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LEGAL ALERT

Analysis of the Tax Changes Introduced by the Tax Laws (Amendment) Act, 2024 and the Tax Procedures (Amendment) Act, 2024

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Introduction

The Tax Laws (Amendment) Act, 2024 (the TLA Act) and the Tax Procedures (Amendment) Act, 2024 (the TPA Act) (together referred to as the Acts) were assented into law by the President on 11 December 2024 and came into effect on 27 December 2024. The Acts have reintroduced some proposals contained in the Finance Bill, 2024 (the Finance Bill) which was withdrawn in June 2024 following countrywide demonstrations against the imposition of additional tax measures. A copy of our analysis of the Finance Bill can be found here.

The Acts have introduced a raft of amendments to 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.

We have set out below a highlight of the key amendments in the Acts as well as their impact on businesses in Kenya.

1. AMENDMENTS TO THE INCOME TAX ACT

A. MEASURES TO WIDEN THE TAX BASE AND ENHANCE REVENUE COLLECTION

a) Repeal of Digital Services Tax and Replacement with Significant Economic Presence Tax on Taxation of Digital Services

The TLA Act has amended the Income Tax Act (the ITA) to repeal the provisions relating to Digital Service Tax (DST) which applied at the rate of 1.5% of the gross transaction value and replaced it with a new deemed profit-based taxing right based on significant economic presence known as the Significant Economic Presence Tax (SEPT). The rationale for SEPT is similar to DST as it applies to non-resident persons who derive income from the provision of services in Kenya through a business carried out over a digital marketplace.

While the tax base for DST was the gross transaction value of an eligible transaction, SEPT will apply at the rate of 30% on the taxable profit of a person which is deemed to be 10% of the gross turnover. The effective tax rate for SEPT is equivalent to 3% of the gross turnover of the non-resident person derived from or accrued in Kenya. This would amount to a twofold increase from the previous DST rate of 1.5% of the gross transaction value. Noting that the taxable profit is deemed and not based on actual profit, a company with a lower taxable profit and lower margins will therefore suffer a much higher tax on deemed profitability.

The TLA Act excludes the following classes of people from SEPT:

a) a non-resident person who offers the services through a permanent establishment;
b) persons whose income is subject to withholding tax, or derived from telecommunication activities;
c) a non-resident person providing digital services to an airline in which the Government of Kenya has at least 45% shareholding; or
d) a non-resident person with an annual turnover of less than KES 5 million.

The TLA Act does not define “significant economic presence” or “gross turnover” but authorises the Cabinet Secretary for Treasury and National Planning to make regulations for better implementation of this provision. A person liable to SEPT is required to submit a return and pay the tax on or before the 20th day of the following month in which the service was offered.

b) Introduction of Minimum Top Up Tax

The TLA Act has introduced a new tax known as Minimum Top-Up Tax to be paid by a person or entity resident in Kenya or with a permanent establishment in Kenya, which is a member of a multinational group where the combined effective tax rate for that person for the year is less than 15% (referred to as a ‘covered person’). For the Minimum Top-Up Tax to apply, the group should have a consolidated annual turnover of EUR 750 million or more in the consolidated

financial statements of the ultimate parent entity in at least two of the four years of income immediately preceding the relevant year of income.

The TLA Act states that the combined effective tax rate is derived as a percentage of the sum of the adjusted covered taxes, divided by the sum of all net income or loss for the year of income. Therefore, the Minimum Top-Up Tax payable is the difference between 15% of the net income or loss of a covered person and the combined effective tax paid using the computation above, to the extent that the effective tax rate is lower than 15%. Certain classes of persons including public entities not engaged in business, tax exempt persons, pension funds, and non-operating investment holding companies, amongst others, are excluded from the application of the Minimum Top Up Tax.

With the introduction of Minimum Top Up Tax in Kenya, mergers and acquisition transactions with Kenyan targets would need to be structured carefully to cover the potential impact of an acquirer making the target a covered person by virtue of the target being part of the group of the acquirer post completion.

c) Supply of Goods to Public Entities to be Subject to Withholding Tax

The TLA Act has introduced withholding tax (WHT) on the gross payments received by a person from the supply of goods to a public entity. The term "public entity" is defined to mean a ministry, state department, state corporation, county department or agency of the national and county Government. The public entities are now required to deduct WHT from the payments made to the supplier at the rate of 5% for a non-resident supplier, and 0.5% for a resident supplier or a supplier with a permanent establishment in Kenya.

The introduction of WHT on the supply of goods to public entities is aimed at ensuring tax compliance by suppliers of goods to public entities as WHT will provide visibility to the taxman on the income earned.

d) Expanded Definition of Royalties

The TLA Act has amended the definition of "royalty" to include payments made as consideration for the use or right to use of any software, whether proprietary or off-the-shelf, license, development, training, maintenance, or support fees.

The impact of this amendment is that persons or companies that purchase software for use in their business ought to withhold tax when making payment for the same and remit the WHT amount to the KRA. Businesses will be forced to incur higher costs on purchase of software, noting that non-resident software providers would often have gross up provisions to ensure that they receive payments net of any applicable local taxes. The WHT rate is 5% for residents and 20% for non-residents (unless a lower rate is available under a double tax agreement).

e) Taxation of Income Accrued in Kenya in relation to Digital Services

The TLA Act has included payments made for digital content monetisation, goods, property, or services on a digital marketplace or platform, whether by a resident or a non-resident owner or operator, as income earned or derived from Kenya for tax purposes. The word ''platform'' is defined as a digital platform or website that facilitates the exchange of a short-term engagement, freelance or provision of a service, between a service provider, who is an independent contractor or freelancer, and a client or customer.

The TLA Act has further introduced WHT on payments made to a resident and non-resident person for making or facilitating payments on a digital marketplace at the rate of 5% and 20% respectively. The amendments are aimed at widening the tax base in the digital space and ensuring tax compliance by persons earning income from digital marketplaces.

B. CLEAN-UPS IN RELATION TO THE AFFORDABLE HOUSING PROGRAM

a) Scrapping of the Affordable Housing Relief and Introduction of Deductibility of AHL Contributions

The Affordable Housing Act, 2024 (AHA) introduced a new provision to section 30A of the ITA effective 19 March 2024 providing a housing relief to resident individuals who pay AHL in the computation of their taxes in a year of income. The TLA Act has repealed section 30A of the ITA which means that affordable housing relief will no longer be available to individuals who pay AHL.

The TLA Act has instead introduced a new provision allowing the AHL contributions from an employee's gross salary as an allowable deduction on an employee's income. The provision therefore replaces the affordable housing relief with a deduction when computing PAYE for employees.

b) Other Housing-Related Amendments

The TLA Act has increased the amount allowable as a deductible expense, with respect to interest paid to financial institutions defined in the ITA such as banks, insurance companies, building societies, the National Housing Corporation, a co-operative society etc., from KES 300,000 to KES 360,000 per year. The interest amount will now be a deductible expense of up to KES 360,000 per year for money borrowed and applied to the purchase or improvement of residential premises.

C. AMENDMENTS RELATING TO INVESTMENTS

a) Lower Capital Gains Tax Rate for Investments Certified by the Nairobi International Financial Centre Authority

Previously, where a firm had invested KES 5 billion, held the investments for at least five years and was certified by the Nairobi International Financial Centre Authority (NIFC Authority), any transfer of such investment would be subject to capital gains tax (CGT) at the rate that was prevailing at the time that the investment was made. This provision was introduced by the

Finance Act 2022 and was effective from 1 January 2023. The effect of this provision was to shield qualifying investors from changes in the rate of CGT upon disposal.

The TLA Act has deleted this provision and introduced a provision setting out a preferential CGT rate of 5% for entities certified by the NIFC Authority, that invest at least KES 3 billion and hold their investments for at least five years.

Going forward, any transfer of investment which is certified by NIFC Authority as being more than KES 3 billion and has been held for at least five years will be subject to CGT at the rate of 5%. The amendment is a welcome move as it would cushion new investments made after enactment of the TLA Act from the current CGT rate of 15%.

D. CHANGES TO THE EMPLOYMENT TAX REGIME

a) Adjustment of Prescribed Amounts for Tax Purposes

The TLA Act has introduced various changes in relation to the taxation of amounts paid to employees which would ordinarily be deemed to be employment income subject to income tax. The TLA Act has increased the threshold of certain amounts in line with the changes in inflation noting that the thresholds have not been adjusted for many years. The amendments are as follows:

- **Miscellaneous benefits**: The TLA Act has increased the non-taxable threshold of any benefit, advantage, or facility of whatsoever nature which is deemed to be employment income subject to income tax from KES 36,000 to KES 60,000 in a year.

- **Meal benefits**: The TLA Act has increased the non-taxable threshold of the value of meals offered to employees by an employer from KES 48,000 to KES 60,000 per year per employee.

The above changes are a welcome move as they align the prescribed amounts with the changing economic times.

b) Health Insurance Contributions to be Allowable for Tax Purposes

Pursuant to the changes introduced by the TLA Act, the contributions made to the recently introduced Social Health Insurance Fund (SHIF) are treated as allowable deductions when computing the tax chargeable for a year of income of the taxpayer. As a clean-up, the TLA Act has deleted the provision on relief granted to employees in relation to contributions made to the National Hospital Insurance Fund (NHIF) which has been phased out and replaced by SHIF.

c) Amendments relating to Retirement Benefits

- **Enhancement of Post-Retirement Medical Fund Deduction**

The ITA previously allowed every resident individual who contributed to a post-retirement medical fund to a relief at the rate of 15% of the annual contribution paid in that year of income up to a maximum of KES 60,000 per annum. The TLA Act has introduced a new provision allowing contributions made to a post-retirement medical fund to be an allowable deduction for purposes

of computing taxable income capped at KES 15,000 per month. In effect, the allowable deduction has been increased from KES 60,000 to KES 180,000 per annum.

- **Increased Deductibility Thresholds for Pension and Provident Contributions**

Previously, gratuity or similar payments made by an employer into a registered pension, provident or individual retirement fund were deductible expenses up to KES 240,000 in a year and KES 20,000 per month for a part year of service. The TLA Act has increased this threshold to KES 360,000 for a full year of service and KES 30,000 per month for a partial year of service.

- **Changes to the Tax Exemptions Applicable to Pension Benefits**

Previously, monthly pension payments granted to a person who is 65 years or older were exempt from tax. The TLA Act has expanded the tax exemption to also apply to the payment of pension benefits to individuals who have retired prior to the age of retirement due to ill health and withdrawals from the fund after the lapse of 20 years from the date the person registered with the fund.

The amendment is a welcome move as it enables Kenyans to freely access their pension benefits without having to wait until the age of 65 years to benefit from the tax exemption.

2. AMENDMENTS TO THE VALUE ADDED TAX ACT

The TLA Act introduced various changes to the Value Added Tax Act, 2013 (the VAT Act) with the aim of increasing revenue collection by introducing VAT on various goods and services which were previously exempt or zero-rated for VAT. Key changes include reintroduction of an exemption from VAT on a transfer of business as a going concern, changes relating to claiming VAT refunds and time of supply of goods. A detailed analysis of the changes to the VAT Act is set out below:

a) Time of Supply of Goods for Exported Goods

The TLA Act has amended section 12 of the VAT Act by inserting a new provision providing for the time of supply for exported goods to mean the time when the certificate of export or such other equivalent export document has been issued by Customs to the exporter.

The change is aimed at bringing clarity on the time of supply for exported goods. Additionally, it is also aimed at ensuring that the taxpayers have valid documentation for the exported goods.

b) Limitation on VAT Refunds and VAT Credits

The TLA Act introduces a new subsection 17(5) (ea) providing for relief in cases where a taxable supply becomes zero-rated or exempted, and an excess input tax arises due to a permanent credit position attributed to the difference between the tax rate applicable as of 1 July 2022 and a lower subsequent rate, provided the credit position existed at the time the taxable supply became zero-rated or exempted.

The amendment requires registered persons who incurred such excess credit to apply to the Commissioner for relief within six months after the commencement of this provision.

c) Amendment to the Apportionment Ratio Provisions

The TLA Act has deleted section 17 (7) of the VAT Act which provides an apportionment formula allowing a registered person who makes both taxable and non-taxable supplies to claim 100% input VAT where the value of taxable supplies exceeds 90% of the total supplies and disallows input VAT in entirety where the value of taxable supplies is less than 10% of the total supplies. The amendment ensures input VAT is claimed only to the extent that it is incurred to generate taxable supplies. Suppliers with more than 90% taxable supplies will no longer be able to enjoy full input tax deduction while those with less than 10% taxable supplies are now eligible for partial input tax claim.

d) Official Aid Funded Projects No Longer Subject to Input VAT Deduction

The TLA Act has deleted section 17 (8) of the VAT Act which allows an input VAT deduction for manufacturers who made taxable supplies to an official- aid funded project as approved by the Cabinet Secretary. This is likely to raise the cost of the taxable supplies to the official aid funded projects as the manufacturers are likely to pass the VAT cost to the official aid funded projects.

e) Application of East Africa Customs and Management Act (EACCMA) to Exported Goods

The TLA Act has amended section 65 of the VAT Act to include the application of the provisions of the EACCMA in respect to accounting for VAT on exported goods. Currently, section 65 provides that provisions of the EACCMA would only be applicable in respect to imported goods. Therefore, in our view, this provision will enhance clarity on application of EACCMA provisions for purposes of exported goods which also go through customs control and enhance regulatory consistency for both imported and exported goods for VAT purposes.

f) Transfer of Business as a Going Concern Exempt from VAT

The TLA Act has reintroduced the VAT exemption on the Transfer of Business as a Going Concern (TOGC). TOGCs were previously subject to VAT at the standard rate of 16%.

The re-introduction of the VAT exemption on a TOGC is welcome as it will provide the required flexibility for internal restructurings for businesses, including mergers and acquisitions transactions. Where this exemption is relied on, it will be critical to ensure that transactions are appropriately structured to qualify as a "transfer of business as a going concern''.

g) Changes to the First and Second Schedules to the VAT Act

The TLA Act has amended the First Schedule (relating to exempt supplies) and the Second Schedule (relating to zero-rated supplies) to the VAT Act by deleting some supplies from the First Schedule (therefore making them taxable) and by moving some supplies from the Second Schedule to the First Schedule (therefore making them exempt). The amendments will impact various industries such as the local film industry, the tourism industry, the financial sector, manufacturers and the agricultural industry.

Please see our detailed analysis of the proposed amendments per sector here.

3. AMENDMENTS TO THE EXCISE DUTY ACT (EDA)

a) Imposition of Excise Duty on "fees" Charged by Digital Lenders

The TLA Act has introduced a definition of the term 'digital lender' under section 2 of the EDA to mean *"a person holding a valid digital credit provider's license issued by the Central Bank of Kenya."* This is a welcome move which will provide clarity on persons required to account for excise duty under the EDA.

Additionally, the TLA Act has introduced a definition of the fees charged by digital lenders to include *"any fees, charges, or commissions related to their licensed activities, excluding interest, pre-loan interest, post-loan interest, return on loan, any share of profit, or insurance premiums or premium-based commissions specified in the Insurance Act or regulations made thereunder."* In our view, the definition of the term "fees" chargeable to excise duty in respect to digital lenders will bring clarity on the applicability of excise duty to the activities of digital lenders. The definition has also been aligned with the scope of fees subject to excise duty for financial institutions licensed by the Central Bank of Kenya pursuant to which the core income streams are not subjected to / are excluded from the purview of excise duty.

b) Imposition of Excise Duty on Digital Services

The TLA Act has amended the EDA to impose excise duty on excisable services offered in Kenya by a non-resident person through a digital platform. Additionally, the TLA Act stipulates that the excise duty in respect of excisable services offered in Kenya by a non-resident through a digital platform shall be payable by the non-resident person offering the service. This provision is aimed at increasing the tax base for excise duty by extending it to cover excisable services offered in Kenya by a non-resident person through a digital platform.

The provision is also aimed at levelling the playing field with the resident service providers providing excisable services through digital platforms who are currently subject to excise duty and thus will promote fairness in taxation.

c) Introduction of Remission of Excise Duty on Spirits

The TLA Act has amended section 7 of the EDA to include spirits made from sorghum, millet, cassava or any other agricultural products (excluding barley) grown in Kenya as one of the products that the Cabinet Secretary may grant remission of excise duty, wholly or partially. Previously, only beers and wine made from sorghum, millet or cassava were eligible for excise duty remission.

In our view, the addition of spirits made from agricultural products (excluding barley) as one of the products that shall be subject to excise duty remission is aimed at curbing the consumption of illicit spirits which pose significant health concerns through the reduction of costs of the spirits made from agricultural products. This may also stimulate growth in the agricultural sector and support local farmers who grow sorghum, millet or such other agricultural products used for manufacturing spirits, beers and wines.

d) Extended Timelines for Payment of Excise Duty by Licensed Manufacturers of Alcoholic Beverages

The TLA Act has amended the EDA to increase the timelines for remitting excise duty to the Commissioner by manufacturers of alcoholic beverages from twenty-four hours upon the removal of the goods from the stockroom to the fifth day of the following month upon the removal of goods from the stockroom.

This change is welcome as it allows taxpayers ample time to remit excise duty to the Commissioner and thus ease the administrative burden on taxpayers. Additionally, it will ease the cash flow constraints currently experienced by manufacturers of alcoholic beverages, who previously had to remit excise duty payments within twenty-four hours of removing goods from the stockroom, often before receiving payment from purchasers.

e) Excise Duty Rates on various Excisable Goods Increased

The TLA Act has increased the excise duty rates applicable in respect of certain goods set out under the First Schedule to the EDA. This increase in the excise duty rates is aimed at enhancing revenue collection. That said, consumers will have to shoulder higher prices for the goods such as imported sugar, cigarettes, nicotine products and imported sugar confectionary as set out here.

f) Amendments to Descriptions and Various Excise Duty Rates

The TLA Act has amended the subheadings in Part i of the First Schedule of the EDA. This amendment provides clarity on the scope and limits of excisable goods and services. The details are set out here.

g) Introduction of Excise Duty on Various Imported Products

The TLA Act has introduced excise duty on various products aimed at enhancing revenue collection on various items such as imported electric transformers, imported printing ink, imported ceramic sinks and similar sanitary items, imported float glass and surface ground or polished glass, imported ceramic flags and paving, hearth or wall tiles, coal, imported saturated polyester, imported polymers of vinyl acetate/vinyl esters and imported emulsion-styrene acrylic. The introduction of excise duty on these imported items is geared towards promoting local industries by increasing the costs the imported products. This is likely to discourage businesses from importing these products and thus encouraging local manufacture of the products.

The specific excise duty rates applicable to these goods is set out here.

h) Introduction of the Excise Duty on Internet and Social Media Advertisements in respect of Alcoholic Beverages and the Betting and Gaming Industry

The TLA Act has introduced a 15% excise duty rate on advertisements related to alcoholic beverages, betting, gaming, lotteries and prize competitions when conducted on the internet and social media platforms.

Previously, excise duty on adverts concerning alcoholic beverages, betting, gaming, lotteries and prize competitions was only applicable where the advertisement was carried out on television, print media, billboards and radio stations.

The amendment is aimed at expanding the tax base for excise duty on such advertisements, reflecting the evolving landscape of advertising media and ensuring consistency in taxation across various platforms.

i) Changes to the Excise Duty Regime for Alcoholic Products

The TLA Act has amended the EDA in a bid to change the method of levying excise duty rates for certain alcoholic products. The TLA Act has transitioned the calculation of excise duty from a "per litre of beverage" basis to a "centilitre of pure alcohol " basis.

This shift addresses the complexity of alcoholic beverages, which contain various components in addition to pure alcohol. By levying excise duty on a centilitre basis, the calculation of excise duty will be more precise, ensuring that the duty is imposed specifically on the alcohol content rather than the overall composition of the beverage. Importantly, this shift will allow for fairness and equity in the taxation of alcoholic beverages, given that higher amounts of taxes will be imposed on beverages with higher contents of alcohol which aligns with international best practices on taxation of alcoholic beverages.

Businesses operating in the alcoholic beverage industry should carefully review and adjust their pricing strategies, tax calculations, and compliance procedures in response to these amendments. We have set out the proposed excise duty rates in this link.

j) Locally Assembled Electric Vehicles Exempt from Excise Duty

The TLA Act has exempted locally assembled electric vehicles from excise duty. This exemption is intended to promote local assembly and adoption of electric vehicles, potentially reducing the cost for consumers and supporting sustainability initiatives. This change aims to encourage investment in local electric vehicle assembly and aligns with efforts to advance green energy and reduce carbon emissions in the transportation sector.

k) Removal of Excise Duty on certain Pasta and Pasta Products

The TLA seeks to amend the EDA to delete imported pasta of tariff 1902 whether cooked or not cooked or stuffed (with meat or other substances) or otherwise prepared, such as spaghetti, macaroni, noodles, lasagne, gnocchi, ravioli, cannelloni, couscous, whether or not prepare and the corresponding rate from the EDA. The import of this is that excise duty previously applicable at 20% will no longer apply to the above stated products.

4. AMENDMENTS TO THE TAX PROCEDURES ACT, 2015

a) Stay of Exemptions and Incentives on Imported Steel Billets and Imported Wire Rods

The TPA Act has introduced a new section 6A (4) in the Tax Procedures Act, 2015 (TPA) staying provisions in any multilateral agreement or treaties entered into by the Government of Kenya providing exemptions or incentives on import duty on imported steel billets (Tariff heading 7207.11.00) and imported wire rods (Tariff headings 7213.91.00 and 7213.91.90) for a period of two years or such longer period as the Cabinet Secretary may prescribe through a Gazette Notice. This amendment will ensure the protection of local manufacturers in the industry from competition posed by lower-priced imports under such treaties.

b) Extension of the Tax Amnesty Program

The TPA Act has extended the tax amnesty programme which lapsed on 30 June 2024, for one more year, to 30 June 2025. The TPA Act has also amended the base year for the amnesty from 31 December 2022 to 31 December 2023. This extension will grant taxpayers who had outstanding principal tax obligations as of 31 December 2023 an opportunity to settle the principal taxes without incurring penalties or interest, provided that the payment is made by the 30 June 2025.

The extension of the amnesty program is a welcome move as it affords taxpayers additional time to mobilise funds to settle outstanding principal taxes while still benefiting from amnesty on interest and penalties and raising more revenue for the Government.

c) Clarity on Information Required for Electronic Tax Invoices

The TPA Act has amended section 23A of the TPA to provide that the following information should be included in an electronic tax invoice (e-TIMS):

- the words "TAX INVOICE";
- the name and the address of the supplier;
- the name, address and PIN (if any) of the purchaser;
- the serial number of the tax invoice;
- the date and time which the invoice was issued;
- the date and time which the supply was made, if it is different from the date the tax invoice was issued;
- the description of the supply including description of goods or nature of services;
- details of any discount allowed at the time of supply;
- the consideration for the supply;
- tax rate charged and total amount of tax charged; and
- any other prescribed information.

The amendments are aimed at aligning the provisions of the TPA with the requirements under the Tax Procedures (Electronic Tax Invoice) Regulations, 2023. Additionally, this provision provides clarity on what information should be specified in the e-TIMs invoices as well as enhancing compliance by standardising invoicing requirements.

d) Reverse Tax Invoicing Requirements for Small Businesses and Small-Scale Farmers

The TPA Act has introduced a new section 23A (3A) relating to electronic tax invoicing for small businesses and small-scale farmers. The provision provides that where a supply is received from a small business or a small-scale farmer, whose turnover does not exceed KES 5 million, the purchaser will be required to issue a tax invoice (reverse invoicing) for the purpose of ascertaining tax liability. The amendment is aimed at widening the tax base to capture the informal sector and small-scale farmers. Additionally, it seeks to address the concerns raised by small scale businesses and farmers on the challenges associated with adoption of electronic tax invoicing systems.

e) Exclusion of Withholding Tax Payments from E-Tims Requirements

The TPA Act has amended Section 23(4) of the TPA to provide that payments for withholding tax shall not require an e-TIMs invoice. This clarifies that an e-TIMs invoice is not required for purposes of making a withholding tax payment.

f) Re-Introduction of Tax Abandonment Provisions

The TPA Act has re-introduced tax abandonment provisions whereby the Commissioner, with the prior approval of the Cabinet Secretary, may refrain from assessing or recovering any tax debts due. The circumstances under which the Commissioner may abandon or deem such tax as extinguished are where the Commissioner is satisfied that.

a. it may be impossible to recover tax;
b. it is in public interest not to recover an unpaid tax;
c. there is undue difficulty or expense in the recovery of unpaid tax;
d. there is hardship or inequity in relation to recovery of unpaid tax; or
e. there is any other reason occasioning inability to recover the unpaid tax.

For context, this amendment effectively reinstates the tax abandonment measures that were previously in effect prior to July 2023. The TPA Act creates a framework in which provisions for both tax amnesty and tax abandonment operate concurrently, allowing taxpayers to benefit from relief under either provision where eligible.

In our view, the introduction of tax abandonment provisions is a welcome move to taxpayers who are struggling financially as the provisions provide a mechanism for taxpayers who are genuinely unable to pay their taxes to be relieved of the tax burden. This provision may also lead to efficiency in tax collections as the Commissioner's collection resources will be focused on taxpayers who can pay their tax debts.

g) Changes to the Withholding VAT Regime

The TPA Act has revised the provisions of the TPA which currently exclude the application of withholding VAT on zero-rated supplies and registered manufacturers whose value of investments in the preceding 3 years from 1 July 2022 is at least KES 3 billion. This threshold has now been adjusted to apply to registered manufacturers with investments of at least KES 2 billion in the three years preceding 31 December 2024. This provision came into force in 2016 and was mainly targeted at avoiding cash flow constraints that would impact businesses that deal with zero-rated supplies, and registered manufacturers who would be in perpetual VAT credit positions.

Additionally, the TPA Act has introduced automatic imposition of a penalty of 10% where a withholding VAT agent fails to remit the withholding VAT payable within five working days. Prior to this amendment, the penalty of 10% could only be imposed on a taxpayer upon conviction by a court of law. This provision will give the KRA the ability to impose the penalty without the matter having to be referred to a court of law for conviction.

h) Clarification on Offsetting and Refunds Arising from Overpaid Taxes

The TPA Act has amended the tax refund provisions in respect to offsetting or refund of overpaid tax. Previously, where a taxpayer had overpaid tax under any tax law, they could apply to the Commissioner for offsetting of the overpaid tax against the taxpayers' outstanding tax debts and future tax liabilities or apply for a refund of the overpaid tax within five years, or six months in case of VAT.

The TPA Act has expanded the scope of offsetting the overpaid tax to include taxpayer's outstanding tax debts and future tax liabilities including instalment taxes and input VAT. Additionally, the Act clarifies the timelines for refund applications, specifying that the five year period for applying for a refund of overpaid tax applies exclusively to income tax. For any other taxes, the refund application is required to be made within twelve months from the date the payment was made.

In our view, the provision allowing for offsetting of the overpaid tax against instalment taxes and VAT is a welcome move as it will help taxpayers in management of their cashflows. Additionally, the increase of the time limits for making VAT refund applications is a welcome move as it provides taxpayers who are consistently in a tax credit position additional time to submit their VAT refund claims.

i) Integration to Data Management and Reporting Systems

The TPA Act has introduced an amendment granting the Commissioner the power to issue a written notice requiring a taxpayer to integrate its data management and reporting systems with KRA's electronic tax systems (such as iTax). The amendment specifies that an integration notice, depending on the nature of the business, shall be limited to reasonable periods not exceeding one year and applies solely to businesses with an annual turnover exceeding five million shillings. However, taxpayers are not required to share data relating to their trade secrets and private or personal data held on behalf of the customers.

The Data Management and Reporting System was established vide the Finance Act, 2023 and was aimed at allowing a framework for the Commissioner to collect transactional data for purposes of determining applicable taxes. Therefore, the amendment of integrating the Data Management and Reporting System into the KRA's electronic tax system (iTax) is aligned with the KRA's commitment to leverage technology to reduce tax leakages.

The TPA Act further criminalises any failure to adhere to the notice by the Commissioner to integrate such systems to a penalty that does not exceed KES 100,000 for every month or part thereof that the failure continues.

j) Exclusion of Weekends and Public Holidays in the Computation of Time

The TPA Act has amended the TPA to exclude Saturdays, Sundays, or public holidays in computing the period for lodging a notice of objection with the Commissioner, appealing to the

Tax Appeals Tribunal, the High Court and the Court of Appeal. The express exclusion of weekends and public holidays in computing the statutory timelines is a welcome move aimed at providing clarity on computing timelines for compliance with the above tax dispute resolution timelines.

k) Late Submission Penalty for EPZ Enterprises

The TPA Act has amended the late submission penalty for EPZ enterprises which fail to submit an annual income return and self-assessment tax. The penalty is KES 20,000 for every month or part thereof that the failure continues. The amendment is an enhancement of the previous penalty for filing of late returns of KES 2,000 per day prescribed in the ITA. The provision is aimed at harmonising the tax laws to ensure that all penalties for submission of returns are within the provisions of the TPA.

l) Employees Working Remotely Outside Kenya Required to have a PIN

The TPA Act has introduced a requirement for a Personal Identification Number (PIN) for an employee working remotely outside Kenya for a Kenyan employer, excluding employees working for the national carrier. This will ensure tax compliance by the remote workers in remitting taxes applicable on their income derived in or accrued from Kenya.

5. AMENDMENTS TO THE MISCELLANEOUS FEES AND LEVIES ACT, 2016

a) Railway Development Levy Increased

The TLA Act has amended the Miscellaneous Fees and Levies Act, 2016 (MFLA) by increasing the rate of Railway Development Levy (RDL) from 1.5% to 2% of the customs value of the goods. Whilst a higher rate of RDL is aimed at increasing revenue for the Government, it is our view that an increase in RDL will increase the cost of imports, and this is likely to result in higher prices for goods, particularly those that are essential or commonly imported. Importers may pass these costs to consumers, potentially increasing the price of imported goods and consumer goods in general.

Small and medium enterprises (SMEs), which rely heavily on imports, may experience higher operational costs due to increased importation expenses. These businesses often have limited capacity to absorb extra costs, meaning they may need to adjust prices or reduce operations, impacting profitability and overall competitiveness in the market.

b) Exemption of Various Goods from Import Declaration Fee and RDL

The TLA Act has amended the MFLA to provide for exemption from RDL and Import Declaration Fee (IDF) on importation of the following items:

i. all goods including material supplies, equipment, machinery and motor vehicles for the official use by the National Intelligence Service and the Defence Forces Welfare

Services. Initially such exemption was only available for the Kenya Defence Forces and National Police Service; and

ii. woven fabrics made from synthetic filament yarn and worn clothing and other worn items (HS Codes 5407 and 6309 respectively) imported as raw materials for manufacture of textile products in Kenya. This exemption applies upon recommendation by the Cabinet Secretary responsible for industry, providing a boost to the local textile industry by reducing input costs.

c) Imposition of Export and Investment Promotion Levy on Sack Kraft

The TLA Act has amended the MFLA to impose export and investments promotion levy on bleached sack kraft (HS Codes 4804.29.00 and 4804.39.00) whose rate shall be 10% of the customs value. The exemption will make bleached sack kraft more affordable for local manufacturers, particularly in the paper, packaging, and related industries.

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