Tax Alert

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The Finance Bill, 2020

The Finance Bill, 2020 (Bill) was published for introduction to the National Assembly on 5 May 2020 detailing out various tax and fiscal proposals.

The Bill is open for public participation and PKF will be making detailed submissions in relation to the same. It is important to note that the proposals contained in the Bill are not effective until approved by parliament and enacted into law in the form of an Act. The effective date for each proposal will be specified in the Act.

There are some measures in the Finance Bill which were rejected by the National Assembly when the recent Tax Amendment Bill had come for their approval. The National Assembly Standing Orders do not allow a motion to be re-introduced in Parliament before the lapse of six months but it is debatable as to whether an issue can be introduced in the National Assembly through a different motion before six months are over. The legality of such a move will be subject to debate and we expect that this issue will arise once the bill comes up for debate in Parliament. Whichever the outcome of such a debate, it will be important for the members of the National Assembly to call out the executive for subjecting them to a repeat debate on matters that they so categorically rejected less than a month ago.

Income Tax

Expansion of Residential Rental Income Tax threshold

The Bill proposes to increase the upper limit for residential rental income from KShs 10 Million to KShs 15 Million per annum. If this amendment is implemented, persons earning residential rental income of between KShs 144,000 and KShs 15 Million per annum would qualify to pay residential rental income tax at the rate of 10%. This would still be considered as final tax.

This is a welcome move that will incentivise investment in the residential real estate sector whilst also reducing the administrative burden on the landlord.

Punitive minimum tax provision

The Bill proposes to introduce a new tax known as minimum tax at the rate of 1% of the annual gross turnover. It seems that the Government wants to charge this minimum tax even if taxpayers have losses, which goes against the basic principle of levying taxes only when a taxable profit is made.

Instalment taxes would be calculated and paid normally unless this minimum tax is higher than the instalment tax calculated. The Finance Bill seems to have an error on the minimum tax section which is opposite to the change made for instalment tax – it seems to say that this minimum tax is payable even if the instalment tax is higher!!. This will probably get corrected when at the Committee stage.

The timing of the payment of this minimum tax is similar to that of instalment taxes. That is in the fourth, sixth, ninth and twelfth month of the year of income.

The minimum tax will not be applicable on:

- incomes that are exempt from tax;
- employment income;
- income subject to turnover tax;
- residential rental income;
- gains from property transfers that are subject to Capital Gains Tax; and
- income earned from the extractive industry.

This proposal is retrogressive in the sense that if ignores the very basic tenets of income tax- that it should be on income earned. The introduction of this tax is akin to a bank account maintenance fee where a customer is required to pay a certain minimum fee - this may as well be renamed PIN maintenance fee. It is not clear if the intention is to allow a taxpayer recoup this tax against future tax once a business generates income higher than the proposed minimum tax threshold.

Taxation of e-commerce activities

The Bill proposes to introduce digital service tax for persons earning income through the digital market place. The tax will be payable at the rate of 1.5% of the gross transaction value at the point of transferring payment to the service providers. Resident persons and Permanent Establishments of non-resident persons will offset the digital service tax against income tax payable for that particular year of income.

Although the Finance Act 2019 introduced the provision to tax income earned through a digital market place, there was no clarity on how non-resident persons would be taxed. The proposed introduction of the 1.5% tax rate on gross transaction value is intended to bring non-residents to the tax net and also get advance taxes from resident persons and Permanent Establishments of non-resident persons in Kenya.

There will be increased revenues for the government but success would only be achieved through proper administration. It is expected that the government would first target the most popular and formal e-commerce platforms to realize immediate gains. In an effort to address the envisaged administrative challenges, there is a proposal to grant the Commissioner powers to appoint digital service agents for purposes of collection of the digital service tax.

Reduction of allowable expenses

The Bill proposes to delete the following expenses that are currently allowable deductions for tax purposes. These would not be deductible for tax purposes if the amendment is enacted:

- Registration and annual subscription fees for trade associations;
- Capital expenses incurred on legal costs and incidental expenses relating to:
  - authorisation and issue of shares, debentures and other securities for purchase by the general public; and
  - listing on a securities exchange operating in Kenya without raising additional capital;
- Capital expenses incurred on rating for purposes of listing on any securities exchange in Kenya;
- Club subscriptions by an employer on behalf of an employee; and
- Capital expenditure incurred, upon approval by the Minister, on construction of public school, hospital, road and similar social infrastructure.

This proposal demonstrates a clear intent by the government to shore up tax collection to tame the increasing budget deficit. The proposal to restrict deduction of expenses incurred on social infrastructure might lead to corporates going slow on corporate social responsibility projects that provide necessary social infrastructure mainly to the less privileged members of the society. Further, restricting deductibility of expenses incurred towards listing and capital raising at the Nairobi Securities Exchange (NSE) will raise the cost associated with such activities, which might further reduce activity at the NSE.

Repeal of tax benefits on registered home ownership savings plans

The Bill proposes to scrap the provision on registered home ownership savings plan (HOSP), which allows depositors to enjoy a tax deduction of up to KShs 96,000 per annum (KShs 8,000 per month) on deposits placed with an approved institution. Additionally the Bill proposes to get rid of the income tax exemption enjoyed by a registered HOSP. These proposals are against the government's big four agenda on affordable housing which is aimed at ensuring Kenyans have access to affordable houses.

Income tax exemptions scrapped

The Bill proposes to scrap the following tax exemptions:

Exemption	Implication
Income of the National Social Security Fund (NSSF) provided that the Fund complies with such conditions as may be prescribed.	NSSF income will be subject to corporate income tax at the rate of 25%. This will have a negative impact on interest earned on employees' savings because NSSF might consider adjusting or reducing the interest accrued to members' accounts with the tax paid.
Monthly pension granted to a person who is sixty-five years of age or more.	This will discourage savings into pension plans and the long-term effect would be aged members of the society with no income.
Income from employment paid in the form of bonuses, overtime and retirement benefits: Provided that this paragraph shall only apply to employees whose taxable employment income before bonus and overtime allowances does not exceed the lowest tax band provided under Head B of the Third Schedule.	Bonus, overtime and retirement benefit paid to persons earning income that does not exceed the lowest tax band will no longer be tax exempt if the Bill is passed into law. However the recent introduction of exemption from Pay As You Earn for employees earning less than KShs 24,000 should take care of this to some extent.

Value Added Tax Changes

Complexities on deductibility of input VAT

The Bill proposes to introduce stringent restrictions on deductibility of input VAT by taxpayers. The amendment seeks to bar taxpayers from claiming input VAT on purchases if suppliers have not declared output VAT on the sales invoices in their VAT returns. This is in addition to the previous condition where taxpayers are not allowed to claim input VAT if they are not in possession of supporting documents. The six-month period for claiming input VAT remains unchanged.

This proposal is not practical since it would introduce administrative challenges where purchasers would have to keep checking with suppliers before they can claim input VAT. It completely goes against the basic principles of VAT and provided purchasers are allowed to claim input VAT within six months there will always be cases of mismatch. This proposal is forcing both suppliers and purchasers to match their output and input VAT declarations each month, which practically and legally is not reasonable. It overlooks the six-month period within which purchasers can claim input VAT and the inability by certain suppliers to declare output VAT on an invoice by invoice basis. This is all linked to ongoing VAT Auto Assessments being issued to all taxpayers. It is high time KRA streamlined the Tax Invoice Management System (TIMS) which is supposed to deal with all these VAT inconsistency issues including easing the administrative burden on taxpayers.

Reclassification of goods and services from VAT exempt status to standard rated

If this proposal is enacted the following goods and services would be subject to VAT at the rate of 14%:

- Helicopters of an unladen weight not exceeding 2,000 kg of tariff 8802.11.00
- Helicopters of an unladen weight exceeding 2,000 kg of tariff 8802.12.00
- Aeroplanes and other aircraft, of unladen weight not exceeding 2,000 kg of tariff 8802.20.00
- Other parts of aeroplanes helicopters of tariff 8803.30.00
- Aircraft launching gear and parts thereof; deck-arrestor or similar gear and parts thereof of tariff 8805.10.00
- Air combat simulators and parts thereof of tariff 8805.21.00
- Other ground flying trainers and parts thereof of tariff 8805.29.00
- Specialized equipment for the development and generation of solar and wind energy, including deep cycle batteries which use or store solar power.
- Tractors other than road tractors for semitrailers.
- Goods of tariff 4011.30.
- Taxable goods locally purchased or imported by manufacturers or importers of clean cooking stoves for direct and exclusive use in the assembly, manufacture or repair of clean cook stoves.
- Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating) barbeques, braziers, gas-rings, plate warmers and similar

nonelectric domestic appliances, and parts thereof, or iron or steel of tariff numbers 7321.11.00, 7321.12.00, 7321.19.00, 7321.81.00, 7321.82.00, 7321.83.00 and 7321.90.00.

- One personal motor vehicle, excluding buses and minibuses of seating capacity of more than eight seats, imported by a public officer returning from a posting in a Kenyan mission abroad and another motor vehicle by his spouse.
- Plant, machinery and equipment used in the construction of a plastics recycling plant.
- Hiring, leasing and chartering of helicopters of tariffs 8802.11.00 and 8802.12.00.

These proposed amendments touch on some key sectors of the Kenyan economy, notably agriculture, aviation and renewable energy. Whilst standard rating the above items will allow the suppliers to claim input VAT on purchases it is still expected that the end customers will bear additional costs associated with VAT charged making these items more expensive.

Reclassification of goods and services from standard rate to exempt status

Item reclassified	Implication
Maize (corn) seeds under tariff no. 1005.10	Increased maize production resulting from cheaper inputs.
Ambulance services	Enhanced affordability of health services.

The government's intention is to make the above items affordable but there is need to interrogate if the impact on input VAT on purchases that cannot be claimed could have an impact on the costs to the end consumer.

Reclassification of zero-rated supplies to standard rate

Item reclassified	Implication
Supply of liquefied petroleum gas (LPGs) including propane	Increased cost to final consumer inversely promoting the use of unclean energy which the government has been trying to avert
Inputs or raw materials for electric accumulators and separators including lead battery separator rolls whether or not rectangular or square supplied to manufacturers of automotive and solar batteries in Kenya	This will result in more revenue for the government, however the products will be more expensive.

Excise Duty

Definition of licence expanded

The definition of license has been expanded to capture all activities i.e. services, goods and any other activity that require excise duty licensing in Kenya. This change clarifies and removes ambiguity on the license requirements for excise duty purposes in Kenya.

Excise duty on locally manufactured sugar confectionery

The Bill proposes to introduce excise duty on locally manufactured sugar confectionery and white chocolate at the rate of KShs 20/kg and KShs 200/kg respectively. Whilst the prices of these commodities will go up resulting in increased revenues for the government, it creates a level playing field since these imported items are subject to excise duty.

Excise duty on alcoholic drinks enhanced

Currently, alcoholic beverages i.e. beers, cider, perry etc. with an alcohol strength of 10% or less attract excise duty of KShs 105.20 per litre. On the other hand, spirits and spirituous beverages with an alcoholic strength exceeding 10% attracts excise duty at KShs 253 per litre.
The proposed change amends the alcoholic strength threshold in both cases from 10% to 8% and therefore, alcoholic beverages and spirits with an alcoholic content of above 8% will now attract excise duty at the higher rate of KShs 253 per litre.

This is expected to increase government revenue from alcoholic beverages and spirits.

Tax Procedures Act

Finally! Local tax amnesty

The Bill proposes to introduce a Voluntary Tax Disclosure Programme. Under this programme, taxpayers would be required to disclose their past tax liabilities to the Commissioner in exchange for relief from penalties and interests accrued on the disclosed principal taxes. The programme is for a period of five years prior to 1 July 2020, which seems to be aligned to the five year period taxpayers are required to maintain records. The programme will commence from 1 January 2021 and will be available for uptake for a period of three years.

In addition, taxpayers qualifying for relief of penalties and interest under the proposed programme would not be prosecuted with respect to the tax liability disclosed if the bill is passed in to law as is currently drafted. Notably, the extent of the remission of the penalties and interest due would be dependent on the year the disclosure and principal tax is paid under the programme as follows:

- If disclosure and payment of the principal tax is in the first year, taxpayers who qualify would be granted one hundred per cent waiver of the resultant penalties and interest;
- If in year two, the waiver would be 50%; and,
- If in year three, the waiver would be 25%.

It is imperative for taxpayers to disclose all material facts otherwise they would risk not getting approval or KRA would demand the penalties and interest even if approval for the waiver had previously been granted. The programme would not be applicable to persons who end up in refund positions after taking it up. In summary, this points to a local tax amnesty that seeks to waive penalties and interest up to one hundred per cent if disclosure and payment is in the first year.

In 2016, the government introduced a foreign tax amnesty on taxable income earned outside Kenya for any year of income ending on or before 31 December 2017. The aim of the foreign tax amnesty was to ensure repatriation of funds held abroad consequently increasing domestic investments and increased revenues in future. Given that there was no tax chargeable on the repatriated funds, the success of the foreign tax amnesty could therefore not be reliably measured. Despite the increased revenue collection and foreign exchange inflows for the financial years the foreign tax amnesty was in place (01/01/2017-30/06/2019), the increase in revenue collection cannot be directly attributed to the foreign tax amnesty. In contrast, the proposed local tax amnesty only grants relief for accrued penalties and interests on unpaid principal tax. Through the proposed amnesty, the government would collect untaxed incomes dating back five years while also securing revenues for the future from non-compliant taxpayers. This should ultimately widen the tax net though the economic challenges imposed by COVID-19 would interfere with realization of increased tax collections in the short-term.

We implore the government to give favourable payment plans to taxpayers willing to take up the local amnesty and offer one hundred percent remission on penalties and interests despite the year of settlement of the principal taxes.

Miscellaneous Fees And Levies

Under the Bill, Import Declaration Fee (IDF) and Railway Development Levy (RDL) charges are proposed to be amended as follows:

IDF

Item	Current Rate	Proposed Rate
Goods imported under the East African Community Duty Remission Scheme	Ksh. 10,000	1.5% of the customs value
Additional import duty payable in respect of goods entered for home use from an export processing zones enterprises	N/A	2.5% of the customs value
Aircraft of unladen weight not exceeding 2,000 kg and Helicopters of tariffs 8802.11.00 and 8802.12.00	Exempt	3.5%
Any other goods as the Cabinet Secretary may determine are in public interest, or to promote investments which value shall not be less than KShs 200 million.	Exempt	3.5%

Item	Current Rate	Proposed Rate
Goods imported for implementation of projects under special operating framework arrangement with the Government.	Exempt	3.5%
Goods including materials supplies, equipment, machinery and motor vehicles for the official use by the Kenya Defense Forces and National Police.	3.5%	Exempt

RDL

Item	Current Rate	Proposed Rate
Currency notes and coins imported by the Central Bank of Kenya.	3.5%	Exempt
Goods, including materials supplies, equipment, machinery and motor vehicles for the official use by the Kenya Defence Forces and National Police.	3.5%	Exempt
Goods as the Cabinet Secretary may determine are in public interest, or to promote investments whose value exceeds KShs 200 million.	Exempt	3.5%

These proposed changes are intended to generate more revenues for the government. They however seem to be long term plans not suited during this difficult times under COVID-19.

Tax Appeals Tribunal

Expanded tax appeals procedures

The Bill proposes to introduce a good provision that would allow an appellant to rely on grounds stated in its documents and not only on the grounds stated in the appeal. This proposed amendment will ensure fair hearing to appellants at the Tax Appeals Tribunal since all material facts will be considered.

Kenya Revenue Authority

Proposed introduction of time limits to sue KRA

This proposed change will enable KRA effectively manage its disputes; consequently, preventing persons from lodging suits against KRA after a specified timeline. In our view this is a retrogressive proposal in an era where KRA should be promoting and facilitating trade to enable taxpayers comply with their obligations. The legality and constitutionality of this proposal should also be challenged.

Capacity building and training of KRA officers

There is a proposal to introduce legal framework for the establishment of an institution to offer capacity building and training on tax, customs and revenue administration. This proposal will enable KRA to streamline its capacity building and training programs. With the existence of KESRA and the programs it offers, it is expected that KESRA is an already registered institution under the TVET Act. This proposal, therefore, raises questions on the legality of KESRA.

right people
right size
right solutions

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