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LEGAL ALERT

TAX

Highlights Of the Proposed Amendments In The Tax Laws (Amendments) Bill, 2024

HIGHLIGHTS OF THE PROPOSED AMENDMENTS IN THE TAX LAWS (AMENDMENTS) BILL, 2024

Introduction

The National Assembly on 1st November 2024 published the Tax Laws (Amendment) Bill 2024 (the "**Bill**"), in the Kenya Gazette Supplement No. 192 (National Assembly Bills No. 47). The Bill aims to amend the Income Tax Act, Value Added Tax Act and Excise Duty Act. Herein below are some of the amendments that the Bill seeks to introduce in the various tax laws.

Amendment to Income Tax Act

The Bill proposes to amend the Income Tax Act CAP 470 Laws of Kenya ("**ITA**") as follows:

1. Review of the Definition of Terms Under Section 2 of the ITA

a) The Bill proposes to change the definition of **Individual retirement fund** by removing the requirement that a registered individual retirement fund must be registered with the Commissioner. This means that if the Bill becomes law, registration of such funds with the Retirement Benefit Authority will suffice. The same proposal is also made to the definition of Pension Fund and Provident Fund to remove the requirement that such funds must be registered with the Commissioner.

b) The Bill also proposes to change the definition of **royalty** by expanding it to include payment made as consideration for the use or the right to use any software, propriety or off-the-shelf, whether in the form of licence, development, training maintenance or supporting fees and also to include such payment for the use of information concerning industrial, commercial or scientific equipment, and any gains derived from the sale or exchange of any right or property giving rice to that royalty. This definition broadens the tax base for taxing royalty and is aimed to increase revenue collection associated with the taxation of royalty.

c) The Bill also proposes the deletion of several definitions such as the definition of wife's employment income, wife's professional income, wife's professional income rate, wife's self-

employment income and wife's self-employment income rate which is now obsolete as tax is payable by individual and not a family.

d) Lastly, the definition of **donation** and **public entity** has also been introduced to ensure that there is clarity on what is classified as donation and public entity for taxation purposes.

2. Taxation of Benefits from Employment Income

The Bill proposes to increase the non-taxable value of employment benefits. It proposes that any benefit, advantage or facility received by an employee and whose aggregate value is less than Kenya Shillings Sixty Thousand (**KES 60,000**) should not be subjected to taxation. Currently, fringe benefits are capped at Kenya Shillings Thirty-Six Thousand (**KES 36,000**) and an increase of KES 24,000 is welcome.

The Bill also proposes to enhance the untaxed benefits of meals to employees from Kenya Shillings Forty-Eight Thousand (**KES 48,000**) to Kenya Shillings Sixty Thousand (**KES 60,000**). However, the proposal does not specify whether the **KES 60,000** capping is per year or per month. The presumption will be that the capping is applicable on an annual basis as the previous threshold of **KES 48,000**.

The Bill proposes to exempt from tax any payment by an employer as a gratuity or similar payment in respect of employment or services rendered, paid into a registered pension scheme and does not exceed **KES 360,000** per year. Currently, the amount is capped at **KES 240,000** per year.

These proposals are advantageous as they reduce taxable income and further increase of tax-free thresholds aligns with the increase in the rate of inflation.

3. Income From a Digital Marketplace or Platform

The Bill proposes to deem income paid by a resident or non-resident person, being the owner or operator of a digital marketplace or platform in respect to digital content monetization, goods, property or services to be income accrued in or derived from Kenya. Such payments shall attract withholding tax at the rate of five percent (5%) for residents and twenty percent (20%) for non-residents. Further, in our view, the non-resident owners of platforms will be required to register for tax purposes in Kenya which will require regulations. The problem with this proposal as drafted is that it

implies a situation where non-residents may be deemed to have made taxable income from Kenya even when dealing with other non-residents and this requires clarification

4. Introduction of Significant Economic Presence Tax

The Bill proposes to replace the digital service tax introduced in 2022 with a new tax known as the Significant Economic Presence Tax. This proposal was also made in the rejected Finance Bill, 2024. The Significant Economic Presence Tax will be payable by non-resident persons whose income is derived from or accrues in Kenya through services provided by a business carried out over a digital marketplace. The proposed tax rate is three percent (3%) of the gross turnover earned by the non-resident. This is derived from the proposal that the taxable profit will be ten percent (10%) of the gross turnover and the applicable tax rate for such profit made by non-residents shall be thirty percent (30%).

However, the proposed tax shall not apply to those non-residents who offer services over the digital marketplace through their permanent establishment in Kenya, those providing services to an airline in which the Government of Kenya has at least forty-five percent (45%) shareholding and those whose income is subjected to withholding tax. This tax will be due and payable on or before the twentieth (20th) day of the month following the end of the month in which the service was offered.

The Significant Economic Presence Tax was initially proposed in the rejected Finance Bill, 2024 with a tax rate of six percent (6%) of the gross turnover. This has now been reduced to three percent (3%). The change from Digital Service Tax at a rate of one point five percent (1.5%) to the Significant Economic Presence Tax at a rate of three percent (3%) is likely to affect growth in the digital economy negatively and also affect Kenya's competitiveness as such investors are likely to shy away from investing or operating in Kenya due to the higher proposed tax. We await to see the implementation of this tax as the Cabinet Secretary for National Treasury and Economic Planning is expected to make regulations for the better implementation of this proposed tax.

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

The Bill proposes to introduce a tax known as the minimum top-up tax. This proposed tax is paid by a covered person where the combined effective tax rate (CETR) in respect to the covered person for the year of income is less than fifteen percent (15%).

The covered person expected to pay the proposed tax is a resident person or a person with a permanent establishment in Kenya who is a member of a multinational group and has a consolidated annual turnover of EUR 750 Million or more in the consolidated financial statement of the ultimate parent entity in at least two of the four years of income immediately preceding the tested year of income.

CETR = (Adjusted Covered Taxes ÷ Sum of Net Income/Loss) ×100.

MTT= (15% of the Net Income/Loss – CERT) × Excess profit of the covered persons.

The adjusted cost is defined as taxes recorded in the financial accounts of a covered person for the income, profits or share of the income or profits of a covered person where the covered person owns an interest and includes taxes on distributed profits, deemed profit distributions under the ITA subject to such adjustments as may be prescribed.

Excess profit is defined as the net income or loss of a covered person for the year of income less the sum of ten percent (10%) of the employee costs and eight percent (8%) of the net book value of tangible assets.

The following persons will be exempted from the proposed tax:

- A public entity not engaged in business;
- A person whose income is exempt from tax under paragraph 10 of the First Schedule;
- A pension fund and its assets;
- A real estate investment vehicle that is an ultimate parent entity;
- A non-operating investment holding company;
- An investment fund that is an ultimate parent entity;
- A sovereign wealth fund; or
- An intergovernmental or supranational organisation including a wholly owned agency or organ of the intergovernmental or supranational organisation.

This proposal 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 fifteen percent (15%). We welcome this proposal as it aims to ensure a fairer distribution of profits and taxing rights among countries.

6. Proposed Allowable Deduction to Ascertain the Income of an Individual

The Bill proposes to amend the Income Tax Act to include the following amounts as allowable deductions in the computation of taxable income of individuals. **First**, the Bill proposes that contributions to the Social Health Insurance Fund will be an allowable deduction and therefore should be deducted from the gross income before calculating the taxable income.

Secondly, the Bill proposes that the amount deducted in accordance with Affordable Housing contribution will similarly be treated as an allowable deduction which will be applied to reduce the taxable income of an individual.

Finally, contributions to a post-retirement medical fund of up to Kenya Shillings Fifteen Thousand (**KES 15,000**) will face the same treatment as an allowable deduction. Additionally, the amount of interest deductible from gross income in cases where one is paying a loan taken to improve their residential premise has been increased from KES 300,000 to KES 360,000.

The import of these proposed changes is that they will reduce the taxable income and therefore reduce the tax payable by an individual. We welcome this proposal as it will reduce the tax burden on all the individuals contributing to the specified funds.

7. Deductions In Respect of Contributions to Registered Pension or Provident Funds and Registered Individual Retirement Funds

The Bill proposes to amend the Income Tax Act to increase the amount deductible in respect of contributions to registered pension or provident funds from taxable income of an individual and contribution by the employer from KES 240,000 to KES 360,000 per year and KES 20,000 to KES 30,000 per month.

The Bill also proposes to amend the Income Tax Act to increase the amount deductible in respect of contributions to registered individual retirement funds or public pension schemes from taxable income of an individual and contribution by the employer from KES 240,000 to KES 360,000 per year and KES 20,000 to KES 30,000 per month.

These two provisions shall further enhance benefits as discussed herein above and are reactions to the high inflation rate and are intended to revise the amounts that have been in place for more than a decade. The proposal is welcome as its main effect shall be to reduce the individual taxable income.

8. Removal of Affordable Housing Relief and Post-retirement Medical Fund Relief

The Bill proposes to repeal the Affordable Housing relief. The Bill has proposed that contributions to the Affordable Housing Fund, Social Health Insurance Fund and Post-Retirement Medical Fund are deductible in the determination of taxable income by an individual, thus, it is only logical to remove such reliefs to avoid a double benefit.

9. Rate of Taxes

There is a proposal to align and simplify Section 34 of the Income Tax Act by deleting the existing provision and referring to all tax rates provided for in the Third and Ninth Schedule to the Income Tax Act.

10. Introduction of Withholding Tax on Supply of Goods to A Public Entity and Facilitating Payment on A Digital Marketplace.

The Bill proposes to subject withholding tax on any payments made to a person for the supply of goods to a public entity. The requirement to deduct withholding tax shall apply whether the payment is made to a resident or non-resident person without a permanent establishment. The rate applicable will be five percent (5%) for non-resident supply and zero-point five percent (0.5%) for resident suppliers. The withholding tax for the non-resident supplier will be a final tax.

With regards to making or facilitating payment on a digital marketplace by a non-resident person, there will be a withholding tax applicable at a rate of twenty percent (20%) for a non-resident person and five percent (5%) for a resident person.

These two proposals are essential in ensuring tax compliance and remittance of tax by those who do business with the government and those undertaking business over a digital marketplace.

11. Proposed Taxation of The Infrastructure Bonds

Infrastructure bonds are currently tax-exempt. However, the Bill proposes to introduce taxation of infrastructure bonds, notes and other similar security at a rate of five percent (5%) payable by both non-resident and resident persons. The advantage of this proposal is that it does not apply to the infrastructure bonds listed before the Bill is made law. This proposal will increase revenue collection as most people have found infrastructure bonds as lucrative investments due to their tax-exempt element on return. On the negative side, this tax might discourage investments in infrastructure bonds and might have a ripple effect in reducing the amount of domestic borrowing by the Government.

12. Removal of Exemption of Family Trust from Payment of Income Tax

The Bill proposes to subject to tax income or principal sum of a registered family trust and capital gain relating to the transfer of title of immovable property to such trust. If passed, these entities will no longer be exempt from taxation as all income will be taxable and therefore the tax advantage will be extinguished. Registered Family trusts have been used as tax planning instruments in the previous years and if this proposal is made law, such advantage will no longer be available.

13. Capital Gains Tax on Investments Certified by The Nairobi International Financial Centre Authority

The Bill proposes to provide for a Capital Gains Tax (CGT) rate of five per cent (5%) on any gain arising on the transfer of investments certified by the Nairobi International Financial Centre Authority. For the certification to be approved, the Bill proposes that the firm has to invest at least KES 3 Billion in at least one entity incorporated or registered in Kenya within two years and the transfer of the investment needs to be made after five (5) years of the date of the investment. This proposal will

advance the initiative set up in the Nairobi International Financial Centre to improve Kenya's competitiveness to attract and boost investment.

Value Added Tax Act

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

1. Time of supply of exported goods and services

The proposed Bill suggests changes to the rules for determining when exported goods are considered to be supplied for tax purposes. Currently, the "time of supply" is based on the earliest of three events (a) the date the goods are delivered, or the services are completed, (b) The date the invoice is issued, or (c) the date payment is made, either fully or partially.

As per the intended change, the time of supply for exported goods will instead be when Customs issues the certificate of Export (or another equivalent document).

This proposed change is welcome as it clarifies when a supply of exported goods occurs. This is essential in determining when a refund application for the VAT input can be made.

2. VAT input tax amendment

The Bill proposes to remove the current rule that allows businesses making ninety percent (90%) of zero-rated supplies from a mixed supply to claim back one hundred percent (100%) input VAT. Instead, businesses will only be able to claim back input VAT based on the actual percentage of taxable sales they make compared to their total sales.

The Bill also proposes to delete the provision that allows manufacturers to claim VAT input on supplies made to aid-funded projects, with approval from the Cabinet Secretary (CS). As a result, manufacturers may pass the VAT costs onto aid-funded projects, potentially increasing their overall cost of goods and services.

3. Reclassification of VAT status of goods and services

The Bill proposes changes by reclassifying the VAT status of the following goods and services.

Good and services	Currently	Proposed
Aeroplanes and other aircrafts on unladen weight exceeding 2,0000kgs but not exceeding 15,000 kg	Exempt	16%
Aeroplanes and other aircraft of unladen weight exceeding 15,000 kgs	Exempt	16%
Spacecraft (including satellites) and suborbital and spacecraft launch vehicles	Exempt	16%
Parts thereof of Chapter 88	Exempt	16%
Helicopters	Exempt	16%
Direction-finding compasses, instruments and appliances for aircraft	Exempt	16%
IP super soft fluff pulp — for-fluff 310 treated pulp 488*125mm (cellulose) of tariff number 4703.21.00	Exempt	16%
Any other aircraft spare parts imported by aircraft operators or persons engaged in the business of aircraft maintenance	Exempt	16%
Locally assembled motor vehicles for transportation of tourists	Exempt	16%
Taxable goods supplied to persons that had an agreement or contract with the Government prior to 25th April 2020 where the agreement provided the goods are exempt from VAT	Exempt	16%
Capital goods the exemption of which the Cabinet Secretary may determine to promote investment in the manufacturing sector	Exempt	16%
All imported inputs and raw materials supplied to manufacturers of agricultural pest control products upon recommendation by Cabinet Secretary	Zero-rated	Exempt
Agricultural pest control products	Zero-rated	Exempt
Fertilizers of chapter 31	Zero-rated	Exempt
Inputs or raw materials locally purchased or imported by manufacturers of fertilizer	Zero-rated	Exempt

Goods of tariff number 4703.21.00 for use in the manufacture of baby diapers, sanitary towels (pads) and tampons	16%	Exempt
Betting, gaming and lotteries services	Exempt	16%
Hiring, leasing and chartering of aircrafts, excluding helicopters of tariff numbers 8802.11.00 and 8802.12.00	Exempt	16%
Air ticketing services supplied by travel agents	Exempt	16%
Entry fees into the national parks and national reserves	Exempt	16%
The services of tour operators	Exempt	16%
Transfer of a business as a going concern	16%	Exempt

Excise Duty Act

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

1. Excise duty on digital services offered by Non-Resident

The Bill proposes to introduce excise duty on digital services provided in Kenya by non-resident businesses through digital platforms. This means that non-resident service providers will have to register for excise duty in Kenya and guidelines for such registration will be required.

As a result of this tax, these businesses may adjust their pricing, potentially passing the additional costs onto Kenyan consumers.

2. Power to exempt some goods and services from excise duty

The Bill seeks to empower the Cabinet Secretary to wholly or partly grant remission of excise duty to spirits made from sorghum, millet, cassava or any other agricultural products, with the exclusion of barley, grown in Kenya.

This change has the potential to reduce the cost of production for local distilleries that use locally sourced ingredients.

3. Payment of excise duty

The Bill proposes an amendment to the timeline within which licensed alcoholic beverage manufacturers should pay excise duty to the Commissioner. Currently, manufacturers must make this payment within twenty-four (24) hours; however, the proposed change extends the deadline to the fifth day of the following month upon removal of the goods from the stockroom.

This adjustment is a positive development, as it will alleviate the cash flow challenges that manufacturers face in meeting the twenty-four (24) hours' payment period requirement. It is also useful in reducing compliance disputes and will give the manufacturers ample time to pay the relevant duty.

4. Rates of excise duty

The Bill proposes the following changes to the rates of excise duty.

S/no.	Item	Current rate	Proposed rate
1.	Imported sugar excluding sugar imported by a registered manufacturer and raw sugar imported for processing by a licensed sugar refinery	KES 5 per Kg	KES 7.50 per Kg
2.	Locally assembled electric vehicles	-	Exempted
3.	Cigarette with filters (hinge lid and soft cap)	KES 4,067.03 per mile	KES 4,100 per mile
4.	Cigarettes without filters (plain cigarettes)	KES 2,926.41 per mile	KES 4,100 per mile
5.	Products containing nicotine or nicotine substitutes intended for inhalation without combustion or oral application but excluding medicinal products approved by the Cabinet Secretary responsible for matters relating to health and other manufactured tobacco and manufactured tobacco substitutes that have been homogenized	KES 1,595 per kg	KES 2,000 per kg

	and reconstituted tobacco, tobacco extracts and essences		
6.	Liquid nicotine for electronic cigarettes	KES 70 per millilitre	KES 100 per millilitre
7.	Imported Electric transformers and parts of tariff codes 8504.10.00, 8504.21.00, 8504.22.00, 8504.23.00, 8504.31.00, 8504.32.00, 8504.34.00, 8504.90.00	N/A	25%
8.	Imported printing ink of tariff 3215.11.00 and 3215.19.00 but excluding those originating from East African Community Partner States that meet the East African Community Rules of Origin	N/A	15%
9.	Imported Ceramic sinks, wash basins, wash basin pedestals, baths, bidets, water closet pans, flushing cisterns, urinals and similar fixtures of tariff heading 6910	N/A	35% of customs value of KES 100 per kg
10.	Imported Float glass and surface ground or polished glass, in sheets, whether or not having an absorbent, reflecting or non-reflecting layer, but not otherwise worked of tariff 7005	N/A	35% of customs value of KES 200 per kg
11.	Imported ceramic flags and paving, hearth or wall tiles; unglazed ceramic mosaic cubes and the like, whether or not on a backing; finishing ceramics of tariff 6907	N/A	35% of custom value of KES 300 per kg
12.	Coal	N/A	5% of the value or KES 27,000 per metric tone
13.	Imported sugar confectionary of tariff heading 17.04	KES 42.91 per kg	KES 85.82 per kg

14.	3907.99.00 – Imported Saturated polyester	N/A	20%
15.	3905.21.00 – Imported polymers of vinyl acetate/vinyl esters	N/A	20%
16.	3903.90.00 – Imported emulsion-styrene acrylic	N/A	20%
17.	Wines including fortified wines, and other alcoholic beverages obtained by fermentation of fruits	KES 243.43 per litre	KES 22.50 per centilitre of pure alcohol
18.	Beer, Cider, Perry, Mead, Opaque beer and mixtures of fermented beverages with non-alcoholic beverages and spirituous beverages of alcoholic strength not exceeding 6%	KES 142.44 per litre	KES 22.50 per centilitre of pure alcohol
19.	Beer, Cider, Perry, Mead, Opaque beer and mixtures of fermented beverages with non-alcoholic beverages and spirituous beverages manufactured by licensed small independent brewers	N/A	KES 10 per centilitre of pure alcohol
20.	Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 6%	KES 356.42 per litre	KES 10 per centilitre of pure alcohol
21.	Imported self-adhesive plates, sheets, film, foil, tape, strip and other flat shapes, of plastics, whether or not in rolls of tariff number 3919.90.90, 3920.10.90, 3920.43.90, 3920.62.90 and 3921.19.90 but excluding those originating from East African Community Partner states that meet the East African Community Rules of Origin	N/A	25% or KES 75 per kg whichever is higher.
22.	Telephone and internet data services.	15%	20%
23.	Betting	12.5%	15%
24.	Gaming	12.5%	15%
25.	Prize competition	12.5%	15%

26.	Lottery (excluding charitable lotteries)	12.5%	15%

Miscellaneous Fees and Levies Act

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

1. Increase in the Railway Development Levy

The Bill seeks to increase the railway development levy from one point five percent (1.5%) to two-point five percent (2.5%). This will result in an increase in the cost of imports and potentially increase the cost of commodities such as cars, fuel and food, which will ultimately be passed onto consumers.

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 alert might affect you, please do not hesitate to contact Lilian Renee Omondi, Partner (renee@oraro.co.ke), James Chepkwony, Associate (jchepkwony@oraro.co.ke) and William Ochieng, Associate (william@oraro.co.ke), or your usual contact at our firm.

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