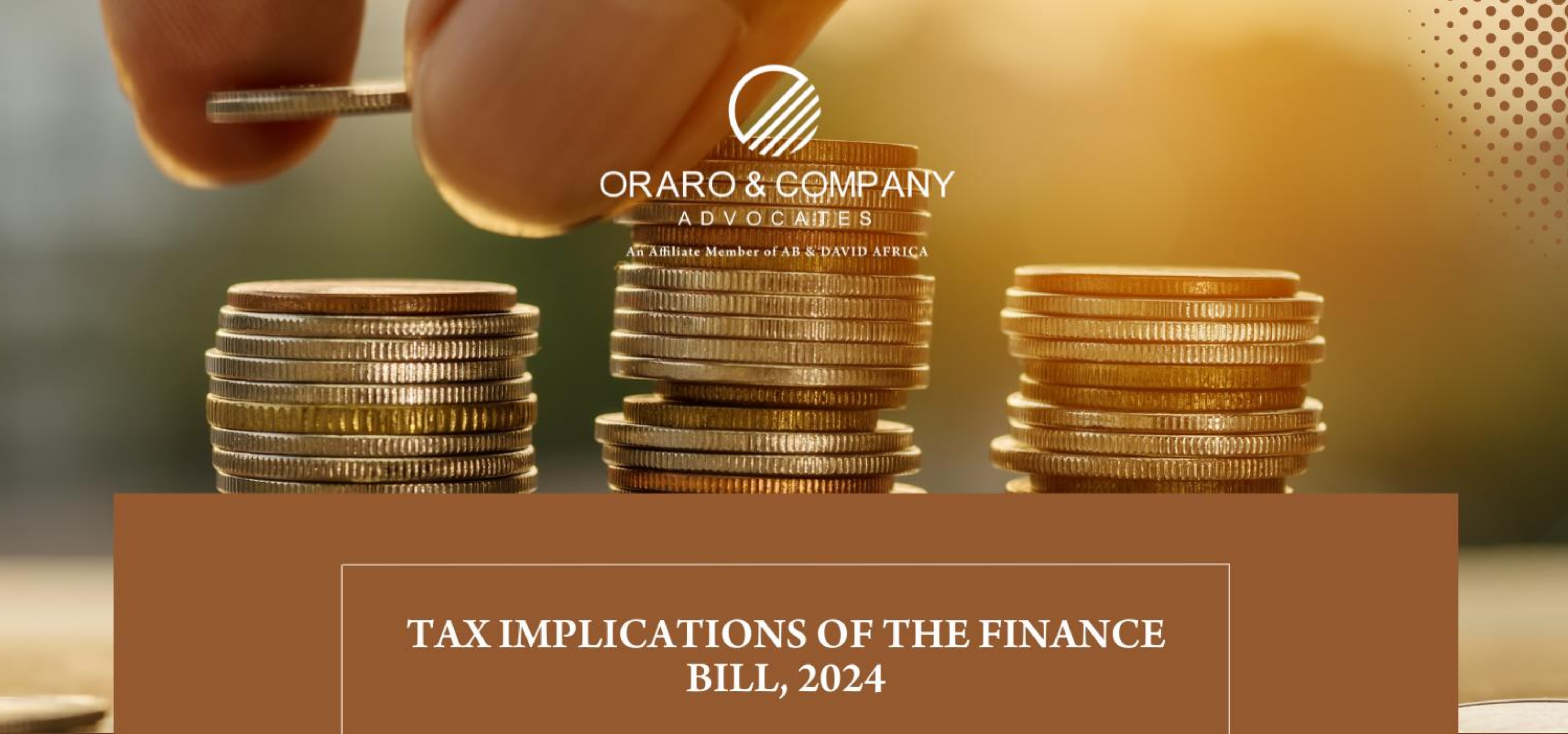

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TAX IMPLICATIONS OF THE FINANCE BILL, 2024

LEGAL ALERT

MAY 2024

INTRODUCTION

The Finance Bill, 2024 (“**the Bill**”) was published by the National Assembly on 9th May 2024 detailing the Government of Kenya’s proposed tax measures for the 2024-2025 financial year.

The Bill proposes to introduce a number of changes to Income Tax, Value Added Tax (**VAT**) and Excise Duty amendments as well as changes to the administration of taxes in Kenya. We summarise in this alert the key changes proposed under the Bill.

The Bill is set to undergo public participation and, following the conclusion of the law-making process, the proposals in the Bill are due to come into force on 1st July 2024 save for certain amendments earmarked for implementation on 1st September 2024 and 1st January 2025.

1. INCOME TAX

The Bill proposes to amend the Income Tax Act, Chapter 470, Laws of Kenya (“**ITA**”) as follows:

a. Taxing the Digital Economy

i. Replacement of the Digital Service Tax ("DST”) with a new Significant Economic Presence Tax (“SEPT”)

Effective 1st January 2025, the Bill proposes to repeal the existing DST provisions in the ITA and introduce a new provision on SEPT.

DST was introduced in 2020 and is payable by non-resident persons who accrued income in Kenya from the provision of services supplied through a business carried out over the internet or through a digital marketplace. The DST rate is 1.5% of the gross transaction value.

It is now proposed to be replaced by a similar SEPT payable by non-residents who accrue income in Kenya from the provision of services supplied through a business carried out over a digital marketplace.

The definition of a digital marketplace is proposed to be amended to outline the following services i.e., an online or electronic platform which enables a person to sell or provide goods, property or services, including, ride-hailing services, food delivery services, freelance services, professional services, rental services, task-based services and any other service that is not exempt from tax under the ITA.

A key proposed change is that the SEPT rate shall be 30% applicable on the non-resident's deemed taxable profit. The deemed taxable profit is proposed to be 20% of gross turnover, resulting in an effective tax rate of 6% of turnover in comparison to DST currently at 1.5%. It will be payable monthly by the 20th day of the end of the month with affected non-resident persons required to file a return at the time of payment. Similar, to DST, SEPT will not apply in cases where the income is otherwise subject to withholding tax.

SEPT is largely similar to the existing DST provisions save for the significant increase in the tax rate. The four-fold increase in this tax applicable on the digital economy is likely to hamper growth in the digital economy and negatively affect Kenya's competitiveness. The amendment to the definition of *'digital marketplace'* further serves to reduce ambiguity and specifically target industry players in the gig-economy.

ii. New Withholding Tax on Income Earned from Digital Marketplaces or Platforms

The Bill proposes to amend section 10 of the ITA to deem payments made or facilitated by resident and non-resident owners or operators of digital marketplaces or platforms in respect of digital content monetisation, goods, property or services to be income accrued in or derived from Kenya.

It is proposed that with effect from 1st January 2025, such payments will attract withholding tax at the rate of 5% for resident persons and 20% for non-residents.

As a result, non-resident owners of platforms will be required to register for tax purposes in Kenya. A simplified registration regime is available under the existing Income Tax (Digital Services Tax) Regulations which, in our view, is proposed to be expanded to non-resident platform owners who are subject to the digital asset tax.

This proposal represents a further widening of the tax bracket to bring to tax more players in the digital economy. It may however have the unintended consequence of making digital marketplaces and platforms uncompetitive. In particular, non-resident platforms are likely to pass on the additional tax costs to their customers, increase the cost of the goods and services supplied via a digital marketplaces and platforms.

Additionally, the proposal as drafted potentially encompasses non-resident to non-resident transactions that may have no nexus with Kenya and would need to be clarified.

iii. Taxing Creatives: Amendments to Withholding Tax on Digital Content

The Bill proposes to introduce changes to the withholding tax regime for payments made to digital content creators that was first introduced through the Finance Act 2023.

With effect from 1st July 2024, withholding tax on payments made in respect of digital content monetisation to non-residents will operate as a final tax and no further tax liability shall accrue on income received through such payments. The withholding tax rate continues to be 5% for residents and 20% for non-residents.

The definition of what constitutes digital content monetisation is further to be expanded to include creative works, creating or sharing of material or any other material that is not exempt under the ITA.

This proposal provides welcome clarity on the application of the withholding tax on non-resident digital content creators while further widening the tax net to capture more players in Kenya's growing digital creative economy.

b. Proposed New Taxes Administered under the ITA: Minimum Top-Up Tax and Motor Vehicle Tax.

i. Introduction of the Motor Vehicle Tax ("MVT")

From 1st July 2024, the Bill proposes to introduce a new Motor Vehicle Tax ("**MVT**") at the rate of 2.5% of the value of the motor vehicle subject to a minimum MVT of KES 5,000 and a maximum MVT of KES 100,000. The Commissioner for Domestic Taxes is expected to prescribe guidelines for the valuation of motor vehicles for purposes of MVT.

MVT is payable by insured persons with insurers of the motor vehicles required to collect and remit the tax within 5 days after issuing a motor vehicle insurance cover. Failure by an insurer to collect and remit MVT attracts a penalty of 50% of the uncollected tax.

The Bill however proposes to exempt ambulances from MVT, as well as government owned vehicles, and vehicles owned by persons who are exempt from tax under the Privileges and Immunities Act.

This proposed amendment follows from the Government's proposal to introduce an annual motor vehicle circulation tax as set out in the Medium-Term Revenue Strategy for Financial Year 2024/25 – 2026/27 ("**MTRS**"). However, MVT as currently proposed opts to have the motor vehicle value as its tax base as opposed to a flat tax based on engine capacity as was proposed in the MTRS.

However, arguably MVT as proposed is not an income tax (in that it is not a tax on gains or profits) and may fall afoul of constitutional principles as set out by the Court of Appeal in ***Kenya Revenue Authority v Waweru & 3 others; Institute of Certified Public***

Accountants & 2 others (Interested Parties) (Civil Appeal E591 of 2021) [2022] KECA 1306 (KLR) (2 December 2022) (Judgment).

This proposal is further likely to disincentivise the full coverage of insurance risks by creating an incentive for the undervaluation of motor vehicles for insurance purposes. It remains to be seen whether this risk will be adequately addressed through guidelines issued by the Commissioner for Domestic Taxes.

ii. Introduction of the Minimum Top-Up Tax ("MTT")

Effective 1st January 2025, Kenya proposes to introduce a domestic minimum top-up tax ("**MTT**") applicable to local members of large multinational enterprises to ensure that the multinational entities maintain an effective minimum corporate income tax rate of 15%. This is part of Kenya's efforts to implement the Organisation for Economic Cooperation and Development ("**OECD**") Pillar Two Framework designed to ensure that the low-taxed income of large multinational entities is subjected to a minimum level of tax at 15%.

Under the proposed law, resident persons or Permanent Establishments that are members of multinational groups with a consolidated annual turnover of EUR 750 million or more will be subject to MTT in certain circumstances to bring its effective tax rate up to the minimum level of 15%.

It is applicable where the turnover threshold of EUR 750 million in the consolidated financial statements of the ultimate parent entity is surpassed in two of the preceding four years of income.

MTT payable is the difference between 15% of the entity's net income or loss for the year and the combined effective tax rate for that year multiplied by the excess profit of the entity.

MTT = [15% of the entity's net income or loss for the year – combined effective tax rate for that year] X excess profit of the entity

Where:

1. <u>Combined effective tax rate</u> = [Sum of all the adjusted covered taxes/sum of all net income or loss for the year of income] X 100.
2. <u>Adjusted covered taxes</u> – Taxes recorded in the financial accounts of a constituent entity for the income, profits or share of the income or profits of a constituent entity where the constituent entity owns an interest, and includes taxes on distributed profits, deemed profit distributions under the ITA subject to such adjustments as may be prescribed.

3. Excess profit = Net income or loss for the year – [10% of employee costs + 8% of net book value of tangible assets]

However, among the entities exempted from MTT are public entities that are not engaged in business; exempt charitable entities, pension funds and assets of pension funds, non-operating investment holding companies; sovereign wealth funds; real estate investment vehicles that are an ultimate parent entity and intergovernmental/supranational organisations including their wholly owned agencies/organs.

c. Foreign Exchange Losses

The Finance Act 2023 introduced a limitation to the deferral of realised foreign exchange losses in computing income tax. Previously, a thinly capitalised entity would defer such losses until it was no longer thinly capitalised. However, under the 2023 amendment, such realised foreign exchange losses were limited to deferral for not more than 5 years from the date of realisation. Effective 1st July 2024, the Bill now proposes to further limit the deferral of realised foreign exchange losses to three years.

This proposed further restriction stands to negatively impact affected thinly capitalised entities. Additionally, given that the amendment introduced in the Finance Act 2023 was effective on 1st January 2024, this proposal results in uncertainty in the tax regime, contrary to settled principles of taxation.

d. Transfer Pricing: Introduction of Advance Pricing Agreements

The Bill proposes to empower the Commissioner of Domestic Taxes to enter into advance pricing agreements with any person who undertakes a transaction that is subject to Kenyan Transfer Pricing Rules. In such circumstances, the arm's length price for such a transaction shall be determined in accordance with the advance pricing agreement.

Advance pricing agreements are however proposed to be valid for 5 years with the Commissioner retaining the power to nullify an advance pricing agreement in writing where such an agreement was entered into through misrepresentation of facts.

This is a welcome proposal which may go a long way towards managing the number of transfer pricing disputes between taxpayers and the Commissioner of Domestic Taxes.

e. Changes to Withholding Tax ("WHT").

i. Introduction of Withholding Tax on supply of goods to public entities

As from 1st July 2024, the Bill proposes to introduce WHT on payments for the supply of goods to a public entity made to resident and non-resident persons. The respective WHT rates are proposed to be 3% for resident recipients of the payments and 5% for non-resident payees.

The Bill has further defined a public entity as a ministry, state department, state corporation, county department or agency of the national or county Government.

This proposal will serve to widen the tax base by bringing to tax persons who make supplies of goods to public entities.

ii. Withholding Tax on Interest from Infrastructure Bonds

Effective 1st July 2024 the Bill proposes to introduce WHT at the rate of 5% on interest payments to resident persons arising from infrastructure bonds which were previously tax exempt.

iii. Withholding Tax on Management or Professional Fees and Contractual Fees

As from 1st July 2024, the Bill proposes to delete the threshold of KES 24,000 that currently exists for the applicability of WHT on management or professional fees and contractual fees. Currently, WHT is only applicable where the aggregate value of management or professional fees or contractual fees paid on amounts of KES 24,000 or more in a month.

As a result, all management or professional fees and contractual fees will attract WHT regardless of the amount of fees paid. This is likely to result in an additional compliance burden where numerous low value payments are made in a month, for example in cases involving commissions for sales agents.

iv. Withholding Tax on Royalties

Effective 1st July 2024, the Bill proposes to amend the definition of "*royalty*" to include a payment made as consideration for the use or the right to use any software, proprietary or off-the-shelf, whether in the form of license, development, training, maintenance or support fees and includes the distribution of the software.

The Bill proposes to subject to WHT, payment for purchase of software regardless of whether the purchase transfers the intellectual property rights in the software to the purchaser or not. This amendment is contrary to international best practices and previous judicial determinations by the High Court of Kenya which affirm that OECD international tax principles exclude payments for the purchase of software where the intellectual property rights in the software are not transferred from the definition of royalties for the purpose of WHT. That is, that WHT is applicable on payments for the transfer of a '*copyright*' but not for the sale of a '*copyrighted article*.'

f. Capital Gains Tax ("CGT")

Effective 1st January 2025, The Bill proposes a preferential CGT rate of 5% for companies that are certified by the Nairobi International Financial Centre to have invested at least KES 3 billion in an entity incorporated in Kenya within 2 years and the transfer of the investment is made after 5 years of the date of the investment. This is intended to attract foreign direct investments into Kenya.

Effective 1st July 2024 the Bill further proposes to amend the definition of a *'company'* to include a body of persons which carries on the activities of a members' club or trade association that is deemed to be carrying on business under the ITA. The Bill further proposes to delete the definition of *'related persons'* currently set out in the Eighth Schedule to the ITA to avoid duplication given that the term is already defined under section 2 of the ITA.

g. Other Corporate Income Tax Amendments

i. Withdrawal of Certain Tax Exemptions Relating to Trusts

Effective 1st July 2024, the income of registered trust schemes and registered family trusts is proposed to be subject to Income Tax. Additionally, any capital gains relating to the transfers of immovable property to a family trust is proposed to be subject to income tax. These incomes are currently exempt from Income Tax under the First Schedule to the ITA.

ii. Capital Allowances for Acquisition of Telecommunications Spectrum Licenses

Effective 1st July 2024, the Bill proposes to amend the Second Schedule to the ITA to allow a tax deduction at the rate of 10% per year on capital expenditure incurred by telecommunications operators on an acquisition of spectrum licence. This is a welcome development given the significant capital expenditure required to acquire spectrum licenses from the Communications Authority of Kenya.

iii. Amendment of the definition of related person

Effective 1st July 2024, the Bill proposes to delete the definitions of *'related person'* currently under sections 2 and 18 (6) of the ITA and replace the same with an expanded definition providing that a related party means: "*in the case of two persons, either person who participates directly or indirectly in the management, control or capital of the business of the other person, and in the case of more than the two persons: (a) any other person who participates directly or indirectly in the management, control or capital of the business of the two persons; or (b) an individual who – (i) participates directly or indirectly in the management, control or capital of* *the business of the two persons; and (ii) is associated to the two persons by marriage, consanguinity or affinity and the two persons participate in the management, control or capital of the business of the individual.*"

The amended definition is intended to cure the existing confusion caused by the existence of two different definitions under different provisions of the ITA. However, it also significantly widens the definition of related parties to include individuals related by marriage, consanguinity or affinity.

iv. Other Income Earned by Non-Resident Contractor, Sub-Contractor, Consultant or Employee.

The Bill proposes to subject to tax other income earned by non-resident contractors, sub-contractors, consultants, or employees where such income is not directly related to a project financed through a 100% grant under an agreement between the Government and a development partner.

h. Taxation of Employees.

i. Amendment of the Tax-Free Threshold for Various Employee Benefits

Benefit	Current tax-free threshold	Proposed tax-free threshold	Comment
Subsistence allowance (Per Diems)	KES 2,000 per day	5% of monthly gross earnings	The new threshold is conditional on the employer maintaining a subsistence allowance policy
Meal benefits	KES 48,000 per annum	KES 60,000 per annum	Proposes to increase the current tax-free threshold
Gratuity paid into registered pension scheme	KES 240,000 per completed year of service	KES 360,000 per completed year of service	This applies where the employee was not making contributions to a registered pension scheme
Other non-cash benefits	KES 36,000 per annum	KES 48,000 per annum	Proposes to increase the current tax-free threshold

ii. Exemption of Reimbursements to Public Officers from Tax

The Bill further proposes to exclude from tax any amount paid or granted to public officer to reimburse an expenditure incurred for purpose of performing official duties, notwithstanding the ownership or control of any assets purchased. A similar proposal was presented in the Finance Bill, 2023 but was deleted following public participation. It has once again been proposed for enactment.

iii. Amendments to Affordable Housing Levy (“AHL”) and Social Health Insurance (“SHIF”) Tax Reliefs

As from 1st July 2024, the Bill proposes to delete the current AHL reliefs as well as the insurance relief that applies to persons who pay premiums for, inter alia, medical insurance, National Health Insurance Fund contributions, life insurance and education policy at the rate of 15% of the premiums contributed.

The Bill now proposes to amend the ITA to provide that SHIF, AHL and post-retirement medical fund contributions shall be deductible in the determination of taxable income. These are welcome developments which will reduce employees’ taxable income and result in higher take home pay for employees.

2. VALUE ADDED TAX

The Finance Bill, 2024 proposes to amend the Value Added Tax Act, Chapter 476, Laws of Kenya (“**VAT Act**”) as follows:

a. Time of Supply for Exported Goods

Effective 1st July 2024, the Bill proposes to amend the time of supply for exported goods by providing that the time of supply of exported goods shall be the time when the registered person is in possession of the required export confirmation documents.

This proposal provides clarity on the time of supply for exported goods by introducing a specific provision providing guidance on the time of supply of exported goods.

b. Transfer of Business as a Going Concern (“TOGC”)

Effective from 1st July 2024, the Bill proposes to amend the VAT Act to exempt the transfer of a business as a going concern from VAT. These services are currently subject to VAT at the standard rate.

Prior to 2020, TOGC’s were exempt from VAT. However, an amendment introduced through the Tax Laws Amendment Act (2020) deleted TOGC from the list of exempt supplies, with the result that TOGC’s were thereby standard rated for VAT. This is therefore a welcome proposal to revert TOGC’s to VAT exempt status.

The exemption is in line with international best practices given that TOGC’s are VAT exempt in other commonwealth jurisdictions, including the United Kingdom, India and South Africa. It would ease the cost of doing business by avoiding a significant 16% additional cash outflow at the time of acquisition of a business, and ease the purchaser’s cash flow pressure.

c. Threshold for Mandatory VAT Registration

Effective 1st July 2024, the Bill proposes to increase threshold for mandatory VAT registration from KES 5 million to KES 8 million. This means that any person making or expecting to make taxable supplies worth KES 8 million in any period within 12 months would be required to be registered under the VAT act.

The increase in the threshold would exempt many small and medium size traders from the mandatory registration of VAT, easing the cost of doing business by reducing their tax compliance burden.

d. Supply of Ordinary Bread

Effective from 1st July 2024, the Bill proposes to subject the supply of ordinary bread to VAT at the standard rate. Currently, the supply of ordinary bread is zero-rated for VAT.

The impact of standard rating the supply of ordinary bread will be to increase the retail price of such a basic commodity, negatively affecting food security. Bread is also a staple food in most of the Kenyan households and an increase in its price may lead to an increase in the general cost of living.

e. Transport of Sugarcane from Farms to Milling Factories

Effective from 1st July 2024, the Bill proposes to subject the supply of transporting services for sugarcane from farms to milling factories to VAT at the standard rate. Currently, the supply of such services is zero-rated.

The impact of this proposal, should it pass into law, would be to increase the production cost of sugar, increasing the price of sugar. Sugar is also another basic commodity whose price increase may affect the general cost of living. Sugar is also a raw material in used in the production of several foods and beverages and an increase in its price is likely to negatively affect the prices of those commodities.

f. Other Notable Changes in the VAT Treatment of Goods and Services

With effect from 1st July 2024, the Bill also proposes the following changes to VAT:

Goods and Services	Current VAT treatment	Proposed VAT treatment
Imports or purchases for local film production	Exempt	16%
Supplies for goods directly and exclusively used for construction of Tourism facilities	Exempt	16%
Supplies for goods directly and exclusively used for construction and equipping of specialized hospital facilities	Exempt	16%
Supply of goods to National Intelligence Service for official use	16%	Exempt

Pressure sensitive adhesive of tariff number 3506.91.00	Exempt	16%
Plain Polythene Film	Exempt	16%
PE white 25-40grams/release paper of tariff number 4811.49.00	Exempt	16%
ADL 25-40gsm of tariff number 5603.11.00	Exempt	16%
Specially designed locally assembled motor vehicles for transportation of tourists	Exempt	16%
Plant, machinery and equipment used in the construction of a plastics recycling plant	Exempt	16%
Musical instruments imported or purchased for exclusive use by educational institutions	Exempt	16%
Supply to persons who had an agreement with the government prior to 25th April 2020 exempting them from VAT	Exempt	16%
Capital goods approved by the Cabinet Secretary to promote investment in manufacturing sector	Exempt	16%
Mosquito Repellent and raw materials for manufacturing the same	16%	Exempt
Tea packaging materials	16%	Exempt
Agricultural pest control products and raw material for manufacturing the same	Zero-rated	Exempt
Supply of motorcycles of tariff heading 8711.60.00	Zero-rated	Exempt
Issuing credit and Debit Cards	Exempt	16%
Telegraphic money transfer services	Exempt	16%

Foreign exchange transactions, including the supply of foreign drafts and international money order	Exempt	16%
Cheque handling, processing, and other related transactions	Exempt	16%
Issuance of security for money including bills of exchanges and promissory notes	Exempt	16%
Assignment of debt for consideration	Exempt	16%
Provision of financial services on behalf of another on a commission basis	Exempt	16%
Betting, gaming, and lotteries services	Exempt	16%
Supply of locally assembled and manufactured mobile phones	Zero-rated	16%
Supply of electric bicycles	Zero-rated	16%
Supply of electric buses of tariff heading 87.02	Zero-rated	16%
Supply of solar and lithium-ion batteries	Zero-rated	16%
Bioethanol vapour (BEV) Stoves classified under HS Code 7321.12.00 (cooking appliances and plates warmers for liquid fuel)	Zero-rated	Exempt

3. EXCISE DUTY

The Finance Bill 2024, proposes to amend the Excise Duty Act, Chapter 472, Laws of Kenya ("**EDA**") as follows:

a. Classification of Goods under the EDA

The Bill proposes that with effect from 1st July 2024, goods will be classified using the tariff codes listed in Annex 1 of the Protocol on the Establishment of the East African Community Customs Union and the general rules of interpretation outlined within the Annex will be followed.

This is a welcome amendment which harmonises the classification of goods for excise purposes to the classification used for customs and import duty under the EACCMA.

b. Excise Duty on Digital Services offered by Non-Resident.

The Bill proposes the imposition of excise duty on excisable services offered in Kenya by a non-resident person through a digital platform. The excise duty is payable by the non-resident person offering the excisable service.

The effect of this proposal would be to lead to an increase in the cost of doing business for non-residents supplying the services. This is likely to impact the operations and pricing strategies of non-resident service providers with the result that the excise duty cost will be passed on to Kenyan consumers. Additionally, such non-residents would have to be registered for purposes of excise duty in Kenya. However, no guidelines have been provided as yet for such registration.

c. Relief On Raw Materials

The Bill proposes the deletion of Section 14 of the Excise Duty Act which provides that excise duty paid on raw materials used in manufacturing finished goods can be offset against the excise duty payable on those finished goods and excise duty paid on internet data services purchased in bulk for resale can be offset against the duty payable on those services supplied to the final consumer.

The effect of this proposal would be to abolish the practice of reducing the excise duty payable on the finished goods when excise duty has been paid to purchase the raw materials used in the manufacture of those finished goods. In simple terms, manufacturers who import raw materials to manufacture other excisable goods will not be able to reduce their excise duty on the finished product by deducting the excide duty incurred in importing the raw materials. This will result in the increased cost of the excisable finished products.

d. Application for a License

The Bill proposes that with effect from 1st July 2024, the Commissioner will have 14 days after the receipt of all the required valid documents, to consider an application for license under the Excise Duty Act.

This provision aims to expedite the licensing process and provide clarity for businesses engaged in excisable activities who currently face significant delays in the approval of license applications.

e. Timeline For Payment of Excise Duty by Manufacturers of Alcoholic Beverages

Effective 1st July 2024, the Bill proposes an extension of the timeline for payment of excise duty by manufacturers of alcoholic beverages to five (5) working days upon removal of the goods from the stockroom. Currently, the law requires for remittance of excise duty within 24 hours.

This is a welcome proposal which will ease the cashflow burden faced by manufacturers of alcoholic beverages in remitting excise duty within 24 hours.

Excisable Goods

S/no.	Item	Current rate	Proposed rate	Effective Date
1.	Motorcycles of tariff 87.11.60.00 other than motorcycle ambulances and locally assembled motorcycles.	Kshs. 12,952.83 per unit	10% of the value or Kshs.12,952.83 per unit, whichever is higher	01-Jul-24
2.	Imported cartons, boxes and cases, of corrugated paper or	25%	Exempt	01-Jul-24

	paperboard, folding cartons, skillets labels of paper and paper board, originating from East African Community Partner States that meet the East African Community Rules of Origin			
3.	Imported eggs originating from East African Community Partner States that meet the East African Community Rules of Origin	25%	Exempt	01-Jul-24

4.	Imported onions originating from East African Community Partner States that meet the East African Community Rules of Origin.	25%	Exempt	01-Jul-24
5.	Imported potatoes, potato crisps and potato chips originating from East African Community Partner States that meet the East African Community Rules of Origin.	25%	Exempt	01-Jul-24

Excisable Services

S/no.	Item	Current Rate	Proposed Rate	Effective Date
1.	Telephone and internet data services	15% of their excisable value	20% of their excisable value	01-Jul-24
2.	Fees charged for money transfer services by banks, money transfer agencies and other financial service providers	15% of their excisable value	20% of their excisable value	01-Jul-24
3.	Fees charged for money transfer services by cellular phone service providers	15% of their excisable value	20% of their excisable value	01-Jul-24
4.	Betting	12.5% of the amount wagered or staked.	20% of the amount wagered or staked.	01-Jul-24
5.	Gaming	12.5% of the amount wagered or staked.	20% of the amount wagered or staked.	01-Jul-24
6.	Prize competition	12.5% of the amount paid or charged to participate in a prize competition.	20% of the amount paid or charged to participate in a prize competition.	01-Jul-24

7.	Lottery (excluding charitable lotteries)	12.5% of the amount paid or charged to buy the lottery ticket.	20% of the amount paid or charged to buy the lottery ticket.	01-Jul-24
8.	Advertisements on the internet and social media on alcoholic beverages, betting, gaming, lotteries and prize competitions.	Nil	15%	01-Jul-24

4. TAX ADMINISTRATION

The Finance Bill, 2024 proposes to amend the Tax Procedures Act, Chapter 469B, Laws of Kenya (“**TPA**”) as follows:

a. Regulations of Tax Agents

With effect from 1st July 2024, the Bill proposes to amend the TPA to provide that the cancellation of a tax agent’s license and registration of the tax agents by the Commissioner of Domestic Taxes shall only be on the recommendation of the Tax Agents Committee established under Regulation 7 of the Tax Procedures (Tax Agents) Regulations 2019.

This proposal will ensure that only tax agents who meet the requirements set forth by the Tax Agents Committee are granted licences to function as tax agents, thereby strengthening the regulation of tax agents and being consistent with the Tax Procedures (Tax Agents) Regulations.

This will ensure that there is a proper regulatory framework to onboard competent tax agents who are professional people that diligently and effectively conduct their duty with the utmost integrity.

b. Contents of the Electronic Tax Invoice

With effect from 1st July 2024, the Bill proposes to amend the TPA to provide for the requirements for a valid electronic tax invoice. The proposed contents of an electronic tax Invoice mirror what is provided for under Regulation 7 of the Tax Procedures (Electronic Tax Invoice) Regulations, 2024.

This proposal seeks to describe in detail the contents of a valid electronic tax invoice to provide for the security and authentication of electronic invoices. However, a key challenge with the adoption of electronic invoicing remains that of accessibility to technology and taxpayer literacy, especially in rural and low-income areas. Such challenges are likely to lead to high incidences of non-compliance and resultant tax disputes, derailing the effective administration of tax.

c. Validity of Agency Notices

With effect from 1st July 2024, the Bill proposes to amend the TPA to provide that agency notices shall remain valid for one year from the date of issue. Consequently, the recipient of an agency notice will have a duty to remit the demanded amount and such duty will only be discharged after the lapse of one year or when the agency notice is lifted by the Commissioner. Further, the Bill amends section 42(13) of the TPA to clarify that persons who fail to comply with agency notices shall be personally liable for the tax amounts specified in the agency notice. This provision had previously erroneously referred to taxpayers instead of the persons in receipt of agency notices.

The Bill also proposes to delete the statutory provisions that prohibits the Commissioner from issuing agency notices before the taxpayer appeals against the decision requiring him or her to pay taxes due. This is a disappointing proposal given the necessity to halt enforcement action for the period within which a taxpayer is considering whether to appeal the decision of the Tax Appeals Tribunal or Court to avoid premature collection of taxes.

d. Value Added Tax Withholding Agent Exemptions

Currently, the law exempts registered manufacturers who invested at least three billion shillings (KES 3,000,000,000) in the three years preceding 1st July 2022 from the application of Withholding VAT. However, the Bill now proposes to withdraw this exemption by deleting the provision that provided for it.

The impact of this proposal is that the Commissioner will have the power to appoint a person to withhold two percent of the taxable value on purchasing taxable supplies at the time of paying for the supplies by the registered manufacturers who invested at least KES 3 billion in the three years preceding 1st July 2022. The tax incentive to the huge investors is no longer available and this will increase the tax compliance obligations of such investors.

e. Refund of Overpaid Taxes

Effective from 1st July 2024, the Bill proposes to amend the period within which one can apply for the refund of overpaid taxes. The Bill proposes that in the case of overpaid income tax, a taxpayer will have five years to apply for a refund of the overpaid tax or to apply the same to offset its tax liability. The Bill further proposes that in case of any other tax overpaid, the taxpayer has only six months to apply for a refund or offset of the same with its tax liability.

The impact of this proposal is that taxpayers will not be eligible for a refund if the refund application is made outside the prescribed period. The TPA already provides that a taxpayer cannot apply for a tax refund after the lapse of five years from the day such overpayment occurred. The VAT Act also provides that a taxpayer cannot claim input tax when six months from the day of such sale have elapsed. The other overpaid taxes, apart from income tax, will only be claimed within the six months of such overpayment. This therefore reduces the period of claiming tax refund in circumstances where custom duty, excise duty and other taxes have been overpaid. Currently, the period of claiming excise duty and customs duty is five years.

f. Abandonment of Tax Recovery

With effect from 1st July 2024, the Bill proposes that KRA will have power to refrain from assessing or recovering an unpaid tax if it is determined that the collection of such tax creates undue difficulty or is impossible. Such power will however be exercised with the written approval of the Cabinet Secretary.

This proposal is a reintroduction of the exact provision of law that was deleted by the Finance Act 2023. Its implementation will ensure that KRA does not waste resources and time in trying to recover taxes that are impossible to recover. This proposal is essential in ensuring effective tax administration.

g. Period of issuing Objection Decision

With effect from 1st July 2024, the Bill proposes two fundamental changes on when to issue an objection decision. The Bill proposes that when a taxpayer has filed its objection notice and KRA requests for additional information within a specified period, then the failure by the taxpayer to provide the additional required information will lead to the objection decision filed being automatically disallowed.

Secondly, the Bill proposes that KRA should make an objection decision within 90 days from the date of receipt of a valid notice of objection. Currently, KRA has 60 days from the date of receipt of a valid objection notice to issue their objection decision.

The proposal to disallow objection decision on the basis of not providing additional information within the specified time is likely to disadvantage taxpayers. It will potentially lead to a situation where the KRA might fail to consider the lodged objection notice and overwhelm taxpayers with multiple requests for voluminous or unretrievable documents to automatically disallow the taxpayer's objection notice. It may also lead to a situation where objection notices will be disallowed not on substance or merit but on the mere technicality of not submitting the required information within the specified time. Further, this provision will likely lead to numerous appeals to the Tax Appeals Tribunal as a result of the KRA potentially disallowing objection notices without evaluating the substance of the tax disputes. This is likely to exacerbate the backlog of cases at the Tax Appeals Tribunal.

The proposal of expanding the period within which KRA needs to issue objection decisions is also an affront to expeditious justice. Increasing the period to 90 days from the day a valid objection notice is filed will give the KRA more time to evaluate and make a decision on the filed objection notice. Such an increase only elongates the tax dispute resolution period which then defeats the objective of expeditiously resolving the tax disputes. The 90 days' timeline will be even lengthier because the Bill also proposes that the 90 days be counted as 90 working days unlike in the current situation where counting of days is inclusive of weekends and public holidays.

h. Integrating Electronic Tax System with KRA's Data Management and Reporting System

With effect from 1st July 2024, the Bill proposes that KRA may, by notice in writing, require a person to integrate the electronic tax system into the data management and reporting system to submit electronic documents. The Bill further proposes that failure to comply with such notice or submit the required electronic documents attracts a penalty not exceeding KES 2 million for every month or part thereof that the failure continues.

The impact of this proposal will be to empower KRA to ensure that taxpayers are onboarded onto its electronic tax systems. The unintended consequence of this proposal will be that most taxpayers may end up being fined due to challenges in accessibility to technology and taxpayer literacy.

i. Computation of Days Under Tax Laws.

With effect from 1st July 2024, the Bill proposes that computing days under tax law will exclude Saturdays, Sundays, and public holidays in such computation. In other words, when the law requires something to be done within a specified number of days, only working days are considered in computing such number of days.

The impact of this proposal is that the statutory timelines for undertaking various actions under tax statutes will be elongated because weekends and public holidays are currently not excluded days in computing time under tax laws. This is likely to result in additional delays in tax administration and tax dispute resolution.

j. Penalty For Late Submission of Return or Failure to Submit Returns By Export Processing Zones (“EPZ”s)

With effect from 1st July 2024, the Bill proposes that an EPZ enterprise that fails to submit a return within the specified period shall be liable to a penalty of KES 20,000 per month for each month or part thereof that the failure continues.

The proposal is an increment on the penalty to such enterprises from the current penalty of KES 2,000. This will enhance compliance and also ensure that EPZ Enterprises pay fines equal to what companies currently pay.

k. Registration of Employees Residing Outside Kenya but Working Remotely In Kenya for an Employer

With effect from 1st July 2024, the Bill proposes that every employee working remotely outside Kenya for an employer in Kenya will be required to have a KRA Personal Identification Number.

The implication of this proposal is to enhance enforcement in the collection of taxes from non-residents making income from employers in Kenya. Such a proposal will enhance enforcement of tax collection from non-residents earning income from Kenya and thus will increase revenue being collected by KRA.

5. MISCELLANEOUS FEES AND LEVIES ACT

The Finance Bill, 2024 proposes to amend the Miscellaneous Fees and Levies Act, Chapter 469C, Laws of Kenya ("**MFLA**") as follows:

a. Increase in the Import Declaration Fees ("IDF") Rate

The Bill proposes that with effect from 1st July 2024, the rate of import declaration fees be increased from two point-five per cent to three percent of the customs value of the goods and shall be paid by the importer of such goods at the time of entering the goods for home use.

The effect of this proposal would be an increase in the cost for importers, potentially affecting the overall cost of imported goods which is likely to be passed onto Kenyan consumers.

b. Utilisation of IDF

The current law provides that ten percent of the import declaration fees be stored in a Fund and used for the payment of Kenya's contributions to the African Union and any other international organisation to which Kenya has a financial obligation. The Bill suggests that commencing from 1st July 2024, ten percent of the funds will be earmarked for Kenya's contributions to the African Union and other international organizations. Furthermore, an additional twenty percent will be allocated to revenue enforcement initiatives or programs.

This is a favourable proposal that is likely to boost Government efforts to improve tax enforcement and the administration of taxes.

c. Introduction of the Eco Levy

The Bill proposes the introduction of an Eco Levy with effect from 1st July 2024. The levy will be imposed on certain goods listed in the Fourth Schedule and at the rates specified therein, whether the goods are produced locally or imported.

Whereas local manufacturers must remit the Eco Levy to the Commissioner upon removing the goods from the excise stock room, importers are responsible for payment upon entry of imported goods into the country.

Some of the goods that are subject to the Eco Levy include: computers and computer equipment and accessories, telephone sets, including mobile phones and smartphones, microphones, loudspeakers, radios and television sets, broadcast equipment, cameras, monitors, projectors, rubber tyres and diapers as specifically identified by the applicable tariff codes.

The Eco Levy is intended to hold manufacturers and importers accountable for the environmental harm caused by the listed goods in line with international best practices and the polluter pays principle. The proposed Eco Levy is a significant climate change mitigation measure and indicates the Government's efforts to meet its treaty and international law obligations on climate change and the environment. Additionally, it will result in an increase in the tax base and revenue generation by the government.

d. Additional Exemptions from IDF and RDL

The Bill proposes that with effect from 1st July 2024, the rate of import declaration fees be increased from two point-five per cent to three percent of the customs value of the goods and shall be paid by the importer of such goods at the time of entering the goods for home use.

The Bill proposes the expansion of the lists under Part A and B of the Second Schedule exempting certain goods from the import declaration fee and railway development levy when imported or acquired prior to customs clearance. These exemptions include material supplies, equipment, machinery, and motor vehicles designated for official use by the Kenya Defence Forces and National Police Service. The list has been extended to include the National Intelligence Service. Additionally, inputs, raw materials, and machinery utilized in the production of mosquito repellents, endorsed by the Cabinet Secretary overseeing health matters, are also exempt from these fees under the Proposed Bill.

The effect of this proposal would be to alleviate the financial burden on both the NIS and mosquito repellent manufacturers by cutting down the expenses associated with importing items essential for their business activities.

e. Export and Investment Promotion Levy

The Bill proposes that with effect from 1st July 2024, the rate of import declaration fees be increased from two point-five per cent to three percent of the customs value of the goods and shall be paid by the importer of such goods at the time of entering the goods for home use.

Tariff Description	Current Export and Investment Promotion Levy Rate	Proposed Export and Investment Promotion Levy Rate
Cement Clinkers. **(*Tariff no. 2523.10.00)***	17.5% of custom value	10% of custom value
Semi-finished products of iron or non-alloy steel containing, by weight, <0.25% of carbon of rectangular (including square) cross-section, the width measuring less than twice the thickness. **(*Tariff no. 7207.11.00)***	17.5% of customs value	None
Bars and rods of iron or non-alloy steel, hot-rolled, in irregularly wound coils of circular cross-section measuring less than 14mm in diameter of cross section measuring less than 8 mm. **(*Tariff no. 7213.91.90)***	17.5% of customs value	None
Bars and rods of iron or non-alloy steel, hot-rolled, in irregularly wound coils of circular cross-section measuring less than 14mm in diameter; other. **(*Tariff no.4804.11.00)***	17.5% of customs value	None
Uncoated kraft paper and paperboard, in rolls or sheets; Kraft liner; Unbleached. **(*Tariff no.4804.21.00)***	10% of customs value	None
Sack kraft paper: Unbleached. **(*Tariff no. 4804.31.00)***	10% of customs value	None
Other kraft paper and paperboard weighing 150 g/m2 or less: Unbleached. **(*Tariff no. 4819.30.00)***	10% of customs value	None
Sacks and bags, having a base of a width of 40 cm or more. **(*Tariff no. 4819.40.00)***	10% of customs value	None
Other sacks and bags, including cones.	10% of customs value	None

(*Tariff no. 2208.60.00)*		
Vodka **(*Tariff no. 2208.60.00)***	None	10% of customs value
Denatured ethyl alcohol and other spirits **(*Tariff no. 2207.20.00)***	None	3% of customs value
Rum and other spirits obtained by distilling fermented sugar. **(*Tariff no. 2208.40.00)***	None	3% of customs value
Organic surface-active products and preparations for washing the skin. **(*Tariff no. 3401.30.00)***	None	3% of customs value
Kraft liner **(*Tariff no. 4804.11.00)***	None	3% of customs value
Uncoated kraft paper and paperboard, in rolls or sheets, other than that of heading 48.02 or 48.03 – Other. ***(Tariff no. 4804.29.00)***	None	3% of customs value
Milk and cream of a fat content by weight, exceeding 1% but not exceeding 6% ***(Tariff no. 0401.20.00)***	None	3% of customs value
Ceramic sinks, wash basins, pedestals, baths, bidet, water closet pans, flushing cistern, urinals and similar sanitary fixtures. ***(Tariff no. 69.10)***	None	3% of customs value
Billets ***(Tariff no. 7207.11.00)***	None	10% of customs value
Cooking stoves for liquid fuel ***(Tariff no. 7321.12.00)***	None	3% of customs value
Motorcycles with internal	None	3% of customs value

combustion engine **not exceeding 50cc.** **(*Tariff no. 8711.10.90*)**		
Motorcycles with internal **combustion engine** **exceeding 50cc but not exceeding 250cc.** **(*Tariff no. 8711.20.10*)**	None	3% of customs value
Motorcycles with internal **combustion engine** **exceeding 50cc but not exceeding 250cc.** **(*Tariff no. 8711.20.90*)**	None	3% of customs value
Motorcycles with internal **combustion engine** **exceeding 250cc but not exceeding 500cc.** **(*Tariff no. 8711.30.90*)**	None	3% of customs value
Motorcycles with **Internal combustion engine exceeding 500cc but not exceeding 800cc.** **(*Tariff no. 8711.40.90*)**	None	3% of customs value
Motorcycles with internal **combustion engine** **exceeding 800cc.** **(*Tariff no. 8711.50.90*)**	None	3% of customs value
Electric Motorcycles. **(*Tariff no. 8711.60.00*)**	None	3% of customs value
Metal furniture of a kind used in offices. **(*Tariff no. 9403.10.00*)**	None	3% of customs value
Other metal Furniture. **(*Tariff no. 9403.20.00*)**	None	3% of customs value
Wooden furniture for office. **(*Tariff no. 9403.30.00*)**	None	3% of customs value
Wooden furniture for kitchen.	None	3% of customs value

(*Tariff no. 9403.40.00)*		
Wooden furniture for bedrooms. **(*Tariff no. 9403.50.00)***	None	3% of customs value
Other wooden Furniture. **(*Tariff no. 9403.60.00)***	None	3% of customs value
Furniture of Plastics. **(*Tariff no. 9403.70.00)***	None	3% of customs value
Furniture of Bamboo. **(*Tariff no. 9403.82.00)***	None	3% of customs value
Furniture of rattan. **(*Tariff no. 9403.83.00)***	None	3% of customs value
Furniture of cane, osier or similar material. **((*Tariff no. 9403.89.00)***	None	3% of customs value
Parts of furniture of wood. **(*Tariff no. 9403.91.00)***	None	3% of customs value
Parts of furniture not of wood. **(*Tariff no. 9403.99.00)***	None	3% of customs value
Mattress supports. **(*Tariff no. 9404.10.00)***	None	3% of customs value
Articles of Leather of Chapter 42 (which includes belts, wallets, bags and similar goods falling in the same Harmonised System (HS) Tariff Code)	None	20% of customs value
Imported Footwear of Chapter 64 (which includes shoes, boots and similar goods falling in the same Harmonised System (HS) Tariff Code)	None	20% of customs value

6. PROPOSALS TO AMEND OTHER ACTS OF PARLIAMENT

a. The Affordable Housing Act, No. 2 of 2024

The Bill proposes the deletion of Section 54 of the Affordable Housing Act No. 2 of 2024 whose effect will be that from 1st July 2024, a purchaser of an affordable housing unit will no longer be restricted from selling his or her unit or any interest therein by contract, agreement or otherwise, to another person.

b. The Industrial Training Act, Chapter 237, Laws of Kenya

The Bill proposes an extension of the powers of the Commissioner-General of the body responsible for the assessment and collection of revenue, who is responsible for collecting training levies from employers, with effect from 1st July 2024. The Bill proposes to align to include the powers conferred in the Tax Procedures Act, (Cap 469 B) which were previously excluded and as part of the Commissioner's functions the legislation ought to be included to enable execute their responsibility.

c. The Data Protection Act, Chapter 411C, Laws of Kenya

The Bill proposes that with effect from 1st July 2024, the processing of personal data is exempt from the provisions of the Data Protection Act if *inter alia,* such disclosure is necessary for the assessment, enforcement or collection of any tax or duty under a written tax law.

The proposed amendment will allow the Kenya Revenue Authority to access all information and records relating to a taxpayer who is under audit.

d. The Public Finance Management Act, Chapter 412A, Laws of Kenya

The Bill proposes the extension of the powers of The Accounting Standards Board by providing that with effect from 1st July 2024, the Board shall also prescribe a framework for implementation of accrual accounting in Government; and prescribe a risk management framework. In addition to this, the framework for implementation of accrual accounting shall provide for a three-year transition period from the date of commencement of the Act, if enacted.

The effect of this provision would be that Government agencies would need to adopt accrual accounting practices, which could lead to improved transparency and financial reporting standards. The risk management framework is likely aimed at enhancing accountability and mitigating financial risks within Government operations.

e. The Kenya Revenue Authority Act, Chapter 469, Laws of Kenya

The Bill proposes that as of 1st July 2024, The Civil Aviation Act (Cap 394) will no longer be listed as a written law relating to Revenue.

DISCLAIMER

This alert is for informational purposes only and should not be taken or be construed as a legal opinion. If you have any queries or need any clarifications as to how any aspect of the judgment might affect you, please do not hesitate to contact Lilian Renee Omondi, Partner (renee@oraro.co.ke), Elly Obegi, Senior Associate (elly@oraro.co.ke) and William Ochieng, Associate (william@oraro.co.ke) or your usual contact at our firm.

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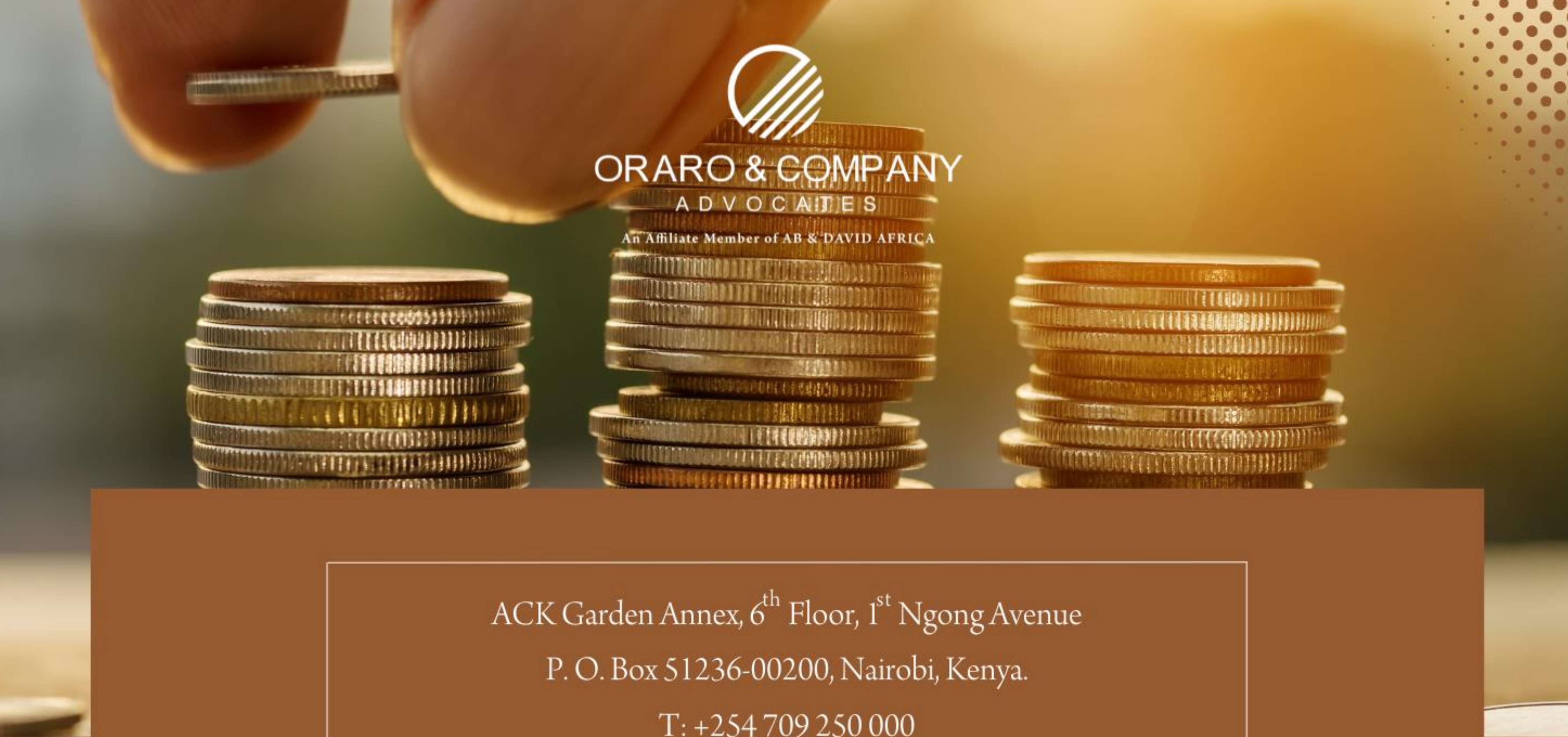

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