

LEGAL ALERT

Analysis of the Key Provisions and Implications of the Affordable Housing Act, 2024

Introduction

The Affordable Housing Act, 2024 (the **Act**) was gazetted on 19 March 2024 after being signed into law by the President on the same date.

The objective of the Act is to implement constitutional mandates regarding the right to accessible and adequate housing and sanitation standards, as well as establishing a mechanism for levies to support affordable and institutional housing. Additionally, the Act provides the legal framework for executing affordable housing programs and projects.

In this Legal Alert, we highlight some key provisions of the Act and analyse their potential implications.

Key Provisions of the Act

1. Imposition of the Affordable Housing Levy

The Act imposes an affordable housing levy (the **Housing Levy**) at the rate of 1.5% of the following amount:

- a) on an employee's gross salary pursuant to Section 4 (2)(a) of the Act; or
- b) on the gross income of a person received or accrued which is not subject to the Housing Levy under (a) above pursuant to Section 4 (2)(b) of the Act. (Emphasis is ours)

Furthermore, the Act requires under Section 5 that employers deduct and remit an equivalent amount of 1.5% of each employee's gross monthly salary to the collector, being the Commissioner General of the Kenya Revenue Authority (the **KRA**).

The provisions imposing the Housing Levy under the Act are different from the provisions of the Finance Act 2023 that initially introduced the Housing Levy. The key change is that the provisions under the Act have widened the scope of income subject to Housing Levy to include the gross income of persons with income from other sources apart from salary. Previously the Housing Levy was imposed on employed persons only, leading to the High Court declaring it unconstitutional on grounds of discrimination.

However, there are a few ambiguities in the Act including those which we highlight below:

- i. It will be noted that for persons not earning a salary, the Housing Levy is intended to be collected on the "**gross income** of a person received or accrued, which is not subject to the Housing Levy under Section 4 (2)(a) ...". The Act does not define the term "**gross income**". However, it may be possible to infer what this means from the Income Tax Act (the **ITA**) namely, that income which is accrued or derived from Kenya includes gains or profits from any business, employment or services rendered, grant of right to use property, dividends, interest, natural resource income, capital gains, gains from financial derivatives, earnings from businesses in the digital economy, amongst others.

If this interpretation were adopted, it would mean that rental income, dividends, interest income earned from banks, amongst other sources of income, would all be subjected to the Housing Levy at the rate of 1.5% on the gross amount received by a person. It is also not clear whether the Act intends to impose the Housing Levy to such a wide net of income or limit it to the gross income of a person from a business, or whether indeed the definition of "**gross income**" should be inferred from the ITA;

- ii. Another concern is that Section 4 (2)(b) applies the Housing Levy on "**gross income of a person received or accrued which is not subject to the Housing Levy under Section 4(2)(a)...**" From our reading of this provision, we understand it to mean that an employee who receives passive income from other sources e.g. rental income will

also be required to pay the Housing Levy on such income, in addition to having paid the Housing Levy through a deduction from his/her gross salary. Again, it is unclear whether this is the intention of the Act as we assume that this subsection was introduced to rectify the initial unconstitutional nature of imposing the Housing Levy solely on salaried employees. Nonetheless, there remains ambiguity regarding this point.

Another example is where a person undertakes business through a company in which he/she is a shareholder and would ordinarily derive income by way of dividends. In this case, would the gross dividends be subject to the Housing Levy? If so, it then follows that the Housing Levy would be payable only in the years the company has declared a dividend to the shareholders. If the dividend income is not subject to the Housing Levy, it can be argued that the Act has not resolved the salient unconstitutional issues raised by the High Court touching on discrimination;

- iii. Similarly, the Act does not define the term “*person*” as regards the income of persons who are subject to the Housing Levy who are not employees. Section 48 of the Act defines “*person*” to mean ‘*a natural person*’ with respect to eligibility for allocation of housing units, but only with reference to Section 48 of the Act. If it had been the intention that this definition applies wherever used in the Act, the definition of “*person*” would have been set out in Section 2 of the Act, which sets out the definitions used in the entire Act. If one were to then rely on the definition of the term “*person*” under the Interpretation and General Provisions Act, it would add to the ambiguity as that would include a company or association or body of persons, corporate or incorporate all of whom would be required to remit the Housing Levy on their gross incomes. It is therefore unclear whether the application of the Act extends to both natural persons and legal persons;
- iv. The Act does not detail how persons with income from other sources (apart from salary) will determine their gross monthly income, to be deducted and remitted each month. For instance, should a sole proprietor who only receives 60% of the profits of his business and reinvests 40% into the business assume that the Housing Levy is to be paid on 100% profit made or only on what he/she draws from the business? How does a businessman deal with cyclical challenges of unequal profitability and months where there is a profit made by the business, but he/she takes no drawing? Should the Housing Levy be paid on profits computed on a “*cash basis*” (that is, actual cash received by the business) or on an “*accrual basis*” (that is, upon raising an invoice, whether the invoice is ever paid or not)? The latter creates the challenge that a businessman could pay the Housing Levy on amounts that may later turn out to be bad debts.

Despite the Act referring to gross income “*received or accrued*,” it should be noted that the Act, unlike the ITA, does not set out any mechanisms for the reimbursement of Housing Levy paid on bad debts.

Given the above, the uncertainties in the Act are likely to be the subject of further challenges against the implementation of the Act in the courts, or at the very least, seeking clarification on its interpretation.

In the meantime, the legal obligation to deduct the Housing Levy is now in effect and therefore, employers will be required to start deducting the same from their employees' salaries as from the March 2024 payroll. As indicated above, the Act appoints the Commissioner-General of the KRA (and by extension, the KRA) as the collector of the Housing Levy. The Housing Levy is required to be remitted to the KRA by the ninth working day after the end of the month in which the gross salary was due or gross income was received or accrued. Failure to remit the Housing Levy within the required timelines attracts a penalty of 3% of the unpaid amount for each month or part thereof that the amount remains unpaid.

2. Allowable Tax Deduction and Affordable Housing Relief

The Act amends Section 15 (2) of the ITA to provide a deductible allowance to employers in respect of all expenditure incurred in payment of Housing Levy equivalent to an amount of 1.5% of each employee's gross monthly salary. The Act further amends Section 30A of the ITA to allow resident individual employees to qualify for affordable housing relief (the Relief) where one demonstrates that during the relevant year of income, the individual has paid the Housing Levy. The Relief is granted at the rate of 15% of the employee's contribution but the Relief is limited to a maximum amount of KES 108,000 (approx. USD 817) in a year. This means that the monthly Relief would be the lower of KES 9,000 (approx. USD 68) and 15% of the housing levy payable by an employee in the relevant month.

Notably, the Relief is not available to individuals and other persons contributing the Housing Levy under Section 4 (2)(b) of the Act based on their gross income. In a notice issued by the KRA on 19 March 2024 ([see here](#)), the KRA stated that resident individuals who pay the Housing Levy shall be entitled to the Relief without distinguishing between employees and persons with income from sources apart from salary. It is therefore the case that the Relief may be availed to both salaried and individuals with other sources of income apart from salary, despite the provisions of the ITA in relation to the Relief only applying to employees.

3. Exemption from Imposition of the Housing Levy

The Act grants discretionary powers to the Cabinet Secretary for the National Treasury (the **CS Treasury**), upon recommendation from the Cabinet Secretary for Housing, to exempt any income or class of income, or any person or category of persons through a Gazette notice from the payment of the Housing Levy. We will need to wait to see how this power will be exercised in practice.

4. Reduction of the Rate of Turnover Tax

In addition to the Housing Levy, the Act has amended Paragraph 9 of the Third Schedule to the ITA by reducing the rate of turnover tax from 3% of the gross receipts of a business to 1.5% of the gross receipts. We understand that the reduction of the turnover tax rate is intended to cushion small and medium enterprises from the impact of the Housing Levy on their businesses.

5. Establishment and Management of the Affordable Housing Fund

The Act establishes the Affordable Housing Fund (the **Fund**), which is vested in and managed by the Affordable Housing Board (the **Board**), to facilitate affordable housing initiatives. The Board is mandated to allocate funds for housing programs, institutional housing, and infrastructure and it has the authority to invest surplus income and borrow funds to achieve the objectives of the Act. The Fund is financed by various sources, including the Housing Levy, appropriations by the National Assembly, gifts, grants, donations, voluntary contributions, income from investments, loans approved by the CS Treasury, and income generated through the Fund's functions.

The Fund's purpose encompasses financing the design, development, and maintenance of affordable and institutional housing, as well as associated infrastructure. It further aims to facilitate home ownership, provide low-interest or low-payment home loans, develop long-term finance solutions, and support maintenance and service provision for housing projects.

6. Role of the County Governments in Affordable Housing

The Act establishes County Rural and Urban Affordable Housing Committees (the **County Committees**) in every county whose role is to develop housing frameworks, advise governors on housing programs, and collaborate with city and municipal boards on infrastructure plans. These County Committees will be chaired by a non-executive appointee nominated by the county governor and vetted by County Assemblies and will consist of representatives from diverse sectors. County Governments retain authority to enact affordable housing legislation within their jurisdictions.

7. Implementation of the Affordable Housing

The Act governs the allocation of public land for affordable and institutional housing, requiring adherence to the Land Act and stakeholder engagement for county government land. The Board has the authority to appoint national government agencies for the development of housing units and necessary infrastructure, enter agreements with public / private entities, and solicit tenders publicly. Additionally, the Board collaborates with approved institutions or mortgage schemes to provide financing for the off-take of the affordable housing units.

The Board is required to prioritise the use of locally available materials, engage local labour, and offer practical experience opportunities for students near the project sites. Importantly, when implementing affordable housing projects in existing settlements, the Board is also required to notify the residents, establish resettlement mechanisms, and offer the residents the first right of purchase for units in the project.

8. Eligibility Criteria for Affordable Housing Unit

Eligibility for affordable housing unit allocation hinges on meeting specific regulatory criteria, primarily targeting natural persons as defined by law. Applicants must furnish the Board with comprehensive documentation, including proof of deposit and national identification. The Act under section 49 (2) however provides that one of the documents that may be submitted include a copy of incorporation certificate in the case of a body corporate which suggests that a company may be eligible to be allocated housing. This provision contradicts the eligibility criteria which is limited to natural persons. It is unclear how a body corporate could be eligible for housing, noting that the eligibility criteria is limited to natural persons.

The Act categorises the affordable housing units into the following clusters:

- a) social housing units – houses targeted at persons whose monthly income is below KES 20,000 (approx. USD 151);
- b) affordable housing units – houses targeted at persons whose monthly income is between KES 20,000 (approx. USD 151) and KES 149,000 (approx. USD 1151);
- c) affordable middle class housing units – middle to high income housing targeted at persons whose monthly income is over KES 149,000 (approx. USD 1,127); or
- d) rural affordable housing units – houses under section 42 of the Act, targeted at persons living in any area which is not an urban area.

The Board prioritises marginalised individuals, vulnerable groups, youth, women, and persons with disabilities in allocation decisions. Furthermore, the Board is authorized to procure affordable housing units within approved schemes meeting policy and statutory requirements, with potential regulatory enhancements facilitated by the CS Treasury. Loan interest rates or administration fees for loans issued under the Act are determined based on reducing balance principles, with rates specified by the CS Treasury. Eligible individuals are required to make voluntary savings with the Fund, stored in dedicated accounts with interest credited accordingly. Withdrawal procedures and the option for an affordable mortgage for rural development are contingent upon Board approval and collateral arrangements.

9. Ownership of the affordable housing units

Upon full payment, the Board is required to transfer ownership of affordable housing units to qualified applicants, by issuing a certificate of ownership. The registration of an owner of affordable housing units can only be undertaken upon the Board's consent and in accordance with the Sectional Properties Act. Selling or transferring units without the Board's written approval is prohibited under the Act.

Whether the Act has Resolved Issues Raised by the High Court Decision

The Finance Act, 2023 introduced the Housing Levy where employers were mandated to deduct and remit the Housing Levy from employees' gross pay starting 1 July 2023. The High Court (the **Court**) in **Constitutional Petition No. E181 of 2023**, held that the Housing Levy introduced by the Finance Act, 2023 was unconstitutional as it lacked a legal framework for its implementation. The Court further held that the Housing Levy was discriminatory as it only targeted those in formal employment while excluding the informal sector. The Court of Appeal upheld this decision.

The Act has therefore been enacted to provide the legal framework for the Housing Levy and address the issues raised by the Court as follows:

- a) the Act imposes the Housing Levy not only on the employee's gross salary, but also on the gross income of persons with income from other sources apart from salary. This is intended to include persons in the informal sector in a bid to address the issue of discrimination against the formal environment;
- b) the Act is more elaborate on various terms and definitions, in particular, the Act offers clearer definitions of key terms such as "levy" and "affordable housing," thus addressing previous ambiguities; and
- c) the Act establishes the Fund that will be managed by the Board to oversee the administration of the affordable housing scheme.

The following are some of the salient issues in the Act that may be argued to be inconsistent with the Constitution:

- i. The Act appears to impose unconstitutional restrictions on property rights by limiting property disposal. This is because selling or transferring units without the Board's written approval is prohibited under the Act.
- ii. The Act appears to violate the use of public land, as housing units are built on public land and then allocated to private citizens without involving the National Land Commission contrary to Constitutional provisions.

- iv. The imposition of the Housing Levy may still be deemed as discriminatory due to the lack of a clear legal framework for the collection of the housing level from the informal sector. Additionally, the Act imposes unreasonable restrictions on property ownership, as highlighted in Section 48(2) which prohibits corporations from owning a house despite their contributions to taxes and the economy. This inconsistency extends to Section 49(2)(c), which seemingly allows corporations to qualify for affordable housing by requiring a copy of their incorporation certificate.

Potential Impact of the Act

The enactment of the Act has sparked various debates leading to court petitions to halt its implementation. In ***Constitutional Petition No. E154 of 2024***, the High Court has declined to grant the conservatory orders to stop the implementation of the Act and instructed that the matter be served on all parties immediately, recognising that it raises fundamental questions and requires urgent consideration.

In light of the above, employers are expected to deduct the Housing Levy from the March 2024 payslip of their employees' gross salaries and remit together with the employer's contribution, pending the hearing and determination of the Petition.

Conclusion

Despite the ongoing court case, employers are expected to comply with the Act pending the Court's decision.

While the Act presents opportunities for addressing housing challenges and fostering socio-economic development, its effective implementation will demand streamlined coordination, robust financial management, and inclusive stakeholder engagement to overcome hurdles and optimise positive outcomes in the face of scrutiny over the financial burden on citizens and the feasibility of the Act's ambitious goals.

Further guidance is hoped for on what income the Housing Levy applies to for individuals who are not employed and whether the Act applies exclusively to natural persons.

Contact Us

Should you have any questions regarding the information in this legal alert or any other tax and/or employment matters, please do not hesitate to contact:



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