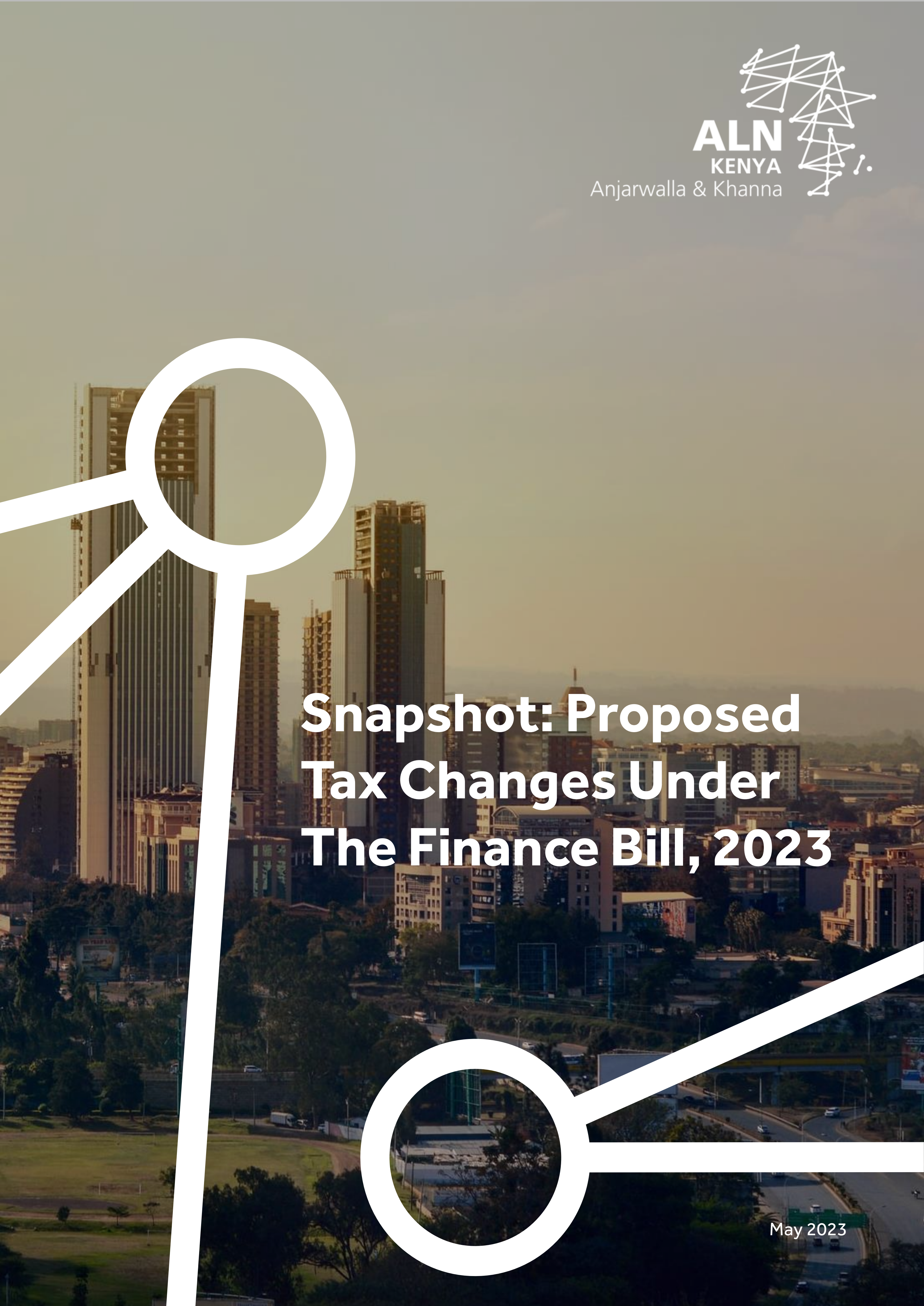

ALN KENYA
Anjarwalla & Khanna

Snapshot: Proposed Tax Changes Under The Finance Bill, 2023

May 2023

OVERVIEW

The Finance Bill, 2023 (the **Bill**) was laid before Parliament on 4 May 2023. The Bill makes the most far-reaching changes that have been witnessed in tax legislation in the recent past. The tax measures introduced are aimed at expanding the taxes collected by the Government of Kenya, against the backdrop of fiscal pressure in the currently prevailing economic circumstances.

The Bill proposes to make amendments to a raft of tax related laws in Kenya, including the Income Tax Act (Chapter 470, Laws of Kenya), the Value Added Tax Act, 2013, the Tax Procedures Act, 2015, the Miscellaneous Fees and Levies Act, 2016 and the Excise Duty Act, 2015 amongst others.

Having been laid before Parliament, the Bill will over the next few weeks undergo a public participation process and Parliamentary debate. It is expected that the Bill will be enacted in law at some point in June 2023, with the expected outcome being that it will be enacted into the Finance Act 2023 on or before the end of June 2023. It should be noted that there are provisions which are aimed to enter into force with effect from 1 July 2023 and therefore we expect that the timelines indicated above will be adhered to.

The Bill which we are currently reviewing will therefore be amended during this process and consequently, these changes should be viewed in that light. We will keep you, our clients, updated on the process in the coming days and weeks.

Please note that this note is a summary of the changes set out in the Bill. We would caution that the summary does not fully analyse the changes set out in the Bill, neither does it fully describe the impact of the changes to any particular set of circumstances or group of persons. We would advise that specific tax advice is sought if you believe that any aspects highlighted herein apply to your circumstances.

1. PROPOSED AMENDMENTS TO THE INCOME TAX ACT

a) Increased costs for players in the betting, gaming and lottery sector

Proposed Effective Date: 1 July 2023

The Bill proposes to introduce a significant change to the betting, gaming and lottery sector by introducing taxes to the amounts that the players bet or stake when engaging in these activities. The Bill proposes to achieve this by amending the definition of the term "winnings" to include the amount wagered or staked. The effect of this amendment, if passed into law, is that punters will be subject to withholding taxes on the gross amounts paid to them upon winning as opposed to the current position where they are only taxed on the amount won over and above the sum staked.

It should be noted that there have been a number of court decisions at the Tax Appeals Tribunal and at the High Court which have described "winnings" as being net of the amount wagered or staked. The legislative amendments now appear to seek to amend this position through change of law.

b) Content creators to be brought into the tax net

Proposed Effective Date: 1 July 2023

Kenya has been often ranked as having a large young population that has been active on platforms such as YouTube, TikTok amongst others. In an apparent move to capture revenue from the digital content creators, the Bill seeks to introduce a new category of income derived from monetisation of digital content. The Bill proposes that income from these activities should be subjected to tax through the withholding tax mechanism at the resident rate of 15% to be paid to the KRA. The amount deducted should be remitted to the Kenya Revenue Authority (**KRA**) within a period of twenty-four (24) hours from the time of deduction and payment of the amount.

The Bill defines "digital content monetisation" to mean "*offering for payment entertainment, social, literal, artistic, educational or any other material electronically through any medium or channel…*" and it includes partnering with brands, sponsorships, affiliate marketing, subscription services for online content, crowdfunding for content creators amongst others. It appears to us that the objective of this provision is to acknowledge the growing content creation and creative sector in Kenya and seeks to bring such income into the tax net.

c) Immovable property now defined

Proposed Effective Date: 1 July 2023

The Bill proposes to introduce a new definition for immovable property which will include land, any estate, rights, interest or easement and anything attached to the earth or permanently fastened to anything attached to earth. Interestingly, the definition also includes intangibles such as debt secured by mortgage or charge on immovable property, a mining right, interest in a petroleum agreement, mining information or petroleum information are included in the definition of immovable property.

This definition is relevant to the Eighth Schedule to the ITA (which deals with capital gains tax) and to the Ninth Schedule to the ITA (which deals with taxation of extractive industries).

d) Limitation of period within which foreign exchange losses can be claimed

Proposed Effective Date: 1 July 2023

It has been the case for some years now that a company which is controlled by non-resident persons would not be allowed to deduct realised foreign exchange losses when it is thinly capitalised but would instead defer the deduction of these foreign exchange losses until such point as the company would cease to be thinly capitalised. The thin capitalisation provisions were however amended recently and replaced with an EBITDA test.

To align the foreign exchange losses deferral provisions with the new EBITDA test, the Bill now proposes to limit the time within which foreign exchange losses can be deferred and claimed to not more than three (3) years from the date the loss was realised. This is contrasted by the current provisions which do not expressly limit the time period within which a foreign exchange loss must be claimed.

e) Spotlight on start-ups and taxation of share ownership schemes offered by start-ups

Proposed Effective Date: 1 July 2023

The Bill proposes to defer the tax point for benefits obtained by employees who are offered company shares instead of cash payments by an eligible start-up. We believe that this amendment is geared towards continuing to bolster Kenya as a hub of an accelerated growing community of venture capital entrepreneurs, particularly in the fintech space. An “eligible start-up company” has been defined in the Bill as a business incorporated in Kenya whose turnover is not more than KES 100 million and which does not carry out management, professional or training business, which has not been formed as a result of restructuring of an existing entity and which has existed for less than five (5) years.

Where a share ownership benefit has been granted by an eligible entity, it is to be taxed within thirty (30) days of the following occurrences, whichever happens earlier: a) the expiry of five (5) years from the end of the year the shares were awarded; b) disposal of the shares by the employee; or c) when the employee ceases to be an employee. The value of the benefit which will be subjected to tax will be the fair market value of the shares at the date on which any of the above scenarios apply.

f) Revised Turnover Tax thresholds expected to increase overall tax collection

Proposed Effective Date: 1 July 2023

During the COVID-19 pandemic, the Government of Kenya introduced a number of measures impacting taxation of small and medium businesses which generated a turnover of more than KES 1 million but less than KES 50 million. Under these changes, a small or medium business would pay turnover tax at the rate of 1% of the gross receipts received by it.

In an apparent change of policy, the turnover tax thresholds have now been proposed to be revised so as to lower the qualification threshold from a turnover of KES 1 million to KES 500,000, and to reduce the upper limit from KES 50 million to KES 15 million. If this proposal is passed, businesses whose turnover from business is greater than KES 500,000 will be subject to turnover tax. Additionally, residents whose turnover exceeds KES 15 million will now be subject to corporation tax at the rate of 30% of their taxable profits. The Bill also proposes to revise the turnover tax rate from 1% to 3% of gross receipts.

g) Widening the tax net through taxation of digital assets

Proposed Effective Date: 1 September 2023

Most countries in the world have been grappling with the taxation of cryptocurrencies and similar digital assets. The Bill proposes to impose an income tax referred to as the "Digital Asset Tax" on digital assets which have been defined to include anything of value that is not tangible such as cryptocurrencies, token codes and Non-Fungible Tokens (NFTs), among others. The Digital Asset Tax is intended to be payable at the rate of 3% of the transfer or exchange value by the person deriving the income at the gross fair market value consideration received, but also through owners of platforms who facilitate exchanges of these assets. Where the owner of the platform is non-resident, they will be expected to be registered for tax in Kenya through the simplified registration regime which applies for non-resident providers of electronic services.

h) Introduction of tax on repatriated income and reduced tax rate for branches of foreign companies

Proposed Effective Date: 1 January 2024

It is currently the case that permanent establishments in Kenya of foreign companies (usually described as branches of foreign companies) are taxable at the rate of 37.5% of their total taxable income. The Bill now proposes to reduce the income tax rate for a non-resident who carries on business in Kenya through a permanent establishment or branch to 30% from 37.5%. Furthermore, the Bill proposes to introduce income tax on repatriated income using a prescribed formula to be used to compute the repatriated income.

In an apparent drafting error in the Bill, while it is clearly intended that repatriation of profits by a permanent establishment or branch will now be subject to tax, a rate has not been prescribed in the Bill. We expect that this will be clarified through the enactment process. Noting the changes to the corporation tax rate of a branch now match the rate applicable to a resident company, we would expect that the repatriated income will be subject to tax at a rate that is no higher than the withholding tax applicable on dividends paid by a resident company to a non-resident shareholder (i.e., 15%) if equality is to be achieved.

If this rate is higher than 15%, then we believe that the effective tax rate of a branch could end up being significant and non-resident entities undertaking business in Kenya through branches ought to consider these changes carefully.

i) Withholding tax on income of management or professional fees, royalties, interest and rent

Proposed Effective Date: 1 July 2023

The Bill proposes to amend the ITA to disallow refunds or deductions for withholding taxes paid in relation to management, professional fees, royalties, interest and rent, made to a non-resident disallowed following a tax audit.

The implication of this proposal is that in the event of a tax audit which results in a transfer pricing adjustment, resident companies that are deemed by the KRA to have made excessive payments to their non-resident related parties will not be allowed to take a credit of or claim a refund of the withholding tax deducted on such excess payments in determining the additional tax payable as a result of the transfer pricing adjustment.

j) Relief for contributions made to a post-retirement medical fund

Proposed Effective Date: 1 January 2024

The Bill proposes to allow taxpayers who contribute to a post-retirement medical fund to be entitled to a personal relief in the computation of the tax payable in each year of income up to a limit of either 15% of the contributed amount or KES 60,000 per year, whichever is lower. The post-retirement medical fund was operationalised in 2018 although there has been low uptake in the program considering that employees already make contributions to pension schemes where the lump sum pension payments made to persons above 65 years of age are tax exempt, as well as various insurance products with pension benefits, to cater for their post-retirement lives.

k) Deduction of expenses incurred outside Kenya to be allowable

Proposed Effective Date: 1 July 2023

The Bill proposes to delete Section 18 (4) of the ITA which disallows the deduction of expenses incurred outside Kenya by a non-resident person, and which also grants powers to the Commissioner to allow deduction of certain expenditure incurred outside Kenya that is deemed to be just and reasonable.

l) Deduction of withholding tax from professional fees and remittance of rental income tax

Proposed Effective Date: 1 July 2023

The Bill proposes to widen the scope of withholding tax to apply on payments for sales promotion, marketing, advertising services and digital content monetisation. An obligation for appointed agents to deduct tax from rental income has also been proposed.

m) Mandatory remittance of withholding tax within twenty-four (24) hours

Proposed Effective Date 1 July 2023

The Bill further proposes that the tax deducted from income subject to withholding tax should be remitted to the Commissioner within twenty-four (24) hours after making this deduction. The law currently requires for this deduction to be remitted before the twentieth day of the month following the month in which the deduction was made.

This requirement will now apply with respect to all forms of withholding tax, including payments on account of interest, dividends, management and professional fees amongst others. This a drastic change which will require taxpayers to reconfigure their systems to ensure that the strict compliance obligations are met. It should be noted that penalties for non-compliance will apply for failure to remit the withholding taxes within the stipulated timelines.

n) Introduction of new income taxes for individuals

Proposed Effective Date: 1 July 2023

The Bill proposes to introduce a new tax bracket to the graduated income tax bands for all income earned above KES 6 million per annum (KES 500,000 per month). The higher tax bracket will be **subject to tax at the rate of 35%**. As has been the case in the past, the graduated income tax bands apply to employment income, income from services rendered as well as business income earned by individuals.

o) Reduction in the tax rate for residential rental income tax

Proposed Effective Date: 1 January 2024

The Bill proposes to reduce the residential rental income tax rate from 10% to 7.5% on the gross amount payable.

p) Clarification on entities that qualify for tax exemptions

Proposed Effective Date: 1 July 2023

The Bill proposes to introduce a substantive definition of entities that would qualify for tax exemptions under paragraph 10 of the First Schedule to the ITA, to mean entities established to benefit the public in a transparent and accountable manner without restriction or discrimination, and which use their assets / income exclusively for the purposes for which they were established without conferring a private benefit to individuals. The proposed amendment appears to be an attempt to restrict availability of tax exemptions for entities that are established for the benefit of a certain class of individuals.

q) Proposed increase in diminution allowance from 33% to 100%

Proposed Effective Date: 1 July 2023

The Bill proposes to increase the diminution allowance provided under Section 15(2)(g) of the ITA from 33% to 100% of the value of loose tools and small implements such as utensils or similar article employed in the production of income. The proposal is beneficial to investors particularly in the agriculture sector.

r) Thin capitalisation / interest deductibility

Proposed Effective Date: 1 January 2024

The Bill proposes to amend the interest restriction rule which capped deductible interest at 30% of earnings before interest, tax, depreciation, and amortization (**EBITDA**) regardless of the source of the loan. Under the proposed provisions, interest restriction (limited to 30% of EBITDA) will only apply on loans from non-resident lenders and will not apply on loans borrowed from local lenders, which is a welcome move. The Bill also proposes to repeal an exemption which had been granted to manufacturers who had met certain conditions.

The Bill further proposes to grant a deduction for any disallowed interest paid to a non-resident to be carried forward in the three subsequent years of income for deduction, to the extent that the 30% EBITDA rule is met in the respective years when the deduction is claimed, which may mitigate the overall impact of disallowed interest for entities with loans from non-resident lenders.

s) Investment allowances

Proposed effective date 1 July 2023

The Bill proposes to introduce the following changes to the Second Schedule to the ITA in respect of investment allowances:

i. the Bill proposes to introduce Industrial Building allowance at the rate of 10%. An Industrial Building in the Bill is defined to mean a building in use for purpose of transport, bridge, tunnel, inland navigation and electricity or hydraulic power undertaking;

ii. the Bill proposes to introduce an investment allowance in relation to investment in a dock at the rate of 10%. A dock is defined in the Bill to mean a container terminal, berth harbour, wharf, pier, jetty, storage yard and other works used to load and unload a vessel; and

iii. the Bill also proposes to extend accelerated investment allowances of 100% to persons who invest in hotel buildings and buildings used for manufacture where the investment value outside of Nairobi and Mombasa is KES 2 billion or the investment is within a special economic zone.

   Notably, the Bill proposes that the accelerated investment allowances shall not apply to investments which due to the nature of their business have to be located outside of Nairobi and Mombasa County. Whereas the proposal to extend accelerated investment allowances to investors in the manufacturing and hotel industry is a welcome proposal, it is not clear which criteria will be used to determine the businesses which due to their nature have to be outside of Nairobi and Mombasa County.

t) Scope of Capital Gains Tax Expanded

Proposed Effective Date: 1 July 2023

The Bill proposes to subject any capital gains arising from the sale of shares in foreign entities which derive more than 20% of their value directly or indirectly from immovable property situated in Kenya to capital gains tax (**CGT**) in Kenya, which is a drastic change from the existing CGT regime. Similarly, CGT would also apply where a non-resident person who holds more than 20% of the share capital of a Kenyan company directly or indirectly disposes off their interest.

The proposed amendments have not clarified who has the obligation to pay the CGT circumstances where a disposal is undertaken outside Kenya, as the liability could be imposed on the Kenyan entity in which the shares have been transferred or on the non-resident person who disposes off the shares in the offshore entity. We hope that further clarity will be provided in this regard.

u) Criteria for re-basing for CGT purposes

Proposed Effective Date: 1 July 2023

Transfer of property in certain circumstances such as group reorganisations may qualify for CGT and other tax exemptions. Upon transfer, the value at which property is transferred would be the base cost which would be relied on for a future transfer or sale of the property.

The Bill has proposed that where a CGT exemption is relied on in a restructuring transaction involving a transfer of property, any subsequent transfer of the property in a taxable transaction **within a period of five years** will not benefit from the re-basing in value of the property. This means that for the re-basing in value to be relied on for a future transaction with a third party, such a sale would need to be undertaken after the expiry of 5 years from the date the tax-exempt restructuring transaction is undertaken.

v) Due date for payment of CGT

Proposed Effective Date: 1 July 2023

The existing provisions relating to the CGT payment due date were declared unconstitutional by the High Court in March 2017. The Bill proposes to amend the due date for CGT payment to be the earlier of receipt of the full purchase price by the vendor or registration of the transfer.

w) CGT Exemption on Group Restructuring

Proposed Effective Date: 1 July 2023

Currently, the transfer of property within a Group, and which does not involve a transfer to a third party, is exempt from CGT. The Bill has proposed to amend the CGT exemption provisions to only apply to Groups which have been in existence for at **least 24 months**. If this proposal is passed into law, CGT restructuring exemptions will not apply unless it can be demonstrated that this criteria has been met.

2. PROPOSED AMENDMENTS TO THE TAX PROCEDURES ACT

a) A refund decision to be an appealable decision directly to the Tax Appeals Tribunal

Proposed Effective Date: 1 July 2023

The Bill proposes to delete "refund decisions" from the list of "tax decisions" under the TPA. If this proposal is passed into law, a rejection of a tax refund application will not be deemed to be a decision which a taxpayer would be required to lodge an objection against before lodging an appeal before the Tax Appeals Tribunal. This means that taxpayers can challenge negative refund decisions directly at the Tax Appeals Tribunal.

b) KRA to act as a collecting agent for foreign revenue authorities.

Proposed Effective Date: 1 July 2023

The Bill proposes that any multilateral agreement or treaty entered into by Kenya relating to mutual administrative assistance in the collection of taxes will have effect in law. In essence, Kenya will then be required to provide assistance in the recovery of tax claims against persons in Kenya who may have tax liabilities outside Kenya, in response to requests by foreign revenue authorities.

c) Introduction of the electronic tax invoice system

Proposed Effective Date: 1 September 2023

The Bill proposes the establishment of an electronic system through which electronic tax invoices will be issued and records of stocks maintained. Any person who carries on business will be required to issue an electronic tax invoice through the system and maintain a record of their stock in the electronic system. Based on the proposed changes, deductions for corporate tax purposes will not be allowed for expenses which are not supported by an invoice issued through the electronic tax invoice system.

These proposals appear to be in line with KRA's agenda to leverage on technology to automate taxpayers' transactions and records in a bid to enhance tax compliance and ensure an electronic trace of all payment records for taxpayers.

d) Repeal of Tax Abandonment Powers

Proposed Effective Date: 1 July 2023

The Bill proposes to repeal the powers granted to the Commissioner for abandonment of tax. These provisions allow the Commissioner to abandon the payment of tax where the Commissioner determines that it may be impossible to recover an unpaid tax or there is undue difficulty or expense in the recovery of an unpaid tax or there is hardship or inequity in relation to the recovery of an unpaid tax.

e) Introduction of tax amnesty on penalties, interest and fines

Proposed Effective Date: 1 September 2023

The Bill proposes to introduce an amnesty on penalties, interest and fines where a person had paid all the principal tax due before 31 December 2022. In instances where all the principal tax due had not been paid prior to 31 December 2022, a taxpayer shall apply to the Commissioner for an amnesty of interest penalties of fines on the unpaid tax and propose a payment plan for the outstanding amount.

This comes against the backdrop of Voluntary Tax Disclosure Programme (VTDP) introduced by Finance Act, 2020 which is due to expire on 31 December 2023. This proposed measure in our view is aimed at enhancing collection of revenue for the Government and reduce the growing tax debt by taxpayers by according an opportunity for tax debtors to regularise their compliance by paying unpaid principal taxes.

f) Issuance of Agency Notices to Enforce Compliance

Proposed Effective Date: 1 July 2023

The Bill proposes to introduce specific grounds upon which the Commissioner can issue an agency notice. These include, where a taxpayer has defaulted in paying an instalment tax, where the Commissioner has raised an assessment and the taxpayer has not objected to or challenged the validity of the assessment within the prescribed period, where the taxpayer has not appealed against an assessment specified in an objection decision within the prescribed timelines, where the taxpayer has made a self-assessment and submitted a return but has not paid the taxes due before the due date lapsed or where the tax payer has not appealed against an assessment specified in a decision of the Tribunal or Court.

These proposals are aimed at expanding the circumstances under which the KRA can issue an agency notice unlike in the current provisions whereby KRA can only issue an agency notice where a taxpayer had not appealed an objection decision to the Tribunal within the prescribed timelines.

g) Mandatory remittance of Withholding VAT within 3 Days

Proposed Effective Date: 1 July 2023

The Bill proposes to reduce the timeline within which a Withholding VAT agent should remit withheld VAT to the KRA to three days after the deduction was made unlike in the current regime where the withholding VAT agent is required to remit the tax withheld before the twentieth day of the month following the month in which the deduction is made.

In our view, this Proposal is likely to create an administrative burden for taxpayers (especially for taxpayers with multiple transactions, and there may be requirements to reconfigure their systems to meet the compliance obligations.

h) Introduction of the Appointment of Rental Income Tax Agents

Proposed Effective Date: 1 July 2023

The Bill proposes to empower the Commissioner to appoint a person as an agent for the purpose of collection and remittance of rental income tax to the Commissioner. Agents appointed by the Commissioner will be required to remit the tax deducted within 24 hours of collection.

i) Overpaid tax to be refunded within six months

Proposed Effective Date: 1 July 2023

The Bill proposes that where an application for the refund an overpaid tax that has been ascertained by the Commissioner, such tax shall be refunded within a period of six months from date of ascertainment and if the Commissioner fails to refund the tax, the overpaid tax shall be applied to offset the taxpayers outstanding tax debt or future tax liabilities.

This Proposal in our view is a welcome move for taxpayers who have over the years faced delays in having their verified applications for refunds processed in time.

j) Extension of time for settlement of disputes out of court

Proposed Effective Date: 1 July 2023

The Bill proposes to extend the time allowable for the settlement of a tax dispute outside of court from ninety days to one-hundred and twenty days.

This Proposal in our view is a welcome move and is aimed at promoting resolution of disputes outside the Court under the alternative dispute resolution mechanisms by according to parties, more time to settle their dispute outside the Court system.

k) Restriction on the addition of new grounds of appeal

Proposed Effective Date: 1 July 2023

Currently, where a taxpayer appeals an appealable decision to the Tribunal, High Court or Court of Appeal, the taxpayer is only allowed to add new grounds of appeal not included in the objection upon the consent of the relevant Tribunal or court.

However, the Bill proposes to restrict the addition of new grounds in relation to an appeal. In this regard, the proposal seems to deny the relevant court the power to allow the addition of new grounds. The impact of this proposal, if passed into law, is that going forward, taxpayers will be expected to ensure that their objections are detailed and include all the grounds that they are likely to rely on at the various levels of appeal, as they will not get an opportunity to add any new grounds at a later stage.

l) Repeal of waiver of penalties and interest

Proposed Effective Date: 1 September 2023

Taxpayers can apply to the Commissioner for the remission of the penalties or interest payable provided reasons are provided to justify the request for waiver, and in certain cases, the waiver applications are escalated to the Cabinet Secretary for the National Treasury. However, the Bill proposes to repeal the provisions relating to the remission of penalties and interest. If the provisions are passed into law, the neither the Commissioner nor the Cabinet Secretary for the National Treasury will have powers to grant waiver of penalties and interest.

m) Enhanced penalties on tax shortfall provisions

Proposed Effective Date: 01 July 2023

The Bill proposes to increase the penalty in the event of a tax shortfall from seventy five percent of the tax shortfall to **double of the amount of the tax shortfall**. A tax shortfall penalty only applies where a taxpayer knowingly makes a false or misleading statement to an authorised KRA officer.

3. PROPOSED CHANGES TO THE VALUE ADDED TAX ACT

a) Introduction of VAT exemption on exported services

Proposed Effective Date: 1 July 2023

The Bill proposes to exempt from VAT the supply of exported services which is currently standard rated (16%).

This is a welcome move unlike the position that has existed over the last 12 months where exported services have been subjected to VAT at the standard rate of 16%. However, it is our view that a VAT exemption is not an optimal proposal for taxpayers undertaking exportation of services. In our view, the optimal proposal would be to zero rate VAT on export of services. To contextualise exemption against zero rating, exemption means that no VAT is applied on the exported service whatsoever, while on the other hand, zero rating means VAT is applied at the rate of zero percent (0%). The underlying impact of this is that the exemption does not entitle a taxpayer to claim an input VAT reduction therefore making the non-recoverable VAT cost becoming a business cost and therefore a hit on business profits. On the other hand, zero rating entitles a taxpayer to claim input VAT deduction on VAT incurred on acquiring taxable business purchases.

Additionally, the Government's move to exempt VAT on exported services is in our view a departure from international best practice which many jurisdictions provide for zero rating of such services. For Kenya, to remain as an economic hub for direct foreign investments, it is our view that the Government needs to further consider this proposal, with the aim being to zero rate exportation of services.

b) VAT on liquified petroleum gases (LPG) and other Petroleum Products

Proposed Effective Date: 1 July 2023

The Bill proposes to delete the VAT charging sections providing for reduced VAT rate of 8% on Petroleum Products and Liquified Petroleum Gas (including Propane).

However, we note that the term Liquified Petroleum Gas (LPG) has been included under the VAT exemption schedule. Whilst from general interpretation, Propane forms part of LPG, we note that the Bill omits the term "including Propane" in the VAT exemption schedule for LPG and therefore bringing uncertainty on whether the intention of the omission is to charge VAT at the rate of 16% on supply of Propane.

That said, it is our view the VAT exemption of LPG is a welcome move for taxpayers and will encourage lesser use of fossil fuels. The proposal is in line with the Governments green policy and climate change agenda.

The impact of the deletion of the reduced VAT rate of 8% on other Petroleum Products listed under Section B of Part I of the First Schedule to the VAT Act is that these Petroleum Products **will now be subject to VAT at the standard rate of 16%**. These Petroleum Products include petrol and diesel for use by motor vehicles. This proposal will see the cost at the fuel pumps increase and, in our view, the rise of the general cost of living.

c) VAT on Compensation for loss of taxable supplies

Proposed Effective Date: 1 July 2023

The Bill proposes to introduce a new provision requiring a bona fide owner of taxable supplies who having claimed the input VAT on the taxable supplies is later compensated for the loss of the taxable supplies, whereby the compensation is treated as a taxable supply. Where the compensation includes a VAT amount, the compensation shall be declared and VAT remitted, on the other hand, if the compensation does not include VAT, the compensation shall be declared and subjected to VAT.

The proposal seeks to ensure that taxpayers do not benefit for an input VAT deduction on goods which the owner is compensated for loss without accounting for the corresponding output VAT.

d) VAT Registration by digital service providers

Proposed Effective Date: 1 July 2023

The Bill proposes that digital service providers shall register for VAT whether or not they meet the turnover threshold of KES 5 million.

This Proposal in our view will provide clarity to digital service providers as there has always been some confusion on whether digital service providers who did not meet the VAT registration threshold of KES 5 million per annum in sales ought to register for VAT.

e) Recording keeping outside Kenya

Proposed Effective Date: 1 July 2023

The Bill proposes to allow for keeping of VAT records outside of Kenya. This is a welcome proposal which will provide flexibility particularly for digital service providers majority of whom do not have a presence in Kenya.

f) Enhanced VAT exemptions on supplies in the medical sector

Proposed Effective Date: 1 July 2023

The Bill proposes to exempt the supply of various goods used in the manufacture of pharmaceutical products such as medicaments, packaging materials for pharmaceutical products and artificial body parts amongst others.

The Bill also proposes to exempt from VAT taxable goods used in the construction and equipping of specialised hospitals with a minimum bed capacity of 100 beds upon approval by the Cabinet Secretary. This is a welcome proposal for investors in the medical sector, however, what qualifies as a 'specialised hospital' has not been defined which may cause confusion in the sector as to whom can apply for the exemption.

g) Zero rating of inbound International Sea freight

Proposed Effective Date: 1 July 2023

The Bill proposes to zero rate (0%) inbound sea freight services offered by a registered person. This will reduce the cost of services for businesses which import their goods by sea.

h) Re-introduction of VAT exemption on transfer of business as a going concern

The Bill proposes to exempt from VAT the transfer of a business as a going concern, which is a welcome move. Currently the transfer of a business as a going concern is subject to VAT at 16%.

i) Proposed changes with an impact to the Agricultural sector

Proposed Effective Date: 1 July 2023

The Bill has proposed several changes which, if passed into law, will impact the agricultural sector. These changes include;

i. the supply of fertilizers, unprocessed milk, maize corn flour, agricultural pest control products and the transportation of sugarcane from farms to milling factories shall be exempt and not zero rated; and
ii. the supply of tea sold for the purpose of value addition before exportation subject to approval by the Commissioner of Customs shall no longer be standard rated at 16% but zero rated.

j) Imposition of VAT on clean cooking stoves

Proposed Effective Date: 1 July 2023

The Bill proposes to introduce VAT on inputs or raw materials locally purchased or imported by manufacturers of clean cooking stoves approved by the Cabinet Secretary. The impact of this is that it will make the cost of clean cooking stoves expensive.

In our view, this proposal goes against the green policy which is supposed to promote clean cooking alternatives which have a reduced carbon footprint.

4. PROPOSED CHANGES TO THE EXCISE DUTY ACT

a) *Repeal of Inflationary adjustments*

Proposed Effective Date 01 July 2023

The Bill seeks to remove the discretion of the Commissioner to adjust excise duty rates yearly on account of inflationary changes.

The impact of this Proposal is to enhance certainty and predictability of xcise duty rates.

b) *Excise duty Changes in the betting, lottery, and gaming industry*

Proposed Effective Date 01 July 2023

I. The Bill proposes further changes to the betting, lottery, and gaming sector above those proposed under the Income Tax Act as follows; ***Increased rates of Excise Duty***

Proposed Effective Date 01 July 2023

The Bill seeks to increase the excise duty rate on betting, gaming, lottery, and price competition from seven-point five percent (7.5%) to twenty percent (20%). In our view, this is aimed at increasing revenue collected in this industry.

Mandatory remittance of Excise Duty within twenty-four (24) hours

Proposed Effective Date 01 July 2023

The Bill proposes excise duty on betting and gaming, offered through a platform or other medium, to be remitted to the Commissioner by a bookmaker within twenty-four hours from the closure of transactions of the day. This Bill has defined “closure of transactions of the day” to mean midnight of that day. As has been observed above, in our view, this proposal is likely to create an administrative burden for bookmakers especially due to multiple transactions carried out by book markers.

II. Excise on alcohol, betting, gaming, lottery, and price competition advertising

Proposed Effective Date 01 July 2023

The Bill proposes to levy excise duty at the rate of 15% of fees charged for advertisement relating to the alcohol, betting, gaming, lottery, and price competition industries carried on both print media and broadcast media.

c) *Reduced Rates on Telephone and Internet Data Services*

Proposed Effective Date 01 July 2023

The Bill seeks to reduce excise duty on telephone and internet data services from twenty percent (20%) to fifteen percent (15%) of the excisable value.

d) *Increase of Excise Duty on fees charged by cellular phone providers and addition of licensed service providers under the National Payment Systems Act,2011 to Excise Duty bracket*

Proposed Effective Date 1 July 2023

The Bill proposes to increase the excise duty on fees charged by cellular phone providers from 12% to 15%. Additionally, in a bid to increase the tax base, the Bill has proposed to bring within the tax bracket fees charged by payment service providers licensed under the National Payment Systems Act,2011 at the rate of fifteen percent (15%).

e) *Excise Duty chargeable on all amounts charged in respect of digital lending*

Proposed Effective Date 1 July 2023

The Bill has amended the provision providing for Excise Duty on digital lending to provide that all amounts charged in respect of lending shall be subject to excise duty.

f) *Other Fees Subject to Excise Duty*

Proposed Effective Date 1 July 2023

The Bill proposes to amend the definition of the term *"Other Fees"* by deleting the words "*relating to their licensed activities"* appearing in the definition this term. The impact of this amendment is that it expands the definition of fees, commissions or charges subject to excise duty to include those not falling within the purview of licensed activities unless they fall within the exclusion.

g) *Proposed introduction of new offences relating to counterfeit excise stamps*

Proposed Effective Date 1 July 2023

The Bill proposes to introduce additional offences relating to excise duty stamps over and above those already provided under the Excise Duty Act including defacing or printing over an excise stamp affixed on any excisable goods. Secondly, it proposes that being in possession of excisable goods on which excise stamps have not been affixed and which have not been exempted from the requirements of the Excise Duty Act or attendant Regulations will also be an offence. Further, any printing or making of counterfeit excise stamps or stamps not authorised by the

Commissioner is to be an offence under the Excise Duty Act. Finally, the Bill also seeks to make it an offence to be found in possession or trading in excisable goods without affixing excise stamps.

The Bill proposes that any person convicted of the commission of these offences to be liable to pay a fine of up to KES 5 million or imprisonment for a term of up to three years, or to both.

h) *Newly Excisable Goods*

Proposed Effective Date 1 July 2023

Some of the newly excisable goods proposed by the Bill include the following:

Description of Item	Proposed Excise Duty Rate
Imported fish	KES 100,000 per metric tonne or 20%, whichever is higher
Sugar excluding sugar imported or locally purchased by a registered pharmaceutical manufacturer	KES 5 per kg
Powdered Juice	KES 25 per kg
Cosmetic Industry i.e., human hair, wigs, false beards, eyebrows and eyelashes, artificial nails	5%
Imported cement	10% of the value or KES 1.50 per kg, whichever is higher
Imported cellular phones	10%

5. PROPOSED CHANGES TO THE TAX APPEALS TRIBUNAL ACT

Proposed Effective Date 01 July 2023

The Bill seeks to introduce a significant amendment to the tax dispute mechanism on appeals to the High Court. Specifically, the Bill intends to amend the Tax Appeals Tribunal Act, 2013 by introducing a requirement for taxpayers dissatisfied with the decision of the Tribunal to either deposit an amount or provide security equivalent to 20% of the disputed tax before filing an appeal at the High court. Where a taxpayer wins their appeal at the High Court, the Bill provides for the KRA to credit the amount/security to the taxpayer within thirty (30) days.

Notably, this is not the first time this section has faced a similar proposal. In 2022, the Finance Bill sought to introduce a requirement that security of50% of the disputed tax be deposited with the Central Bank of Kenya before appealing to the High Court but this proposal was rejected by Parliament.

6. PROPOSED AMENDMENTS TO THE MISCELLANEOUS FEES AND LEVIES ACT

a) Reduction in the rate of Import Declaration Fee

Proposed Effective Date: 1 July 2023

The Bill proposes to reduce the rate payable as import declaration fee (**IDF**) from the current three-point five percent (3.5%) of the customs value of goods to two point five per cent (2.5%) of the customs value of the goods. Additionally, the Bill proposes to delete the reduced IDF rate of one point five per cent (1.5%) that is currently charged on raw materials and intermediate products imported by manufacturers and input for the construction of houses under an affordable housing scheme and goods imported under the East African Community Duty Remission Scheme.

These proposals will in our view go a long way in reducing import costs.

b) Reduction in the rate of Railway Development Levy

Proposed Effective Date: 1 July 2023

The Bill proposes to reduce the rate payable as railway development levy (**RDL**) to one point five per cent (1.5%) of the customs value of the goods. Additionally, the Bill proposes to delete the reduced RDL of one point five per cent (1.5%) that is currently charged on raw materials and intermediate products imported by manufacturers and input for the construction of houses under an affordable housing scheme. These proposals relating to the RDL regime are expected to reduce import costs.

c) Introduction of Export and Investment Promotion Levy

Proposed Effective Date: 1 July 2023

The Bill proposes to introduce an Export and Investment Promotion Levy on all goods imported into the country for home use that are set out under the Third Schedule to the Act. **The levy rate on the listed goods is 10% of the customs value.**

The introduction of Export and Investment Promotio n Levy is aimed at providing funds to boost local manufacturing, increase exports, create jobs, and promote investments. However, the Bill grants an exemption from the export and promotion levy on goods originating from the EAC Partner States that meet the EAC Rules of Origin.

Some of the salient goods set out in the proposed Third Schedule which is proposed to be effective on 01 September 2023 which will be subject to a levy rate of 10% on their customs value include:

- 2523.10.00 - Cement Clinkers
- 7207.11.00 - Semi-finished products of iron or non-alloy steel containing, by weight,
- 7213.91.10 - Bars and rods of iron or non-alloy steel, hot-rolled, in irregularly wound coils of circular cross-section

- 7213.91.90 - Uncoated kraft paper and paperboard, in rolls or sheets; Kraft liner; Unbleached
- 4819.30.00 - Sacks and bags, having a base of a width of 40 cm or more.

d) ***Amendments in respect to products subject to export levy and products exempt from IDF and RDL***

The Bill proposes a raft of changes to those products subject to export levy under the First Schedule and products that are exempt from IDF and RDL under the Second Schedule which we shall analyse in our detailed alert shortly.

We will publish a further detailed analysis of the proposed changes in the coming days.

CONTACTS

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