

Tax & Legal Alert
April 2024



Affordable Housing Act, 2024

A summary of the key aspects

The Affordable Housing Act of 2024 was assented by the President on **19th March 2024**, having been fast-tracked through Parliament. Sections 4 and 5 of the Act which guide on the imposition of the levy and the obligations of the employer came into force immediately on 19 March 2024 while the rest of the Act came into operation on **22nd March 2024** following gazettelement by the Cabinet Secretary.

This alert examines the recent history of the Affordable Housing Levy, from its introduction through the Finance Act, 2023 to the current status as a standalone statute. The alert further highlights some of the key insights on sections of the new ACT impacting contributors, employers and employees.

Background and Introduction

The re-introduction of the Affordable Housing Levy (“AHL”) through the Affordable Housing Act, 2024 in our view is an attempt by the Government to comply with the findings of the High Court (HC) highlighted in our brief below.

Section 84 of the Finance Act, 2023 introduced the Affordable Housing Levy vide amendments to **Sections 31B and 31C** of the Employment Act, 2007 with the effective date being **1st July 2023**. However, petitions challenging the constitutionality of some of the provisions regarding this levy were filed in the High Court.

The High Court delivered its ruling on **28th November 2023** finding that the Housing Levy was unconstitutional for the following reasons;

- ❖ The Housing Levy lacked a comprehensive **legislative framework**.
- ❖ The imposition of the Housing Levy to only those in formal employment is **discriminatory**.

In its ruling, the HC also granted a temporary stay of the judgment until **10th January 2024** pending filing of a formal application for stay/conservatory orders in the Court of Appeal (COA). This meant that the government continued collecting the levy.

The above orders were extended by the Court to **26th January 2024** when the ruling on the extension of the stay order was to be delivered. While this was ongoing, the government tabled in Parliament the Affordable Housing Bill, 2023 on **4th December 2023**, seeking to address the issues raised by the HC.

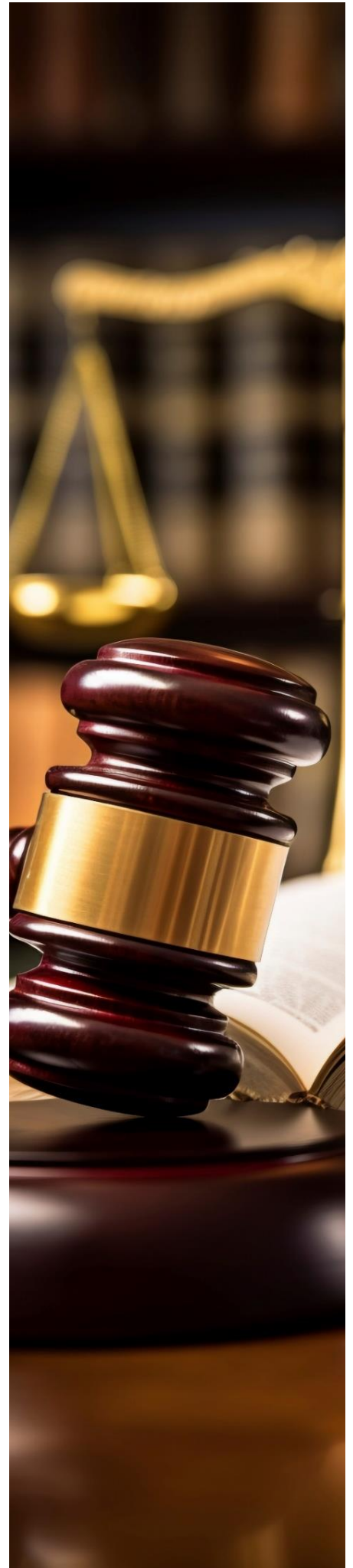
At the COA, the request by the appellants for a stay was denied on grounds that granting such an extension of stay was not in the public interest. Consequently, the government had no legal basis to continue enforcing deduction and collection of AHL from January 2024 payroll.

Presumption of Constitutionality of Statutes

The **presumption of constitutionality** holds that “ **unless otherwise proven**, every legally enacted statute shall be taken to be constitutional “. Following from this principle, the Affordable Housing Act, 2024, though fast-tracked remains a legally enacted statute unless challenged in Court.

The above principle was referenced in the COA ruling that denied the application for a stay of the AHL wherein the judge observed that the presumption of constitutionality holds true until a statute is declared unconstitutional.

We note from the media that a petition has been filed challenging the implementation of this Act but no Court order has been issued barring its validity and therefore the Act is presumed constitutional.





Date of Commencement

Section 1 of the Affordable Housing Act, 2024 provides that sections 4 and section 5 shall come into operation on the date of assent i.e. **19th March 2024** while all other sections of the Act came into operation on **22nd March 2024** as per the gazette notice by the Cabinet Secretary.

Imposition of Affordable Housing Levy – effective 19th March 2024

Section 4 of the Act provides for imposition of the AHL as follows;

- I. **1.5%** of the gross salary of an employee ; or
- II. **1.5%** of the gross income of a person received or accrued which is not subject to the levy under employment income.

Further, subsection 3 provides that the **due date** for payment of AHL to the collector (The Kenya Revenue Authority) is no later than the **9th working day** after the end of the month in which the gross salary was due or gross income was received or accrued.

Worth noting, the Act has not defined the term “gross salary” but in our view employers may consider using the guidance provided by the Kenya Revenue Authority (KRA) vide a public notice dated 15th August 2023.

In addition, the due date for remittance of AHL to the KRA is not aligned with due date for Pay As Your Earn (PAYE) despite the government’s efforts to consolidate employee statutory payments and filings to enhance ease of doing business.

Further, **Section 4** seeks to resolve one of the issues raised by the High Court that, the levy as implemented then, was discriminatory as it was only imposed on **individuals in formal employment**. Under Section 4(2)(b), persons earning or accruing incomes other than that from employment are subject to the levy.

Therefore, independent consultants, insurance agents, casual labourers and other persons under the informal sector are required to account for AHL.

However, the Act does not place an obligation on the **payer to withhold** AHL, as is the case for the employer-employee relationships. Based on the data provided by the Kenya National Bureau of Statistics (KNBS), around three million Kenyans are in formal employment. Therefore, one would have expected the Act to provide clear collection and enforcement mechanisms for persons earning their income from other sources other than employment as they form the **majority of the targeted persons** and would easily raise the much-needed funds to actualise provision of affordable housing.

The High Court ruling also found AHL unconstitutional on grounds of discrimination and held as follows;

*“in the absence of a rational explanation for the manner in which the housing levy was enacted, we can only conclude that the respondents took the **path of least resistance** because collecting taxes from employees in formal employment is easier. It is the respondents’ constitutional responsibility to create a broad-based, efficient, and fair tax system that complies with Article 201(b)(i) of the constitution.” (Emphasis Ours)*

We hope, the lack of a clearly legislated collection and enforcement mechanism for individuals not in formal employment, will not lead to this Act facing a similar challenge to the previous AHL provisions on grounds that the government is simply taking the ***path of least resistance***.

Obligations of Employers

Section 5 of the Act which is effective immediately provides that;

- I. Employers are required to deduct the levy from their employees and remit the same to KRA.
- II. Employers are also obligated to remit to the collector an equal amount or matching levy.

Persons who comply with their obligation to remit their levy as an employer are exempted from the requirement to pay the levy on their income which is not employment income.

Consequences for Non-compliance

Section 7 of the Act imposes a penalty of **three percent (3%)** per month or part thereof of the amount due or remaining unpaid after the due date.

The above penalty will be recovered as a civil debt from the person liable to remit the amount or levy.

Other Penalties Under the Act

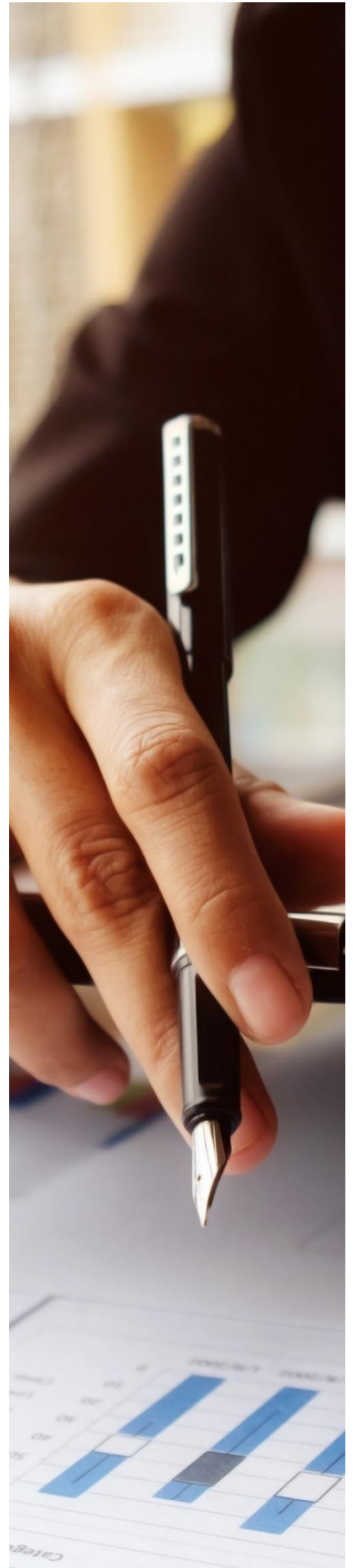
Section 56 of the Act provides for a fine not exceeding KES 20M or an imprisonment to a term not exceeding 10 years upon conviction for any misappropriation of funds or assets of the Affordable Housing Fund.

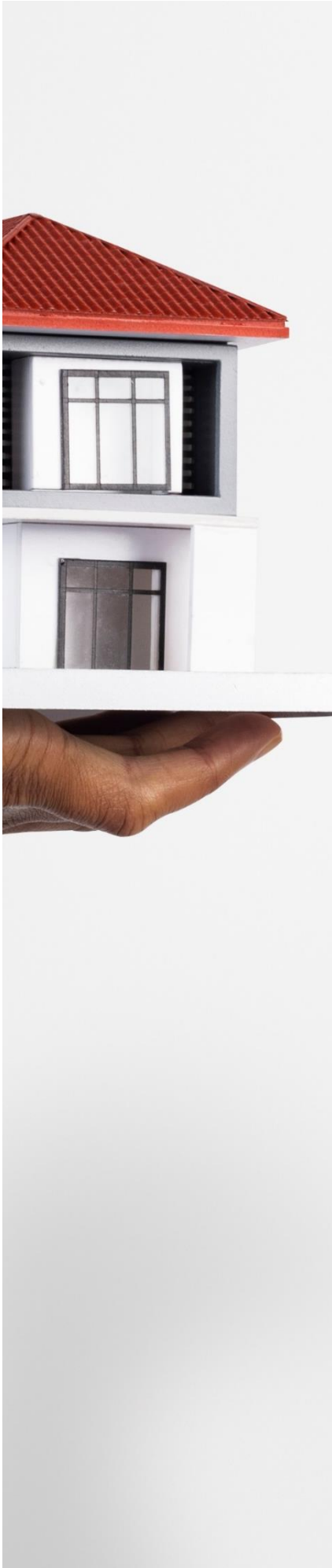
However, if as a result of the misappropriation the person received a quantifiable benefit, or another person received a quantifiable loss then an **additional mandatory fine** is imposed.

The harsh penalties will hopefully, prevent any misuse or misappropriation of funds as they also seek to recover the monies and assets misappropriated.

Further, **Section 57** of the Act, makes it an offence to fail to give information or to give false or inaccurate information required under the Act and punishes this by imposition of a fine not exceeding **KES 10M** and/or imprisonment to a term not exceeding **5 years**.

All persons liable to pay this levy including employers will need to ensure the information submitted to the KRA is accurate to avoid the above onerous fines.





Reliefs and Deductions Provided by the Act

Deductible Expenses for Employers

The Second Schedule of the Act introduces an amendment to the Income Tax Act (“ITA”) by inserting **paragraph (ga)** to section 15 (2) of the ITA thereby allowing for a deduction before tax for payment of the Affordable Housing levy incurred by an employer carrying on a business.

Employers who make the matching levy payment as required under this Act will be allowed a deduction equal to the levy paid for corporation tax purposes thus reducing the cost impact by 30% for resident companies.

Affordable Housing Relief

The Second Schedule also amends the ITA by inserting sub-section (1A) under Section 30A of the Income Tax Act and stipulates that “a resident individual who proves that in a year of income, he/she has paid the affordable housing levy, shall for that year of income be entitled to the affordable housing relief.”

The Third Schedule, Head A sets the Affordable Housing relief at 15% of the employee’s contribution, subject to a maximum of KES 108,000 per annum (KES 9,000 per month).

The above relief is a welcome move as it will reduce the impact on the disposable incomes of the employees albeit minimally.

Other Consequential Amendments

Reduction of the Turnover Tax Rate

The Act has also amended paragraph 9 of the Third Schedule of the ITA to reduce the rate of Turnover Tax (TOT) from the current three percent (**3%**) to one point five percent (**1.5%**) of gross receipts.

The reduction in TOT from 3% to 1.5% of gross receipts is a welcome move to businesses subject to turnover tax as they will now pay TOT at the rate of 1.5% and the AHL at the rate of 1.5% of their gross income, where they have no employees. Where such businesses have employees, they will pay the employer matching contribution of 1.5% of gross salary and TOT at 1.5% of gross receipts.

Amendments to the Kenya Revenue Authority Act

The Affordable Housing Act, 2024 has amended Part II of the First Schedule of the KRA Act to include the Affordable Housing Act, 2024 as written law relating to revenue though not as a primary tax statute.

Conclusion

Implementation of affordable housing is one of the key government agendas as evidenced by the pressure to ensure the levy is collected despite the prevailing hard economic times and the economic pressure this deduction is likely to subject the persons required to pay this levy.

As we have highlighted in this alert, following the gazettelement of the Affordable Housing Act, 2024 employers need to immediately adjust their payroll systems to capture the levy deduction as well as grant their employees the relief as provided in the Act.

Further, with the coming into force of this Act , it will be useful to see the findings of the AHL case still ongoing at the COA and the precedent this will set going forward in situations like this where the government seeks to comply with the findings of the lower Court (especially where a piece of legislation is found to be unconstitutional), without waiting for the due process of the judiciary to be completed.

Should you wish to discuss this further, kindly feel free to contact any of the contacts below or your usual Deloitte contact who will be more than glad to offer you guidance and assistance.



Contacts for this alert

Fred Omondi

East Africa- Tax & Legal Leader
+254 719 039 318
fomondi@deloitte.co.ke

David M'ibari

Associate Director
+254 719 039 111
dmibari@deloitte.co.ke

Lilian Kubebea

Tax Partner
+254 719 039 113
lkubebea@deloitte.co.ke

Lucy Kirika

Tax Manager
+254 719 039 000
lkirika@deloitte.co.ke

Doris Gichuru

Partner
+254 719 039 454
dgichuru@deloitte.co.ke

Maureen Kimamo

Tax Manager
+254 719 039 013
mkimamo@deloitte.co.ke

Walter Mutwiri

Partner
+254 719 039 253
wmutwiri@deloitte.co.ke

Kennedy Odongo

Tax Manager
+254 719 039 121
kodongo@deloitte.co.ke

Doreen Mbogho

Partner
+254 719 039 225
dmbogho@deloitte.co.ke

Brian Warutere

Tax Associate
+254 719 039 378
bwarutere@deloitte.co.ke

James Mwendia

Partner
+254 719 039 210
jmwendia@deloitte.co.ke

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