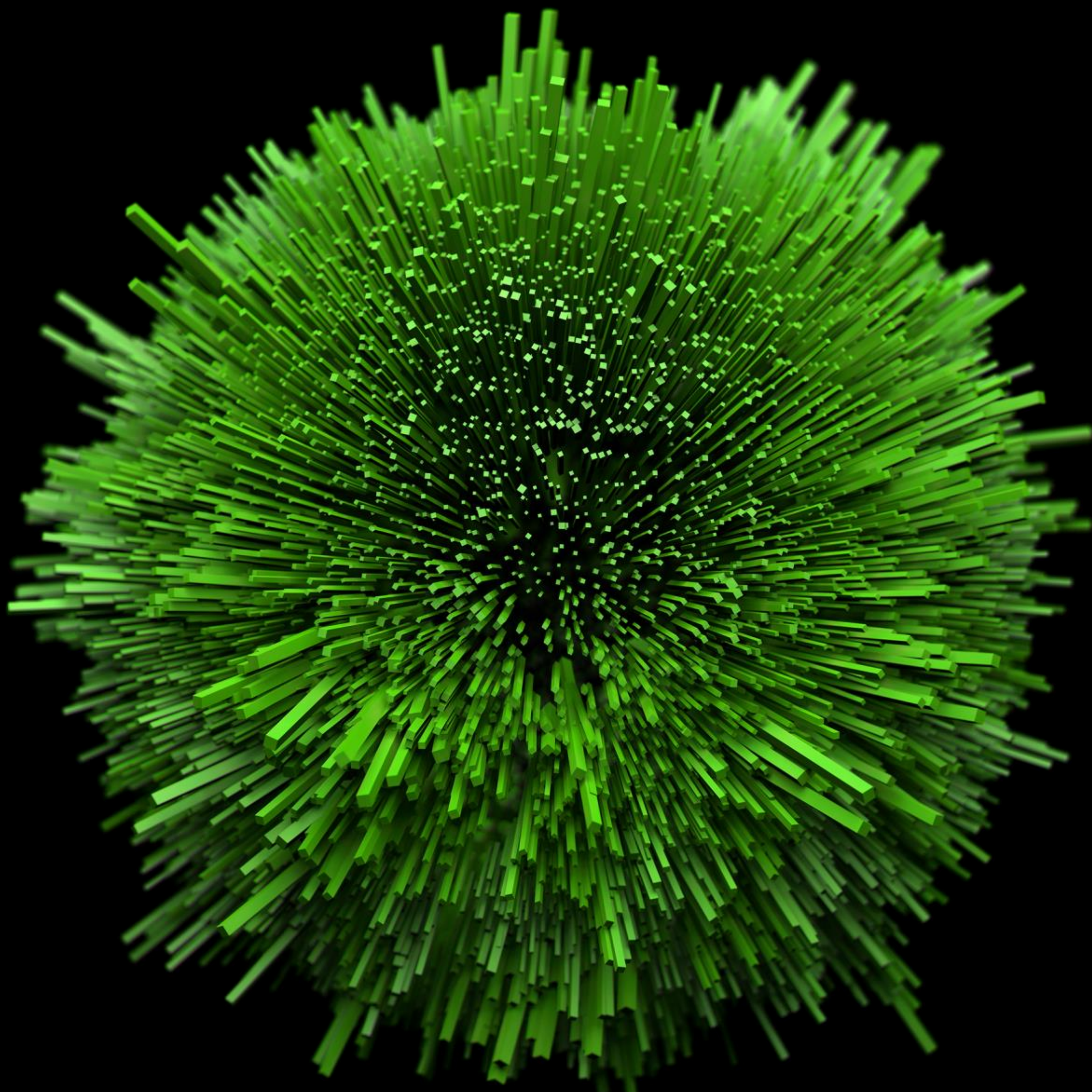
Deloitte.



Kenya Tax Alert

Tax Laws (Amendment) Act, 2020

April 2020

The President assented to the Tax Laws (Amendment) Bill, 2020 on 25 April 2020 thus giving it the force of law.

The Tax Laws (Amendment) Act, 2020 has introduced amendments to the Income Tax Act, Value Added Tax Act, 2013, Excise Duty Act, 2015, Tax Procedures Act, 2015, Miscellaneous Fees and Levies Act, 2016, Kenya Revenue Authority Act, 1995 and the Retirement Benefits Act, 1997.

Although it was expected that the Act would focus on provisions giving effect to the tax relief measures announced by the President when he outlined the Government's initiatives aimed at addressing the economic impact of the COVID-19 pandemic, it is rather surprising that the Act contains a raft of changes to the tax laws that will have a significant impact on taxpayers. Perhaps the National Treasury seized the opportunity to push through changes that would have been under consideration as part of the proposed Income Tax Bill and subsequent reviews to other tax laws. It appears that the National Treasury is seeking to enhance revenue collection to bridge the budget deficit by radically reducing tax incentives and benefits. Although there may be merit in some of the changes, the timing is questionable given the economic distress facing most taxpayers as a result of the COVID-19 pandemic.

Key changes introduced by the Act include:

- Reduction of income tax rates for both individuals and corporate entities;
- Reduction and/or elimination of tax incentives such as investment allowances and exemptions;
- Withholding tax measures aimed at taxing income of non-residents and income accrued from digital platforms; and
- Reduction in the number of VAT zero rated and VAT exempt products.

This publication summarizes our analysis of the amendments introduced by the Act and their impact. We have also included in the publication the amendments to the tax statutes introduced by the Business Laws (Amendment) Act, 2020 which was assented to on 18 March 2020.

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Reduction of the resident corporate tax rate

The measure

The Act has amended Paragraph 2 (a) Head B of the Third Schedule to the Income Tax Act by introducing a resident corporate tax of KES 5 for every KES 20, which translates to a corporate tax rate of 25%. The reduced resident corporate tax rate applies from the year of income 2020.

Who will be affected

All resident corporates

When

Effective 25 April 2020

Our view

The reduction of the resident corporate tax rate is a welcome move for resident corporates, as it will reduce their corporate tax and consequently increase the distributable profits to shareholders or retained earnings available for re-investment. Companies with a year of income ending on or after 25 April will benefit from the lower rate

It would be advisable for companies to review their basis for computation of the instalment tax for this year to ensure they do not end up in significant tax overpayments due to the rate adjustment and the current trading conditions.

The corporate tax rate for non-resident companies (37.5%) has not been changed, hence, the significant difference in rates may impact decisions of foreign investors on whether to operate as a branch or subsidiary while taking into account the revised rate of tax on dividends paid to non-resident shareholders.

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Repeal of the preferential tax rates applicable to newly listed entities

The measure

The Act has amended the Income Tax Act by repealing the following provisions under Head B of the Third Schedule:

a. Paragraph 2(c), which prescribed a reduced corporate tax rate of 27% for the first 3 years after listing, where at least 20% of the issued share capital of a company is listed;

b. Paragraph 2(d), which prescribed a reduced corporate tax rate of 25% for the first 5 years after listing, where at least 30% of the issued share capital of a company is listed;

c. Paragraph 2(e), which prescribed a reduced corporate tax rate of 20% for the first 5 years after listing, where at least 40% of the issued share capital of a company is listed; and

d. Paragraph 2(g)(i), which prescribed a reduced corporate tax rate of 25% for the first 5 years after listing, in the case of a company introducing its shares through listing or any securities exchange via introduction.

Who will be affected

Recently listed entities and companies wishing to issue their securities to the public

When

Effective 25 April 2020

Corporate Income Tax

Repeal of the preferential tax rates applicable to newly listed entities...cont.

Our view

The repeal of the preferential rates may be informed by the reduction of the normal corporate tax rate from 30% to 25%.

Whereas it could be argued that this move could discourage listing of securities, it is worth noting that the number of new listings at the stock exchange has dried up in recent times and therefore the National Treasury may have concluded that the tax incentives have not been a game changer in driving new listings.

Overall, the measure is in line with recent moves towards fiscal consolidation with some quarters being of the view that tax incentives are costing the Government much needed revenue. This is a subject that remains open to debate.

Corporate Income Tax

Repeal of the reduced corporate tax rate for companies operating recycling plants

The measure

The Act has deleted Paragraph 2(l) of Head B of the Third Schedule to the Income Tax Act, which prescribed a reduced corporate tax rate of 15% for the first 5 years for any company operating a plastics recycling plant. The reduced rate was introduced through the Finance Act 2019 and has been effective since 7 November 2019.

This amendment means that entities operating plastics recycling plants will be taxable at the normal corporate tax rate of 25%.

Who will be affected

All companies operating a plastics recycling plant

When

Effective 25 April 2020

Our view

The reduced corporate tax rate was aimed at reducing the negative impacts of plastic on the environment by encouraging the recycling of plastics.

The repeal of the reduced rate, barely a year after its introduction, calls into question whether the objective has been achieved. But as indicated elsewhere, this is in line with the move to reduce tax incentives in order to shore up Government revenue.

Corporate Income Tax

Repeal of the special corporate tax rate for companies operating under a special operating framework

The measure

The Act has deleted Paragraph 2(k) of Head B of the Third Schedule to the Income Tax Act, which restricted the maximum corporate tax rate for a company engaged in business under a special operating framework arrangement with the Government to the rate specified under the specific agreement.

The rate under already executed agreements shall however continue to apply for the unexpired period of the Agreement.

Who will be affected

Companies operating under a special operating framework with the Government such as projects being executed under Public-Private Partnership (PPP) agreements

When

Effective 25 April 2020

Our view

As with other similar measures, this is a move to reduce tax incentives extended to various entities. It is positive that already existing arrangements have been protected, as any changes post-execution would adversely impact project economics.

It is expected that this change may reduce the attractiveness of some PPP projects that are in the pipeline.

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Repeal of the electricity rebate

The measure

The Act has deleted Section 15(2)(ab) of the Income Tax Act, which entitled manufacturers to an extra deduction of up to 30% of their electricity cost.

Who will be affected

All manufacturers.

When

Effective 25 April 2020

Our view

The electricity rebate was introduced through the Finance Act 2018 and only became operational upon gazettement of the guidelines on 31 July 2019.

The introduction of the rebate was a welcome move, as it was expected to enhance the competitiveness of local manufacturers in line with the Government's Big 4 Agenda of increasing contribution of the manufacturing sector to GDP to 15% by 2022.

The impact of the rebate has not yet been tested and it is therefore surprising that the Government has repealed it barely a year after its introduction. However, as already mentioned, this measure is in line with the move to reduce tax incentives in order to shore up Government revenue.

Corporate Income Tax

Overhaul of the capital allowances schedule

The measure

The Act has overhauled the Second Schedule to the Income Tax Act, which spells out various forms of capital deductions/ allowances. The Second Schedule contains some of the most significant tax incentives available to investors such as Investment Deduction, Wear and Tear Allowances, Farm Works Deduction, and Industrial and Commercial Building Allowances.

The table below provides a summary of the Second Schedule changes:

Building	Repealed rate	New rate	Comments
Hotel buildings	• 100% or 150% in the first year of use	• 50% in the first year of use; and • 25% p.a. on reducing balance thereafter	• To be eligible only when licensed by the competent authority • In case of change of user, the deduction to be restricted to the residual balance
Buildings used for manufacture	• 100% or 150% in the first year of use	• 50% in the first year of use; and • 25% p.a. on reducing balance thereafter	• Buildings for manufacture to include any structure or civil works deemed to be part of a building, where the structure of civil works relates or contributes to the use of the building • In case of change of user, the deduction to be restricted to the residual balance

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Building	Repealed rate	New rate	Comments
Hospital buildings	• 0%	• 50% in the first year of use; and • 25% p.a. on reducing balance thereafter	• To be eligible only when licensed by the competent authority • In case of change of user, the deduction to be restricted to the residual balance
Petroleum or gas storage facilities	• 10% p.a. on straight-line	• 50% in the first year of use; and • 25% p.a. on reducing balance thereafter	• In case of change of user, the deduction to be restricted to the residual balance
Educational building including students hostels	• 50% p.a. on straight-line	• 10% per annum on a reducing balance basis	• To be eligible only when licensed by a competent Authority • In case of change of user, the deduction to be restricted to the residual balance
Commercial buildings	• 25% p.a. on straight-line	• 10% p.a. on reducing balance	• The Act defines a commercial building to mean a building used as an office, shop, showroom, godown, storehouse or warehouse used for storage of raw materials for manufacture of goods; or civil works relating to water or electricity power undertaking carried out by way of trade • In case of change of user, the deduction to be restricted to the residual balance

Corporate Income Tax

Machinery	Repealed rate	New rate
Machinery used for manufacture	• 100% or 150% in the first year of use	• 50% in the first year of use; and • 25% p.a. on reducing balance thereafter
Hospital equipment	• 12.5% p.a. on reducing balance	• 50% in the first year of use; and • 25% p.a. on reducing balance thereafter
Ships	• Ships of more than 125tonnes – 100% in the first year of use • Ships of less than 125tonnes - 12.5% p.a. on reducing balance;	• 50% in the first year of use; and • 25% p.a. on reducing balance thereafter
Aircrafts	• 30% p.a. on reducing balance	• 50% in the first year of use; and • 25% p.a. on reducing balance thereafter
Heavy earth-moving equipment	• 37.5% p.a. on reducing balance	• 25% p.a. on reducing balance
Other motor vehicles	• 25% p.a. on reducing balance (Qualifying cost of non-commercial vehicle restricted to KES 2m)	• 25% p.a. on reducing balance (Qualifying cost of non-commercial vehicle restricted to KES 3m)
Computer and peripheral computer hardware, software, calculators, copiers and duplicating machines	• 30% p.a. on reducing balance and 25% for software	• 25% p.a. on reducing balance

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Machinery	Repealed rate	New rate
Furniture and fittings	• 12.5% p.a. on reducing balance	• 10% p.a. on reducing balance
Telecommunication equipment	• 20% p.a. on straight-line	• 10% p.a. on reducing balance
Filming equipment by a licensed local film producer	• 100% in the first year of use	• 25% p.a. on reducing balance
Machinery used to undertake operations under a prospecting right	• 20% p.a. on straight-line	• 50% in the first year of use; and • 25% p.a. on reducing balance thereafter
Machinery used to undertake exploration operations under a mining right	• 20% p.a. on straight-line	• 50% in the first year of use; and • 25% p.a. on reducing balance thereafter
Other machinery	• 12.5% p.a. on reducing balance	• 10% p.a. on reducing balance

Other expenditure	Repealed rate	New rate
Indefeasible right to use fibre optic cable by a telecommunication operator	• 5% p.a. on straight-line	• 10% p.a. on reducing balance
Farm-works	• 100% in the first year of use (In case of a farm-house, only one-thirds of the cost is eligible)	• 50% in the first year of use; and • 25% p.a. on reducing balance thereafter

Corporate Income Tax

Overhaul of the capital allowances schedule ...cont.

The Act has also introduced a transitional provision under Section 133 of the Income Tax Act, stating that Paragraph 24E of the Second Schedule shall continue to be in force until 31 December 2021.

Paragraph 24E, which was introduced through the Business Laws Amendment Act 2020 in March 2020, provides for investment deduction of 150% where a person incurs capital expenditure of at least KES 5 Billion on the construction of bulk storage and handling facilities for supporting the Standard Gauge Railway (SGR) operations. The said facilities must have a minimum storage capacity of 100,000 metric tonnes of supplies.

The Act has also repealed the provision that allowed related companies to elect to transfer machinery and equipment at tax written down value.

Who will be affected

All taxpayers

When

Effective 25 April 2020

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Overhaul of the capital allowances schedule ...cont.

Our view

While the amendments in the Second Schedule appear to have simplified the interpretation of the qualifying capital expenditure and introduced some enhanced allowances, it has significantly reduced certain allowances, especially investment deduction.

The reduction in the rates of investment deduction, which was a key incentive for investment especially in capital intensive businesses will negatively impact the affected sectors such as manufacturing, and utilities. Furthermore, the Act has done away with the enhanced allowances to encourage investment outside the main cities. It may be useful to assess the impact of this against the growth of other towns.

Clarity is needed on the transition from the repealed schedule to the new schedule especially around the residual balances.

In our view, while it is appreciated that there is a need to limit incentives not only to protect the tax base but also to enhance equity, it would be important to provide targeted enhanced incentives in areas where it is critical to attract investment. As these may change with time and to address the concern around subjectivity, a framework for determining such qualifying investments should be put in place with parameters such as value of investment, number of jobs created and alignment to priority development agenda being considered.

Corporate Income Tax

Removal of income tax exemptions

The measure

The Act has significantly reduced the income tax exemptions listed under the First Schedule to the Income Tax Act.

Below is a list of the incomes whose tax exemption has been done away with:

a) Income of the following Boards and parastatals:

- The Tea Board of Kenya;
- The Pyrethrum Board of Kenya;
- The Sisal Board of Kenya;
- The Kenya Dairy Board;
- The Canning Crops Board;
- The Central Agricultural Board;
- The Pig Industry Board;
- The Pineapple Development Authority;
- The Horticultural Crops Development Authority;
- The National Irrigation Board;
- The Mombasa Pipeline Board;
- The Settlement Fund Trustees;
- The Kenya Post Office Savings Bank; and
- The Cotton Board of Kenya.

Corporate Income Tax

Removal of income tax exemptions ...cont.

b) Profits or gains of an Agricultural Society accrued in or derived from Kenya from any exhibition or show held for purposes of the Society which are solely in the interest of investments in that Society;

c) Interest on tax reserve certificates, which may be issued by authority of the Government;

d) Gains or profits resultant from a reward paid by the UK Atomic Energy Authority for discovery of Uranium ore in Kenya;

e) Interest or management or professional fee paid by Tana River Development Company Limited or its successors in title to non-residents not having a permanent establishment in Kenya;

f) Income of East African Power and Lightening Company (EAPLC) in searching for a natural resource in Kenya of geothermal energy and on investigations concerning the development in Kenya of electric power generation or supply;

g) Income of the General Superintendence Company Limited, a company incorporated in Switzerland, accrued in or derived from Kenya under an agreement dated 18th October, 1972, between that company and the Central Bank of Kenya;

h) Interest earned on contributions paid into the deposit protection Fund established under the Banking Act;

i) Interest paid on loans granted by the Local Government Loans Authority;

j) Dividends received by venture capital companies and Special Economic Zones (SEZ) enterprises;

k) Gains on trade of shares by unlisted venture capital companies for the first 10 years;

l) Interest income on asset backed securities;

Corporate Income Tax

Removal of income tax exemptions ...cont.

m) Dividends paid by Special Economic Zone enterprises, developers or operators to any non-resident;

n) Compensating tax accruing to a power producer under a power purchase agreement; and

o) Interest income arising from the Securities listed under Part II of the Second Schedule.

Who will be affected

All persons whose income tax exemption has been done away with by the Act

When

Effective 25 April 2020

Our view

Although this measure is majorly aimed at shoring up government revenue by reducing exemptions, it is also aimed at cleaning up the Income Tax Act since some of the removed exemptions were already redundant, as some of the institutions whose income had been exempted no longer exist.

As already mentioned, there is a general policy move towards reducing the number of exemptions as these are seen not be equitable and also with a view to enhance tax collection.

Personal Income Tax

Scope of qualifying interest expanded

The measure

The Act has deleted the current definition of "qualifying interest" and introduced the following definition in its place: *"qualifying interest" means the aggregate interest, discount or original issue discount receivable by a resident individual in any year of income:*

Provided that—

a) interest earned on an account held jointly by a husband and wife shall be deemed to be qualifying interest; and

b) in the case of housing bonds, the aggregate amount of interest shall not exceed KES 300,000.

Who will be affected

All resident individuals with interest income

When

Effective 25 April 2020

Our view

This amendment is aimed at expanding the definition of qualifying interest to capture any interest income received by a resident individual. The repealed definition only covered interest income receivable from a bank or financial institution licensed under the Banking Act, a Building Society or the Central Bank of Kenya. The expanded scope therefore means that any interest income receivable by a resident individual shall be taxable only through a withholding tax mechanism. The tax deducted shall be final tax.

This is a welcome move and simplifies the taxation of interest earned by individuals. We believe the amendment will encourage savings and financing of companies through shareholder loans.

Personal Income Tax

Changes to the individual rates of tax

The measure

The Act has amended the individual rates of tax under Paragraph 1 Head B of the Third Schedule to the Income Tax Act as follows:

Repealed tax bands	Tax rate	New tax bands	Tax rate
First KES 147,580	10%	First KES 288,000	10%
Next KES 139,043	15%	Next KES 200,000	15%
Next KES 139,043	20%	Next KES 200,000	20%
Next KES 139,043	25%	Any income above KES 688,000	25%
Any income above KES 564,709	30%		

These rates will also apply to pension withdrawals (in excess of the tax free amounts) made before expiry of 15 years from joining the fund.

With the revised individual rates of tax, the monthly Pay As You Earn (PAYE) rates shall change as follows:

Repealed tax bands	Tax rate	New tax bands	Tax rate
First KES 12,298	10%	First KES 24,000	10%
Next KES 11,587	15%	Next KES 16,667	15%
Next KES 11,587	20%	Next KES 16,667	20%
Next KES 11,587	25%	Any income above KES 57,333	25%
Any income above KES 47,059	30%		

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Personal Income Tax

Changes to the individual rates of tax ...cont.

The measure

The Act has also introduced the following tax rate changes on pension withdrawals (in excess of the tax free amounts) made after expiry of 15 years from joining the fund, or on attainment of 50 years, or upon early retirement on grounds of ill health or infirmity of body and mind.

Repealed tax bands	Tax rate	New tax bands	Tax rate
First KES 400,000	10%	First KES 400,000	10%
Next KES 400,000	15%	Next KES 400,000	15%
Next KES 400,000	20%	Next KES 400,000	20%
Next KES 400,000	25%	Any amount above KES 1,200,000	25%
Any amount above KES 1,600,000	30%		

Personal Income Tax

Changes to the individual rates of tax …cont.

Who will be affected

All individuals liable to tax in Kenya

When

Effective 25 April 2020. As tax rates are applicable to a year of income, individuals will apply the revised rates to their total taxable income for the year 2020 (January to December). Employees will likely end up in a refund position where PAYE was deducted at the old rates before the Act came into force.

Our view

All individuals will enjoy reduced tax liability on their income; hence, this change will increase their disposable income. High income earners will enjoy greater tax savings since the top tax rate has been revised from 30% to 25%.

The move is a welcome relief for individual taxpayers, especially taking into account that recent proposals under the Income Tax Bill indicated that there were plans to increase the top tax rate to 35%. However, from an equity perspective, the changes may be viewed as skewed in favour of high income earners beyond a particular threshold.

Another consideration is the fact that the tax bands are not frequently reviewed to keep pace with economic realities such as inflation and cost of living. This measure will therefore go a long way in shielding the low income earners by significantly raising the lower threshold to KES 24,000 per month which is about double the current threshold.

Personal Income Tax

Personal relief increased from KES 16,896 to KES 28,800

The measure

The Act has increased the annual personal relief from the current KES 16,896 to KES 28,800.

For PAYE purposes, the monthly relief will change from KES 1,408 to KES 2,400.

Who will be affected

All resident individuals

When

Effective 25 April 2020. The higher relief (KES 28,800) for the year 2020 should be claimed in full when computing tax for the year 2020.

Our view

The effect of this change is that any resident individual earning up to KES 288,000 in a year (KES 24,000 per month) will be fully relieved from paying tax. Individuals with income in excess of KES 288,000 in a year (or KES 24,000 per month) will also benefit from this measure, as their taxes will reduce by KES 11,904 (KES 992 per month).

This is a welcome move, as it is expected to increase the disposable income of taxable individuals. Since the change is likely to be effected in the course of the 2020 calendar year, taxpayers may find themselves in tax refund positions if adjustments are not made to the tax workings for the year to true up the annual relief as well as to take into account the revised tax bands. The Kenya Revenue Authority (KRA) should therefore consider issuing guidelines that will avert this situation.

Personal Income Tax

Removal of tax exemptions for individuals

The measure

The Act has deleted the following incomes from the First Schedule to the Income Tax Act. The deletion means that the incomes will now be taxable.

a) Capital gains accruing to an individual on the transfer of:
   - Shares in the stock or funds of the Government, the High Commission or the Authority established under the Organization or the Community;
   - Shares of a local authority; and
   - Land which has been adjudicated under the Land Consolidation Act or the Land Adjudication Act when the title to that land has been registered under the Registered Land Act and transferred for the first time

b) Payment in respect of disturbance, not exceeding three months’ salary, made in connection with a change in the Constitution of the government of a Partner State or the Community to a person who, before the change, was employed in the public service of any of those governments or of the Community;

c) Emoluments of a non-resident officer of the Desert Locust Survey;

d) Education grants paid by the United Kingdom government to a Kenyan public officer;

e) Remuneration received from the International Co-operation Administration under a contract, which was entered into consequent upon financial assistance;

f) Employment income paid to citizens of the USA who are employed by the Department of Agriculture of the USA on research work in co-operation with the Kenya government; and

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

Personal Income Tax

Removal of tax exemptions for individuals ...cont.

Who will be affected

Individuals whose income tax exemption status has been deleted

When

Effective 25 April 2020

Our view

This measure is aimed at broadening the tax base. It also eliminates some of the tax exemptions that were redundant.

Turnover Tax

Overhaul of the turnover tax regime

The measure

The Act has introduced the following changes to the turnover tax regime:

a. Reduction of the turnover tax rate from 3% to 1%;

b. Increasing the turnover threshold from an income of up to KES 5 million to income of between KES 1 million to KES 50 million;

c. Expansion of the turnover tax regime to incorporated entities;

d. Removal of the requirement to pay presumptive income tax by persons who fall within the turnover tax regime; and

e. Reduction of the penalty for late filing of a turnover tax return from KES 5,000 to KES 1,000.

Who will be affected

Businesses (including companies) whose annual turnover is more than KES 1 million but does not exceed KES 50 million.

Turnover tax does not apply to rental income, income from management and professional fees and income subject to final withholding tax.

When

Effective 25 April 2020

Turnover Tax

Overhaul of the turnover tax regime ...cont.

Our view

The overhaul of the turnover tax regime is aimed at expanding the tax base, as it is expected to capture most SMEs in the tax regime. Businesses still have an option to opt-out of the turnover regime through a written notification to the Kenya Revenue Authority.

Businesses whose turnover is below one million during a year of income would appear to be exempt from tax. However, this needs to be made more explicit to avoid any controversy.

The move to include companies within the turnover tax regime is a positive one since many small businesses operate as companies due to legal and other considerations. The lower rate of turnover tax, while welcome, will result in lower tax yield.

It is hoped that the law on turnover tax, which has seen several changes in the recent past, including repeal and reintroduction, will now be maintained and implemented to drive compliance for small businesses.

The repeal of the presumptive income tax provisions soon after introduction could be as a result of implementation challenges given that it was pegged to business permits and licenses administered by the county governments.

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Withholding Tax

Expansion of the scope of services liable to withholding tax

The measure

The Act has widened the scope of non-resident services liable to withholding tax to include:

a) Sales promotion, marketing and advertising services; and

b) Transportation of goods (excluding air and shipping transport services).

The services will attract withholding tax at the non-resident rate of 20%. However, transportation services provided by EAC citizens will be exempt from the withholding tax.

Who will be affected

Suppliers and recipients of the above services

When

Effective 25 April 2020

Our view

This measure had been proposed in the Finance Bill 2019 but dropped in the Finance Act 2019. We believe the main aim of the measure is to expand the tax base and bring into effect the taxation of services provided through digital platforms where a lot of revenue is generated through advertising. Additionally, any non-resident persons providing sales promotion, marketing and advertising service, and road/rail transportation will now be subject to withholding tax on payments received from Kenya.

The amendment could potentially increase the cost of doing business in Kenya, as service providers are likely to pass the burden of this tax to their counterparties. Of particular concern is the high withholding tax on transport costs which seems targeted at road transport provided by non-residents.

Withholding Tax

Tax on dividends payable to non-residents increased from 10% to 15%

The measure

The Act has amended paragraph 3(d) of the Third Schedule to the Income Tax Act by increasing the rate of tax on dividends to non-residents from 10% to 15%.

Who will be affected

Non-resident shareholders

When

Effective 25 April 2020

Our view

The increased dividend tax rate could discourage equity investments by foreign shareholders. This may also impact activity at the Nairobi Securities Exchange whose trade volumes relies significantly on foreign investors.

On the other hand, this could be seen as a move to plough back some of the taxes lost on profits, following the reduction of the corporate tax rate to 25%, by increasing the tax on distributions (dividends). However foreign investors would be disadvantaged relative to local shareholders.

Withholding Tax

Tax rate on non-resident reinsurance premiums introduced

The measure

The Act has amended Section 34 and the Third Schedule to the Income Tax Act to state that reinsurance premiums (excluding premiums in respect of aviation insurance) paid to non-residents would be liable to tax at 5%.

Who will be affected

Insurance and reinsurance companies

When

Effective 25 April 2020

Our view

The Finance Act 2019 amended Section 10 and Section 35 of the Income Tax Act in order to introduce a withholding tax obligation on payment of re-insurance premiums ((excluding premiums in respect of aviation insurance) to non-residents. However, no amendment was introduced to provide for the rate of tax on the re-insurance premium.

The amendment in the Tax Laws (Amendment) Act, 2020 is therefore aimed at introducing the applicable rate (of 5%).

Value Added Tax

Change in the taxable value of VAT on petroleum products

The measure

The Act has amended the VAT base of petroleum products by deleting the proviso to Section 5 (2) (aa) of the VAT Act, 2013. This therefore implies that excise duty, fees and other charges which were previously excluded from VAT value will now be subjected to VAT.

Who will be affected

Manufactures, transporters and consumers

When

Effective 15 May 2020

Our view

The inclusion of excise duty, fees and other charges in the computation of the taxable VAT value will lead to an increase in the price of petroleum products, which will have a ripple effect in the transport and manufacturing sector, with the increased costs likely being transferred to the Mwananchi.

The global oil prices have recently plunged due to reduced demand occasioned by the COVID-19 and other factors, which has seen the fuel prices reduce significantly per the last price review undertaken by the Energy and Petroleum Regulatory Authority. Against this backdrop, it is likely that the impact of the tax adjustment will not be strongly felt in the short term given the downward trend in prices, thus providing the Government with an opportunity to reap from increased VAT revenue from petroleum products. However when the global oil prices begin to rise, the impact of higher taxes will be more pronounced.

In view of the foregoing, it appears that this amendment is aimed at raising additional tax revenues for the Government as opposed to cushioning Kenyans from the tough economic times.

Value Added Tax

Credit note issuance period

The measure

The Act has amended the proviso to Section 16(1) of the VAT Act to allow for a credit note to be issued within 30 days of a determination of a matter in court where the matter relates to a commercial dispute in court with regard to the price payable.

Currently, a credit note can only be issued within 6 months of the issuance of an original tax invoice.

Who will be affected

VAT registered taxpayers

When

Effective 25 April 2020

Our view

The amendment affords taxpayers an opportunity to claim relief from tax invoices that have been subject of a commercial dispute that exceeds six months from the date when the original tax invoice was issued.

Further, it appears that the amendment is aimed at limiting instances where taxpayers claim refund of VAT on bad debts, where VAT was already paid on account of invoices that are subject of commercial disputes. This is because the revenue authority will likely insist that a Court determination is required for such a claim to be allowed. The amendment however falls short of addressing the issue of credit notes relating to cases that are resolved through arbitration or other forms of alternative dispute resolution since this is increasingly becoming the preferred mode of resolution of most commercial disputes.

Value Added Tax

Refund of VAT on bad debts and keeping of records

The measure

The Act has reduced the time for applying for a refund of VAT on bad debts from five to four years from the date of supply. This is notwithstanding the requirement to lodge an application relating to a debt that has been outstanding for a period of more than three years.

The Act further imposes the requirement to keep records relating to VAT on every person, irrespective of whether or not such persons are registered for VAT.

Who will be affected

VAT registered taxpayers and consumers

When

Effective 25 April 2020

Our view

The amendment reduces the window within which one can lodge a refund of VAT on bad debts by one year. This change is likely to lock out some taxpayers from lodging refund applications (by dint of the applications being time barred), thereby reducing the volumes and quantum of such refunds lodged with the KRA.

Separately, the requirement to have all businesses keep records relating to VAT for a period of five years, irrespective of their registration status appears to be aimed at assisting the KRA to demand for provision of documents to verify VAT- related transactions, more so in light of the current VAT automated assessments and VAT investigations being conducted by the KRA. While the change may prove to be beneficial for KRA, it is likely to prove to be an unnecessary compliance burden for taxpayers who are not registered for VAT.

Value Added Tax

Change of VAT status from zero-rated to exempt

The measure

The Act has changed the VAT status of the following items from zero rated to exempt:

a) Vaccines for human and veterinary medicine; and

b) Medicaments previously listed in Part C of the Second Schedule of the VAT Act.

Who will be affected

Manufacturers of vaccines and other medicaments; and consumers

When

Effective 25 April 2020

Our view

The change the VAT status of these items from zero rated to exempt implies that any related input tax incurred by the manufacturers of such products would not be deducted. It is therefore likely that the cost of such non-deductible VAT will be passed on to the final consumers thus resulting into increased prices of basic and essential products.

This change seems to be untimely, especially in the face of the COVID-19 pandemic where medication and vaccines need to be more affordable.

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Exemption of Personal Protective Equipment ("PPEs")

The measure

The Act has exempted from VAT, PPEs including facemasks, for use by medical personnel in registered hospitals and clinics, or by members of the public in the case of a pandemic or a notifiable infectious disease.

Who will be affected

Medical practitioners and the general public

When

Effective 25 April 2020

Our view

The exemption of these items is aimed at making them more affordable in the wake of COVID-19 pandemic where the need to make these items affordable has become a priority. We would have expected the government to move further to zero rate the locally produced PPEs to ensure that they are supplied to the people who need them most at the least prices possible.

Value Added Tax

Change of VAT status from exempt to standard-rated

The measure

The Act has changed the VAT status of the following goods and services from exempt to standard rated:

1. Plants and machinery of Chapter 84 and 85 used for the manufacture of goods;
2. Taxable supplies, excluding motor vehicles, imported or purchased for direct and exclusive use in the construction of a power generating plant, by a company, to supply electricity to the national grid approved by Cabinet Secretary for National Treasury upon recommendation by the Cabinet Secretary responsible for energy;
3. Taxable supplies, excluding motor vehicles, imported or purchased for direct and exclusive use in geothermal, oil or mining prospecting or exploration, by a company granted prospecting or exploration license in accordance with Geothermal Resources Act, production sharing contracts in accordance with the provisions of Petroleum (Exploration and Production) Act (Cap. 308) or mining license in accordance with the Mining Act (Cap. 306), upon recommendation by the Cabinet Secretary responsible for energy or the Cabinet Secretary responsible for mining, as the case may be;

5. Taxable supplies, procured locally or imported for the construction of liquefied petroleum gas storage facilities with a minimum capital investment of four billion shillings and a minimum storage capacity of fifteen thousand metric tonnes as approved by the Cabinet Secretary for National Treasury upon recommendation by the Cabinet Secretary responsible for liquefied petroleum gas;
6. Plastic bag biogas digesters;
7. Biogas;
8. Leasing of biogas producing equipment;

Value Added Tax

Change of VAT status from exempt to standard-rated continued…

9. Parts imported or purchased locally for the assembly of computer, subject to approval by the Cabinet Secretary for the National Treasury, on recommendation by the Cabinet Secretary responsible for matters relating to information technology;
10. Taxable goods purchased or imported for direct and exclusive use in the construction and infrastructural works in industrial parks of one hundred acres or more including those outside special economic zones approved by the Cabinet Secretary for the National Treasury;
11. Museum and natural history exhibits and specimens and scientific equipment for public museums;
12. Chemicals, reagents, films, film strips and visual aid equipment imported or purchased prior to clearance through the customs by the National Museums of Kenya;
13. Goods falling under tariff number 4907.00.90;
14. Materials and equipment for the construction of grain storage, upon recommendation by the Cabinet Secretary for the time being responsible for agriculture;
15. The transfer of a business as a going concern by a registered person to another registered person;
16. Taxable goods supplied to marine fisheries and fish processors upon recommendation by the relevant state department;
17. Goods imported or purchased locally for direct and exclusive use in the implementation of projects under a special operating framework arrangements with the Government;
18. Insurance agency, insurance brokerage and securities brokerage services;

Value Added Tax

Change of VAT status from exempt to standard-rated continued…

19. Taxable services provided for direct and exclusive use in the construction and infrastructural works in industrial parks of one hundred acres or more including those outside special economic zones approved by the Cabinet Secretary for the National Treasury;
20. Taxable services, procured locally or imported for the construction of liquefied petroleum gas storage facilities with a minimum capital investment of four billion shillings and a minimum storage capacity of fifteen thousand metric tonnes as approved by Cabinet Secretary for National Treasury upon recommendation by the Cabinet Secretary responsible for liquefied petroleum gas;
21. Asset transfers and other transactions related to the transfer of assets into real estates investment trusts and asset backed securities; and
22. Services imported or purchased locally for direct and exclusive use in the implementation of projects under special operating framework arrangements with the Government.

When

Effective 25 April 2020

Our view

The change will lead to an increase in the prices of the affected items, with far reaching impact in some cases. We discuss below, the likely impact that will significantly affect several sectors/ businesses :

a) Increase in the cost of plant and machinery is likely to adversely impact investments especially those requiring huge capital outlay as the VAT component will be significant;

b) Taxable supplies for use in capital projects including those to be used in key sectors including Agriculture, Tourism, Mining, Petroleum and Energy that were VAT exempt will now be standard rated. This is likely to have a huge impact on the cost of the projects;

Value Added Tax

c) Transfer of business as a going concern, which was initially zero rated thereafter amended to VAT exempt status is now taxable at the standard rate. We are likely to see investors take a keen interest in this change since the VAT amounts involved in the transfer of businesses are likely to be significant. This will adversely impact mergers and acquisitions and restructurings;

d) Investments in energy and power projects – investors will need to bear the VAT incurred on their inputs and recover these either through their pricing or as input tax.

Excise Duty

Amendment of the definition of other fees charged by financial institutions

The measure

The Act has amended the definition of other fees charged by financial institutions to read as follows:

"fees, charges or commissions charged by financial institutions relating to their licensed activities, but does not include interest on loan or return on loan or fees or commissions earned in respect of a loan or any share of profit or an insurance premium or premium based or related commissions specified in the Insurance Act or regulations made thereunder"

Who will be affected

Financial institutions

When

Effective 25 April 2020

Our view

The current definition of "other fees" is not clear on whether other services provided by financial institutions but not relating to their licenced financial services fall within the purview of excise duty. The ambiguity has led to disputes between financial institutions and the KRA on whether services which are not regulated under the relevant Kenyan laws, are subject to excise duty.

This change will provide more clarity on the scope of other fees charged by financial institutions and effectively means that "non-licensed" activities will not be excisable.

Excise Duty

Amendment of the excise duty exemption schedule.

The measure

The Act has deleted the following items from the excise duty exemption schedule:

a) Goods imported or purchased locally for direct and exclusive use in the implementation of projects under special operating framework arrangements (SOFA) with the Government.

b) Personal motor vehicle imported by a public officer returning from a posting in a Kenyan mission abroad.

Who will be affected

Persons implementing projects under SOFA; and public officers on missions abroad.

When

Effective 25 April 2020

Our view

In 2018, the CS Treasury exempted goods imported for implementation of SOFA projects to reduce the cost of implementing essential Government projects and encourage investments in Government projects by the private sector.

The removal of SOFA projects from excise duty exemption seems to be geared towards generating additional revenue for the Government. This measure is also in line with what appears to be the Government`s deliberate move to reduce the number of tax exemptions.

Excise Duty

Excise duty on imported glass introduced

The measure

The Business Laws (Amendment) Act, 2020 has introduced excise duty on imported glass bottles (excluding bottles for packaging of medicaments). The excise duty shall be applicable at 25%.

Who will be affected

Importers of glass bottles

When

Effective 18 March 2020

Our view

This amendment aims at shielding local glass manufacturers from losing their market share to imports. However, it will likely result into higher costs especially where products cannot be locally sourced for various reasons.

Miscellaneous Fees & Levies

Introduction of processing fees on duty free motor vehicles

The measure

The Act has introduced a processing fee of KES 10,000 on motor vehicles imported or purchased duty free prior to clearance through Customs.

Specifically, the processing fee will apply to motor vehicles imported by the following privileged persons under import duty exemption in accordance with the Fifth Schedule of the East African Community Customs Management Act (EAC CMA):

a) Diplomatic and first arrival persons;

b) Donor agencies with bilateral or multilateral agreements with Kenya;

c) International and regional organisations;

d) The War Graves Commission;

e) Disabled, blind and physically handicapped persons;

f) Rally drivers;

g) Goods and equipment for use in aid funded projects;

h) National Red Cross Society;

i) Motor vehicle previously owned by a deceased person outside Kenya; and

j) Returning residents.

Miscellaneous Fees & Levies

Introduction of processing fees on duty free motor vehicles …cont.

Who will be affected

Importers of duty free motor vehicles

When

Effective 25 April 2020

Our view

This measure is aimed at compensating the Government for costs incurred in the clearance of duty free motor vehicles through customs and generating additional revenue for the Government. While the fee itself may not be significant, the key will be to make the process efficient to reduce other costs incurred by importers arising from delays in clearance.

Miscellaneous Fees & Levies

Removal of Import Declaration Fee (IDF) and Railway Development Levy (RDL) exemption

The measure

The Act has deleted the following items from the IDF exemption schedule:

- Gifts or donations by foreign residents to their relatives in Kenya for their personal use.
- Samples of no commercial value.
- Raw materials for direct and exclusive use in construction by developers or investors in industrial parks of 100 acres or more located outside municipalities of Nairobi and Mombasa.
- Goods imported for the construction of LPG storage facilities.

The Act has also deleted the following items from the RDL exemption schedule:

- Raw materials for direct and exclusive use in construction by developers or investors in industrial parks of 100 acres or more located outside municipalities of Nairobi and Mombasa.
- Goods imported for the construction of LPG storage facilities.
- Goods imported for implementation of SOFA projects.

Miscellaneous Fees & Levies

Amendment of Import Declaration Fee (IDF) and Railway Development Levy (RDL) exemption schedule ...cont.

Who will be affected

Importers of the affected goods

When

Effective 25 April 2020

Our view

The reduction of the number of goods exempted from IDF and RDL is aimed at generating additional revenue for the Government and is in line with similar amendments to the VAT Act and Excise Duty Act.

It will significantly increase the cost of high value items such as aircraft and high value investments. We are of the view that the Government should introduce a value cap on these levies to avoid unnecessary cost pressures on certain sectors.

Miscellaneous Fees & Levies

IDF and RDL exemptions on imports for use in the construction of bulk storage facilities

The measure

The Business Laws (Amendment) Act, 2020 has introduced Railway Development Levy and Import Declaration Fee exemptions on goods imported or purchased for the construction of bulk storage facilities, for supporting the SGR operations with a minimum storage capacity of 100,000 metric tonnes (MT) of supplies as approved by the Cabinet Secretary responsible for Transport.

Who will be affected

Importers of goods for the construction of storage facilities to support SGR operations

When

Effective 18 March 2020

Our view

This move is geared towards encouraging constructing of storage facilities to facilitate SGR operations

Tax Procedures

Commissioner now required to respond to a private ruling application within 60 days

The measure

The Act has increased the period within which the Commissioner is required to respond to a private ruling application from 45 days to 60 days.

The Act has also deleted the provision that requires the Commissioner to publish a private ruling in at least two daily newspapers.

Who will be affected

All taxpayers

When

Effective 25 April 2020

Our view

The extension of the time within which the Commissioner may respond to a private ruling application may have been informed by the need to consult internally before issuing a ruling. We hope that the Commissioner will comply with the extended timeline, as the 45-day timeline was hardly complied with. In this regard, there is need to state the consequences of the Commissioner's non-compliance so as to give weight to this provision.

While publication of private rulings has been in the law since the coming into force of the Tax Procedures Act in 2016, we note that the Commissioner has not been able to fully comply with the provision. The repeal is informed by the understanding that private rulings only apply to the taxpayer in question and thus there is no need to publicise such rulings.

Other measures

Additional tax whistle-blower reward introduced

The measure

The Act has amended Section 5A(2) of the Kenya Revenue Authority Act, 1995 by introducing a reward of KES 500,000 to any person who provides information, not already captured in the section, that leads to enforcement of tax laws. This reward is in addition to the following rewards, which are already in place:

a) A reward where the information provided leads to the identification of unassessed duties or taxes. The law stipulates a reward of KES 100,000 or 1% of the duties or taxes identified, whichever is less; and

b) A reward where the information provided leads to the recovery of unassessed duties or taxes. The law stipulates a reward of KES 2 million or 5% of the taxes or duties recovered, whichever is less,

Who will be affected

Tax whistle-blowers

When

Effective 25 April 2020

Our view

This move is expected to act as an incentive to whistle-blowers who will provide information leading to enforcement of tax laws. While these could lead to the revenue authority receiving more reports on likely cases of tax evasion, it may result into an increase in investigation type enquiries on taxpayers that may be unwarranted.

Other measures

Appointment of revenue banking services agents

The measure

The Act has introduced a provision under the Kenya Revenue Authority Act, 1995 that empowers the KRA to appoint a person registered under the Banking Act to act as an agent for revenue banking services. Any person appointed shall be required to transfer the funds to Central Bank of Kenya (CBK) within two days from the date of collection, failure of which a compounded penalty of 2% will apply. The amendments further provides that the penalty shall be treated as a tax debt to the government in which case enforcement measures for collection and recovery for tax shall apply.

Who will be affected

Banks and financial institutions licensed under the Banking Act.

When

Effective 25 April 2020

Our view

We understand that Banks already had this arrangement with the KRA, albeit informally.

Although the introduction of a legal provision to govern the arrangement is welcome, it may have been advisable for the government to consult with banks before introducing the amendment. We note for instance that the two-day window within which an agent should transfer funds to CBK ignores weekends, public holidays and other externalities such as system challenges. The law has also introduced penalties that are punitive.

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Retirement benefits to be used to acquire residential houses

The measure

The Act has amended Section 38 of the Retirement Benefits Act, 1997 to allow members of retirement benefit schemes to access retirement benefits for purposes of purchasing a residential house.

Who will be affected

Retirement benefit schemes and their members.

When

Effective 25 April 2020

Our view

This measure is aimed at increasing home ownership in the country in line with the Government's Big 4 Agenda.

Other measures

Changes introduced by the Business Laws (Amendment) Act, 2020

Changes to the Industrial Training Act

The Act has amended Section 5B(3) of the Industrial Training Act to provide for a compounded penalty of 5% per year or part thereof on any amount that remains unpaid by the due date. Previously, the penalty was applicable per month or part thereof. However, following a change of the filing and payment obligations from monthly to annual through the Industrial Training (Training Levy) (Amendment) order 2020, it was deemed necessary to also amend the penalty provisions.

The Act has also amended Section 5B(4) of the Industrial Training Act to provide for a fine not exceeding KES 100,000 where a person fails to comply with any provision of a training levy order. If such failure continues after a conviction, such a person shall be liable to a penalty not exceeding KES 50,000 for every year or part thereof during which such failure is continued. The penalty of KES 50,000 used to apply on a monthly basis or part thereof but has now been changed to annual, following a change of the payment and filing obligations to annual.

Changes to the Stamp Duty Act

The Stamp Duty Act has been amended to provide that documents can be electronically stamped, extending the scope of the initial provision, which only recognized stamping by a franking machine or an adhesive stamp.

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Effective 18 March 2020

For clarifications on this publication:

Maurice Lugongo
Senior Manager, Tax
mlugongo@deloitte.co.ke

Doris Gichuru
Associate Director, Tax
dgichuru@deloitte.co.ke

Patrick Chege
Associate Director, Tax
pchege@deloitte.co.ke

Walter Mutwiri
Associate Director, Tax
wmutwiri@deloitte.co.ke

Tax & Legal leaders

Fred Omondi
Tax & Legal Leader, Deloitte East Africa
fomondi@deloitte.co.ke

Lillian Kubebea
Tax & Legal Partner
lkubebea@deloitte.co.ke

Doreen Mbogho
Tax & Legal Partner
dmbogho@deloitte.co.ke

James Mwendia
Tax & Legal Partner
jmwendia@deloitte.co.ke

Offices

Kenya
Deloitte Place
Waiyaki Way, Muthangari
Nairobi
Tel: +254 719 039 000

10th Floor
Imaara Building, Kizingo
Opposite Pandya Memorial Hospital Off
Nyerere Road
Mombasa
Tel: +254 41 222 5827
or +254 41 2221 347