was not passed into law within the period required, the amendments contained therein were therefore not legitimate, and as such were never law in the first place.

We differ with this view, on the basis that for the first six months after the Bill is published, the Provisional Collection of Taxes and Duties Act is the only piece of legislation that is required to effect the amendments contained in the Bill. This effectively means that this Act provided a legal basis for the application of the amendments between June and December 2011. Further, under tax legislation, refunds are usually payable where tax has been paid erroneously, or where the law specifically provides that under certain circumstances a tax payer is entitled to such refund.

In light of the foregoing, it is our view that all the taxes paid during the period June to December 2011 were not paid in error, had the full force of the law, and the issue of refunds does not therefore arise. Indeed in practical terms, making such refunds would be next to impossible!

We will be monitoring the position and shall provide updates as and when they arise. In the meanwhile, please contact your tax relationship manager for more information on this and other tax issues.

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