Kenya Tax Alert

Finance Bill, 2020

May 2020

The Finance Bill, 2020 was published on 5 May 2020.

The Bill has proposed amendments to the following statutes:

1. The Income Tax Act;
2. The Value Added Tax Act, 2013;
3. The Excise Duty Act, 2015;
4. The Tax Procedures Act, 2015;
5. The Miscellaneous Fees and Levies Act, 2016;
6. The Tax Appeals Tribunal Act, 2013;
7. The Public Roads Toll Act;
8. The Capital Markets Act;
9. The Insurance Act;
10. The Standards Act;
11. The Road Maintenance Fund Act, 1993;
12. The Kenya Revenue Authority Act, 1995;
13. The Retirement Benefits Act, 1997; and
14. The Insolvency Act, 2015.

The Bill was tabled in the National Assembly on 6 May 2020 and is expected to be passed by the end of June 2020. This publication summarizes our analysis of the amendments proposed by the Bill and their impact.

Corporate Income Tax

Proposal to increase the maximum income threshold subject to residential rental income tax

The measure

The Bill proposes to amend Section 6A (1) of the Income Tax Act to raise the maximum income threshold for residential rental income tax from KES 10 million to KES 15 million.

If passed in its current state, residential rental income tax shall, unless one opts out in writing, be applicable on any rental income falling between KES 144,000 and KES 15 million per annum in respect of residential property. The current income threshold is KES 144,000 to KES 10 million. This applies to resident persons only.

Who will be affected

Resident persons (including companies) who earn rental income from residential property.

When

1 January 2021

Our view

The proposal to increase the maximum income threshold for residential income tax could be a testament that the introduction of the tax may have been successful. Hence, the motivation to capture more owners of property within the regime.

However, with the recent changes that increases the threshold for turnover tax and the personal tax bands, our view is that the lower limit of KES 144,000 should be reviewed upwards to align with other taxpayers.

Corporate Income Tax

Introduction of a new tax known as "minimum tax"

The measure

The Bill proposes to introduce a tax known as minimum tax (MT), which shall be applicable at 1% of the gross turnover. Minimum tax shall not be applicable on the following incomes:

- Any income that is exempt from tax under the Income Tax Act;
- Employment income;
- Income that is taxable through the residential rental income tax or turnover tax regimes;
- Capital gains computed in accordance with the Eighth Schedule; or
- Income derived from extractive industries as prescribed under the Ninth Schedule.

MT shall be paid through an instalment tax system by the 20th of the fourth, sixth, ninth and twelfth months.

Interestingly, it would seem that MT would only apply to the extent that it is higher than the instalment tax computed in accordance with Section 12 of the Income Tax Act. This appears to be a drafting error, as the Bill has also proposed to amend Section 12 of the Income Tax Act to exempt persons from payment of instalment tax if the MT is higher than the instalment tax. Therefore, as currently drafted, taxpayers would be required to either pay both instalment tax and MT or nothing at all.

Who will be affected

All taxpayers with business income (other than income subject to turnover tax), rental income (other than income subject to residential rental income tax) and other non-exempt income.

When

Effective 1 January 2021

Corporate Income Tax

Introduction of a new tax known as "minimum tax"…cont.

Our view

The introduction of MT aims at shoring tax revenue by ensuring that all taxpayers pay, at least, some tax liability irrespective of their performance. This is borrowing from trends in some countries to ensure businesses that report losses over extended periods pay a MT.

However, as currently written, the provision has several shortcomings as discussed below:

a. It does not limit MT to businesses with long periods of losses. Currently, even a loss for one year would mean one pays MT. In most countries (including our neighbours Uganda and Tanzania), MT applies only when one has consecutive losses for 3-5 years; and

b. It does not provide for transition. This is necessary since there are taxpayers/ businesses with past losses, which would be offset against profit in 2021 and subsequent years. However, as currently written, one would still pay MT. There are also businesses that may be in a tax loss position arising from investment allowances, in which case MT will clawback some of the allowances; and

c. There seems to be an error in Part c of the provision since it imposes MT in a scenario where instalment tax is higher than the MT. In our view MT should only be applicable where instalment tax payable is lower than MT. We believe that the same will be corrected before enactment of the Bill.

In our view, this amendment is untimely as it will be punitive to businesses, which will be reporting tax losses. With the current adverse economic conditions, many businesses will be caught up in this position. It would thus be advisable to review this proposal to address the above deficiencies.

Corporate Income Tax

Introduction of digital service tax

The measure

The Bill proposes to introduce a digital service tax at 1.5% of gross transaction value. The tax shall be payable by a person whose income from provision of services is derived from or accrues in Kenya through a digital market place.

"Digital marketplace" is defined under the Income Tax Act to mean a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means.

Digital service tax shall be payable at the time of transfer of payment to the service providers.

In the case of residents and non-residents with permanent establishments in Kenya, the tax shall be available for offset against their income tax liability for the year.

Who will be affected

Entities generating income through a digital marketplace/ e-commerce.

When

Effective 1 January 2021

Corporate Income Tax

Introduction of digital service tax...cont.

Our view

The amendment demonstrates the increased effort by the government to target players in the digital market for increased tax revenue generation. However, as currently written, it has many gaps. There is need to carefully define what services are covered; the current definition is quite wide in scope since many businesses use electronic means to provide their services. In addition, the provision does not state who is responsible for paying the tax.

For non-residents, it could increase the risk of double taxation. It will also have negative cash flow implications, especially for low margin businesses and businesses that are already subject to other taxes such as withholding tax.

In our view, resident taxpayers who are registered for tax should be exempted from this tax. In the case of non-residents, it should be applicable only on attaining a specified minimum turnover threshold in respect of sales in Kenya.

A provision that will empower the Commissioner to appoint an agent for purposes of collection and remittance of digital service tax provision has also been separately introduced under the Tax Procedures Act, 2015. This could impose an unreasonable administrative burden if the consumer is required to account for the tax, bearing in mind there is no minimum threshold of payment amount that would be subject to the digital service tax.

Corporate Income Tax

Employee club subscriptions and fees paid to trade associations no longer allowable

The measure

The Bill proposes to delete Section 15(2)(h) and Section 15(2)(v) of the Income Tax Act, which provide for deductions in respect of:

a) S. 15(2)(h) - Entrance fees or annual subscriptions paid to a trade association, which had elected to be taxed.

b) S. 15(2)(v) - Club subscriptions paid by an employer on behalf of an employee.

Who will be affected

Trade associations, clubs and their members as well as employers and employees.

When

Effective 1 January 2021

Our view

This amendment will likely result in reduced membership to clubs and trade associations. There will be an extra cost to employers who meet the cost of club subscriptions for their employees and subscriptions to trade associations.

If this proposal is to be adopted, it will only be fair to also amend the Income Tax Act to exempt the income of members' clubs and trade associations that may have elected to be taxed.

We note that this was one of the proposals under the Tax Laws Amendment Bill 2020. The proposal was rejected on recommendation by the Departmental Committee on Finance and National Planning after taking into consideration various submissions from the public. One would wonder why the attempt to reintroduce it so soon after it was rejected.

Corporate Income Tax

Repeal of the deductibility of capital expenditure incurred on listing of securities

The measure

The Bill proposes to delete Sections 15(2)(s), 15(2)(ss) and 15(2)(u) of the Income Tax Act, which provide for deductions in respect of:

a) Section 15(2)(s) - Legal costs and other incidental expenses relating to authorisation and issue of securities for purchase by the public;

b) Section 15(2)(ss) - Legal costs and other incidental expenses incurred to list on any securities exchange operating in Kenya, without raising additional capital; and

c) Section 15(2)(u) - Expenditure incurred on rating for the purposes of listing on any securities exchange operating in Kenya.

Who will be affected

Companies intending to issue their securities to the public.

When

Effective 1 January 2021

Our view

These changes had been proposed under the Tax Laws (Amendment) Bill, 2020 but they were rejected before approval of the Bill by the National Assembly.

The objective of these provisions was to encourage listings at the stock exchange but it appears the measures are deemed to be no longer necessary. This could also be informed by the fact that sale of securities listed at the stock exchange is currently exempt from Capital Gains Tax and therefore the move to limit further benefit in the form of deductions.

Corporate Income Tax

Capital expenditure on social infrastructure no longer deductible

The measure

The Bill proposes to delete Section 15(2)(x) of the Income Tax Act, which entitles taxpayers to a deduction in respect of expenditure incurred on the construction of a public school, hospital, road or any similar kind of social infrastructure subject to approval by the Minister.

Who will be affected

All taxpayers and the public.

When

Effective 1 January 2021

Our view

This deduction provided an incentive for taxpayers especially corporates to invest in improving infrastructure in their vicinity and in the society at large. This change is part of the move to reduce tax incentives with a view to fiscal consolidation.

While businesses should not be primarily motivated by tax benefits when deciding to invest in social infrastructure, it is recognised that in certain cases, businesses and the community take up responsibility that would otherwise lie with the government and therefore the need for such incentives. It may thus be necessary to provide some relief, especially for taxpayers operating in remote areas who need to incur expenditure. As an alternative, we would recommend that such expenditure be granted investment allowances under the Second Schedule.

Corporate Income Tax

Repeal of tax exemptions applicable to certain incomes

The measure

The Bill proposes to delete Paragraph 44 and 45 of the First Schedule to the Income Tax Act. If passed in its current state, the following incomes will be taxable:

a) The income of a registered Home Ownership Savings Plan (HOSP); and

b) The income of the National Social Securities Fund (NSSF).

Who will be affected

HOSPs, NSSF, pensioners and the public.

When

Effective 1 January 2021

Our view

The repeal of these exemptions appears to be a deliberate move by the government to shore up tax revenue.

We expect the repeal of the tax exemption applicable to the income of the NSSF to affect the amount of retirement benefits that will be available to pensioners. We consider this a retrogressive move and discriminatory given that the income of other (registered) pension and provident funds are exempt from tax. Furthermore, the current level of savings and funding for retirement is considered inadequate and one would expect measures to promote additional savings for retirement.

On the other hand, the repeal of the tax exemption on the income of registered HOSPs will likely discourage the use of such plans for home ownership and therefore it is not in line with the government's Big 4 Agenda of increasing access to housing.

Personal Income Tax

Deposits to registered home ownership savings plans no-longer deductible

The measure

The Bill proposes to delete Section 22C of the Income Tax Act, which entitles any person who deposits funds to a registered HOSP to a deduction of up to KES 48,000 per year or KES 4,000 per month. The section also exempts from tax, any interest income earned by a depositor on deposits of up to KES 3 million.

Who will be affected

Persons who contribute to registered HOSPs.

When

Effective 1 January 2021

Our view

HOSPs were introduced in order to enable an admitted depositor to accumulate a fund to purchase or build a permanent house for his occupation. They have not been widely implemented in the country despite being in existence for about 25 years. However, the government has recently tried to enhance savings through HOSPs by introducing important changes in law. The repeal of the tax incentives for HOSPs suggests a reversal in the policy; hence, likely to discourage home ownership. In our view, the change is untimely.

Personal Income Tax

Repeal of tax exemptions applicable to certain incomes

The measure

The Bill proposes to delete Paragraph 53 of the First Schedule to the Income Tax Act. The Paragraph lists the following incomes as being exempt from tax.

a) Monthly or lump sum pension granted to a person who is 65 years of age or more; and

b) Bonuses, overtime and retirement benefits paid to low-income employees.

The deletion of Paragraph 53 now means that the above incomes will be taxable.

Who will be affected

Pensioners and low income employees.

When

Effective 1 January 2021

Our view

The removal of exemption in relation to bonuses, overtime and retirement paid to low income employees may be attributed to the recent widening of tax bands. It may also be a move to seal tax avoidance loopholes as the current provision does not limit the exempt bonus or overtime payable to such employees.

However, one may question the reversal of the exemption granted to retirees in respect of their pension income as this would adversely affect those retirees who rely solely on their pension income.

This measure had been proposed under the Tax Laws Amendment Bill 2020 but it was rejected by the National Assembly.

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Value Added Tax

Additional requirement for deduction of input tax

The measure

The Bill has proposed to amend Section 17 (2) of the Value Added Tax Act, 2013 to include an additional requirement for claiming input tax. A registered purchaser would be required to ensure that the supplier has declared a sales invoice in their VAT return before claiming the related input tax.

Who will be affected

All VAT registered persons.

When

Upon assent of the Bill

Our view

The requirement for VAT registered taxpayers to defer the claiming of input tax until such a time when they have confirmed that the suppliers have declared the same in their VAT returns will make it increasingly difficult for taxpayers to claim input tax. This is a retrogressive measure that aims at validating the VAT auto-assessment practice that the KRA has rolled out.

If passed, the proposal will place a huge administrative burden for purchasers to ensure all their vendors confirm that they have declared sales in their VAT returns before input tax on related invoices can be claimed. This will ultimately create a significant impediment for businesses.

This proposal will effectively transfer the revenue authority's mandate and responsibility of enforcing compliance to the taxpayers. We are of the view that the proposal is impractical and a recipe for continued disputes that should not be passed by the National Assembly.

Value Added Tax

Change of VAT status from exempt to standard rated

The measure

The Bill proposes to change the VAT status of the following goods from exempt to taxable at the general rate of 14%:

1. Helicopters of tariff numbers 8802.11.00 and 8802.12.00;
2. Aircrafts of tariff numbers 8802.20.00 and 8802.30.00;
3. Aircraft launching gear and parts thereof; deck-arrestor or similar gear and parts thereof of tariff number 8805.10.00;
4. Air combat simulators and parts thereof of tariff number 8805.21.00; and
5. Other ground flying trainers and parts thereof of tariff number 8805.29.00.

Who will be affected

Aviation industry players.

When

Upon assent of the Bill

Our view

The proposal to remove the above aircrafts and their parts from the exemption schedule will make them costly and thus negatively impact the aviation sector which continues to suffer under the economic slowdown occasioned by the COVID-19 pandemic.

This is an untimely move considering the pandemic has adversely affected the aviation sector. Even in the absence of the pandemic, such a move would significantly increase the cost of the equipment for aviation players given the huge capital outlay required to acquire aircraft and related equipment.

Value Added Tax

Change of VAT status from exempt to standard rated

The measure

The Bill has proposed to remove the following items from the exemption schedule:

1. Specialised solar equipment and accessories, including solar water heaters and deep cycle-sealed batteries which exclusively use or store solar power;
2. Tractors;
3. New pneumatic tyres of tariff number 4011.30.00 for use in aircrafts;
4. Taxable goods locally purchased or imported by manufacturers or importers of clean cooking stoves for direct and exclusive use in the assembly, manufacture or repair of clean cook stoves approved by the Cabinet Secretary (CS) upon recommendation by the CS for the time being responsible for matters relating to energy;
5. Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating) barbeques, braziers, gas rings, plate warmers and similar non-electric domestic appliances, and parts thereof, or iron or steel of tariff numbers 7321.11.00, 7321.12.00, 7321.19.00, 7321.81.00, 7321.82.00, 7321.83.00 and 7321.90.00;
6. One personal motor vehicle, excluding buses and minibuses of seating capacity of more than eight seats, imported by a public officer returning from a posting in a Kenyan mission abroad and another motor vehicle by his spouse, which is not exempted from VAT under the First Schedule;
7. Plant, machinery, and equipment used in the construction of a plastics recycling plant; and
8. Hiring, leasing and chartering of helicopters of tariff numbers 8802.11.00 and 8802.12.00.

Value Added Tax

Change of VAT status from exempt to standard rated cont'd

Who will be affected

Various industries and consumers.

When

Upon assent of the Bill

Our view

Some of the items such as tractors, specialised solar equipment, and stoves had been included in the list of items to be removed from the exemption schedule in the Tax Laws (Amendment) Bill, 2020 but the proposals were not passed by Parliament. They have been included again in the Finance Bill, 2020.

It appears that the government is keen to reduce the list of exempt goods and services in an effort to increase tax revenue. Questions have also been raised regarding the effectiveness of exemptions and whether any benefit is passed on to the final consumer. Therefore, it is expected that going forward, we are likely to see less exemptions.

However, we believe some targeted exemptions may be necessary where the benefit is demonstrable.

Value Added Tax

Exemption of essential commodities and services

The measure

The Bill has proposed to exempt the following items:

1. Ambulance services;
2. Maize (corn) seeds of tariff number 1005.10.00.

Who will be affected

Consumers and Farmers.

When

Upon assent of the Bill

Our view

The proposal to exempt ambulance services is a welcome move, especially at a time when the need to improve health services has become more evident. The express inclusion in the schedule of exempt services provides clarity and would ensure that ambulance services are exempt from VAT.

Maize seeds of tariff 1005.10.00 were removed from the exempt schedule by the Finance Act, 2018. The proposal to exempt the seeds should reduce the cost of inputs for farmers thus making the products more affordable to consumers and thereby contributing to enhanced food security.

Value Added Tax

Change of VAT status from zero - rated to standard rated

The measure

The Bill proposes to change the VAT status of the following items from zero-rated to standard rated:

1. The supply of liquefied petroleum gas; and
2. Inputs or raw materials for electric accumulators and separators, including lead battery separator rolls, whether or not rectangular or square, supplied to manufacturers of automotive and solar batteries in Kenya.

Who will be affected

Consumers and suppliers/ manufacturers of liquefied petroleum gas (LPG) and batteries.

When

Upon assent of the Bill

Our view

The proposal to tax LPG at the standard rate was not passed by Parliament during the debate of the Tax Laws (Amendment) Bill, 2020 but has been re-introduced in the Finance Bill. It appears that the government is keen to tax LPG at the standard rate, which will make it less affordable. This could erode gains made in discouraging the use of unclean energy sources such as firewood and kerosene. Use of unclean energy negatively affects the health of users. As such, this change should be reconsidered.

However, as stated before, it is possible that the reason for the change is that the government considers that the benefit of zero-rating may not be fully passed to the consumers.

Excise Duty

Amendment of the definition of license

The measure

The Bill has proposed to amend the definition of license in the Excise Duty Act (EDA) to mean:

a) in the case of excisable services, the certificate of registration;

b) in the case of excisable goods, the licence issued under section 17; or

c) in the case of any activity under section 15 (1) (e), the licence required thereunder.

Who will be affected

Persons required to be licensed under the EDA.

When

Upon assent of the Bill

Our view

The current definition of "license" under the EDA covers a certificate of registration, in case of services and license and in case of excisable goods issued under Section 17 of the EDA. According to Section 17 and 15 of the EDA, a license is required for persons who undertake various activities including, inter alia, any activity in Kenya as required by the Commissioner General, through a Gazette Notice.

It appears that the current definition of "license" in the EDA includes licenses issued for carrying out any other activity in Kenya as required by the Commissioner General by notice in the Gazette as per Section 15(1)(e) of the EDA. The proposed change therefore appears to clearly differentiate between licenses issued for excisable goods from licenses issued for carrying out any other activity as required by the Commissioner General.

Excise Duty

Imposition of excise duty on imported sugar confectionary and chocolate

The measure

The Bill proposes to re-introduce excise duty on locally manufactured sugar confectionery of tariff heading 1704 at KES 20 per Kg and white chocolate, chocolate in blocs, slabs or bars of tariff Nos. 1806.31.00, 1806.32.00 and 1806.90.00 at KES 200 per Kg.

Who will be affected

Manufacturers of confectionery and chocolate, and consumers.

When

Upon assent of the Bill

Our view

Excise duty on confectionary and chocolate had been introduced in 2018. The National Treasury CS in his budget speech, indicated that the primary objective of this measure was to discourage consumption of confectionary and chocolate products, which are associated with negative health effects. In 2019, the government removed excise duty on locally manufactured sugar confectionary and chocolate with a view to cushion local manufacturers from cheap imports.

Therefore, the proposal to re-introduce excise duty on these products seems to be driven by the need to generate additional tax revenue for the government and promoting equity between locally manufactured and imported goods.

We note that the CS had proposed a similar amendment through the Tax Laws (Amendment) Bill, 2020 but the proposal was rejected by the National Assembly.

Excise Duty

Change in alcoholic strength threshold for alcoholic beverages

The measure

The CS has proposed to amend the alcoholic strength threshold for excisable spirituous beverages as follows:

a) The alcoholic strength threshold of ready to drink spirits has been reduced from 10% to 8%.

b) The alcoholic strength threshold of concentrated spirits has been amended to cover spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 8% instead of 10%.

Who will be affected

Importers and local manufactures of spirituous beverages.

When

Upon assent of the Bill

Our view

The EDA currently provides for excise duty on spirituous beverages not exceeding 10% at KES 110.62 per litre and those exceeding 10% at KES 253 per litre. This proposal if adopted will imply that excise duty on spirituous beverages of alcoholic strength not exceeding 8% will be KES 110.62 while spirits of under natured ethyl alcohol, spirit liqueurs and other spirituous beverages of alcoholic strength exceeding 8% will attract excise duty at KES 253 per litre. In effect, excise duty on spirituous beverages of alcoholic strength exceeding 8% but less than 10% will increase from KES 110.62 per litre to KES 253 per litre.

The aim of the proposal is to generate additional revenue for the government.

Miscellaneous Fees & Levies

Amendment of Import Declaration Fee (IDF) on goods imported under the East African Community (EAC) Duty Remission Scheme

The measure

The Bill proposes to amend the IDF rate applicable on goods imported under the EAC Duty Remission Scheme from a fixed fee of KES 10,000 to 1.5% of the customs value.

Who will be affected

Importers of goods under the EAC Duty Remission scheme.

When

Upon assent of the Bill

Our view

The Miscellaneous Fees and Levies Act (MFLA) provides for IDF of KES 10,000 per import entry on goods imported under the EAC Duty Remission Scheme. The proposal to amend the IDF rate to 1.5% of the customs value seems to gear towards harmonsing the IDF rate applicable on raw materials and intermediate goods.

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Miscellaneous Fees & Levies

Introduction of additional import duty on goods entered for home use from an Export Processing Zone (EPZ)

The measure

The Bill has proposed to introduce additional duty on goods entered for home use from an EPZ at the rate of 2.5% of the customs value.

Who will be affected

Buyers of goods from an EPZ.

When

Upon assent of the Bill

Our view

Goods taken out of an EPZ to the Kenyan territory are deemed to have been imported into Kenya for tax purposes and are subject to import taxes including import duty as prescribed in the EAC Common External Tariff.

The CS has proposed to charge additional duty at the rate of 2.5% of the customs value to further discourage the sale of goods manufactured in EPZs within the EAC territory, in line with the primary objective of EPZs of promoting exports from Kenya.

This proposal, if adopted will increase the cost of goods purchased from an EPZ and may reduce local demand of goods manufactured in EPZs.

Miscellaneous Fees & Levies

Removal of IDF and Railway Development Levy (RDL) exemptions

The measure

The Bill has proposed to delete the following items from the IDF exemption schedule:

- Aircraft of unladen weight not exceeding 2,000Kg and Helicopters.
- Goods as the CS may determine are in public interest, or to promote investments of a value exceeding KES 200 million.
- Goods imported for implementation of Special Operating Framework Agreement projects.

Who will be affected

Importers of the affected goods.

When

Upon assent of the Bill.

Our view

The proposed reduction of the number of goods exempted from IDF and RDL aims at generating additional revenue for the government. The removal of IDF and RDL exemption on the items above will significantly increase the cost of high value items such as aircrafts and high value investments. We believe it is necessary to introduce a value cap on these levies to avoid unnecessary cost pressures on certain sectors.

Miscellaneous Fees & Levies

Introduction of additional items into the IDF and RDL exemption schedules

The measure

The Bill has proposed to exempt from IDF all goods, including materials, supplies, equipment, machinery and motor vehicles for the official use by the Kenya Defense Forces (KDF) and National Police.

The Bill has also proposed to exempt from RDL the following items:

- All goods, including materials, supplies, equipment, machinery and motor vehicles for the official use by KDF and National Police.
- Currency notes and coins imported by the Central Bank of Kenya (CBK).

Who will be affected

KDF, National Police and CBK.

When

Upon assent of the Bill

Our view

Goods imported for official use by KDF and National Police are exempted from import duty, VAT and excise duty. The proposal to exempt IDF and RDL on the said goods is geared towards further reducing the cost of items for use by the KDF and National Police with a view to promoting national security.

Tax Procedures

Introduction of a tax amnesty programme

The measure

The Bill proposes to introduce a tax amnesty programme that will run for a period of three years effective 1 January 2021. The amnesty shall apply to tax liabilities that accrued within a period of five years prior to 1 July 2020.

Below are the highlights of the programme:

a) Under the programme, a taxpayer who voluntarily discloses to the Commissioner their tax liabilities (including material facts) will be granted relief from penalties and interest on the tax disclosed as follows:

- Where the disclosure is made and tax paid within the first year of the programme, a full remission of the interest and penalty would be granted.
- Where the disclosure is made and tax paid in the second year of the programme, a remission of 50% of the interest and penalty would be granted.
- Where the disclosure is made and tax paid in the final year of the programme, a remission of 25% of the interest and penalty would be granted.

b) A taxpayer granted relief shall not be prosecuted with respect to the tax liability disclosed;

c) The taxpayer and the Commissioner will be expected to enter into a payment plan for the tax liability for a period of up to one year;

d) Where the taxpayer fails to meet the terms of the payment plan, the taxpayer shall be liable to pay the full interest and penalty that had been remitted;

Tax Procedures

Introduction of a tax amnesty programme…cont.

e) A taxpayer granted relief under the Programme shall not be entitled to any remedy including right to appeal with respect to taxes, penalties, and interest remitted by the Commissioner;

f) Where before expiry of the agreement between the Commissioner and the taxpayer, it is established that the taxpayer did not disclose a material fact in respect of the relief granted, the Commissioner may (i) withdraw any relief granted, (ii) assess and collect any balance of tax liability, and (iii) commence prosecution. The taxpayer may appeal against any of these actions;

g) The Programme will not apply to a taxpayer who is under audit, investigation or is party to an ongoing litigation or who has been notified of a pending audit or investigation by the Commissioner; and

h) The disclosure of tax liability shall be confidential.

Who will be affected

All taxpayers

When

Effective 1 January 2021

Tax Procedures

Introduction of a tax amnesty programme...cont.

Our view

A tax amnesty provides an avenue for taxpayers to voluntarily correct mistakes or omissions that result in tax liability without being penalised. We expect the amnesty to improve revenue collection in the short term and tax compliance going forward.

The amnesty is a welcome move. However, to increase its effectiveness, the following should be addressed:

- The tax amnesty should not exclude persons who have been notified of a tax audit/ investigation from the programme. As long as the audit has not commenced, the taxpayer should be allowed to apply for the amnesty;
- The period covered by the amnesty should be aligned to the commencement date – i.e. as currently worded, the amnesty commences on 1 January 2021 but covers 5 years prior to July 2020.

Taxpayers are advised to review their tax affairs to take early advantage of the amnesty, as the revenue authority will likely increase the intensity of audits to make up for revenue shortfalls expected to arise due to the adverse economic effect of COVID-19.

Tax Procedures

Appointment of digital service tax agents

The measure

The Bill proposes to introduce a provision that will empower the Commissioner to appoint an agent for purposes of collection and remittance of digital service tax.

The appointment may be revoked by the Commissioner at any time.

Who will be affected

Players in the digital market place and their clients.

When

Effective 1 January 2021

Our view

The amendment aims at enabling the Commissioner to collect the introduced Digital Service Tax. It is likely that the agents may comprise of persons who offer a digital platform, recipients of digital services, banks, mobile payment providers and other payment platforms.

This measure is likely to increase the compliance burden of the appointed agents. Going by past experience, the revenue authority is likely to appoint many agents and may not give taxpayers the option to decline the appointment. We believe this needs to be reconsidered and possibly a value threshold should be introduced so that one only qualifies to be appointed an agent, where the value of transactions/ payments to digital service providers is very significant.

The trend of the revenue authority transferring its obligations to tax agents is worrying especially given the significant administrative burden imposed on the agents and huge sanctions for non-compliance.

Other measures

In addition to the tax measures, the Bill has also proposed the following changes. The changes are expected to come into force upon assent:

The Tax Appeals Tribunal Act, 2013

The Bill proposes to amend Section 13 (6) of the Tax Appeals Tribunal Act, 2013 to provide that the appellant shall, unless the Tribunal orders otherwise, be limited to the grounds stated in the appeal **or documents** to which the decision relates.

Currently, Section 13(6) only limits an appellant to the grounds stated in the appeal. If the proposed amendment is passed in its current state, the appellant will not be allowed to introduce new grounds of appeal or new documents to support an appeal after filing an original appeal.

The Roads Toll Act (Cap 407)

The Bill proposes to amend the Roads Toll Act (Cap 407) in order to:

a. Remove the provisions that require the Minister in charge of roads to seek the National Assembly's approval before signing a planning, design, construction and management agreement of a public road or any portion thereof that has been declared to be a toll road;

b. Allow the use of alternative arrangements, beyond the conventional toll stations/ facilities, for the levying, collection and administration of tolls and management of toll infrastructure;

c. Introduce a proviso that will allow toll rates to be adjusted, varied or revised;

d. Provide for the establishment of a Fund that will be known as the National Roads Toll Fund, which shall receive tolls collected by persons appointed by the government; and

e. Allow a person with whom the Minister in charge of roads enters into a toll road management agreement to collect unpaid tolls from defaulters as a civil debt recoverable summarily.

The above proposed amendments appears to make tolling regimes attractive in order to encourage the private sector to partner with the government on road infrastructure.

Other measures

The Capital Markets Act (Cap 485A)

The Bill proposes to empower the Capital Markets Authority to license, approve and regulate private equity and venture capital companies that have access to public funds.

The Insurance Act (Cap 487)

The Bill proposes to amend the Insurance Act (Cap 487) in order to limit the period within which an appeal against the Commissioner of Insurance's decision, on a dispute between an insurance customer and regulated entity, may be lodged to the Tribunal.

An appeal may now only be lodged within 30 days of the Commissioner's decision.

The Standards Act (Cap 496)

The Bill proposes to replace the definition of "consolidator" in the Standards Act (Cap 496) with the following definition:

"Consolidator" *means a firm that is licensed to consolidate goods belonging to different consignees at the country of export, which shall be under one Master Bill of Lading or Master Airway Bill, and breaks the consignment into smaller consignments at the port of destination for the different consignees for the purpose of individual customs declaration.*

The proposed definition clarifies the following:

- That only firms can be licensed to be consolidators; and
- That each consignee will be required to individually declare his/ her consignment at the port of destination for customs purposes. In the current definition, a consignment is declared as belonging to one importer at the port of destination before being de-consolidated for delivery to the individual consignees.

Other measures

The Road Maintenance Fund Act, 1993

The Bill proposes to amend Section 7 of the Road Maintenance Fund Act, 1993 in order to delete any mention of "transit tolls" as forming the proceeds of the Roads Maintenance Levy Fund.

This proposed amendment may have been informed by the expected establishment of a new Fund known as the National Roads Toll Fund that will receive all toll levies. The new Fund will be established under the Roads Toll Act (Cap 407).

The Kenya Revenue Authority Act, 1995

The Bill proposes to amend the Kenya Revenue Authority Act, 1995 in order to:

- Allow the Kenya Revenue Authority ("KRA" or "the Authority") to establish an institution to provide capacity building and training for the better carrying out of its functions;
- Allow the KRA Board to make regulations with respect to capacity building and training;
- Entitle the KRA to commissions for collecting revenue on behalf of county governments or government agencies, which commissions shall be capped to 2% of the revenue collected; and
- Prevent legal action against KRA unless:
  - It is commenced within 12 months after the act, neglect or default complained of;
  - In the case of continuing injury or damage, within six months after cessation of the act;
  - At least one month written notice specifying the particulars of the claim and intention to commence the action or legal proceeding has been served upon the Commissioner General.

Other measures

The Retirement Benefits Act, 1997

The Bill proposes to introduce a penalty equivalent to KES 100,000 where a trustee fails to submit a copy of the actuarial report to the Chief Executive Officer of the Retirement Benefits Authority.

A further penalty of KES 1,000 shall be charged for each day or part thereof during which the report remains un-submitted.

The Insolvency Act, 2015

The Bill seeks to amend the Insolvency Act, 2015 in order to give unpaid amounts held on behalf of the KRA by an institution appointed as an agent for revenue banking services, second priority in the event of liquidation or receivership of the institution.

Introduction

Corporate Income Tax

Personal Income Tax

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Excise Duty

Miscellaneous Fees & Levies

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