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# Global Tax Alert

## Kenya proposes Finance Bill, 2020

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### Executive summary

On 6 May 2020, the Chairperson of the Department Committee on Finance & National Planning presented the Finance Bill, 2020 (the Bill) to Parliament. It is anticipated that Parliament will request stakeholder and public comments before the Bill becomes an Act.

The Bill is presented as a matter of ordinary Fiscal Budgetary course and follows the enactment of the *Tax Laws (Amendment) Act, 2020* on 25 April 2020. The *Tax Laws (Amendment) Act, 2020* amended various tax laws and was aimed at responding to the COVID-19 pandemic (for background on the Act, see EY Global Tax Alert, [Kenya enacts Tax Laws \(Amendment\) Act, 2020](#), dated 28 April 2020).

The Bill proposes additional changes to tax laws, but also provides for other miscellaneous amendments to the *Insurance Act*, *Retirement Benefits Act*, *Capital Markets Authority Act* and *Public Roads Toll Act*, among others.

The Bill also re-introduces some of the not-business-friendly provisions that were rejected by Parliament when the *Tax Laws (Amendment) Act, 2020* was enacted. While the reason for this is unclear, it is likely that these provisions will likely receive the same reaction from the stakeholders.

Once the Finance Bill, 2020 has been subjected to public consultation, it will be submitted by Treasury to Parliament before it is signed into law by end of June.

This Alert summarizes the key proposals contained in the Bill. Unless specifically provided, all the proposals will come into effect on the date of assent by the President.

## Detailed discussion

### Corporate income tax

#### Introduction of a minimum tax

The Bill seeks to introduce a minimum tax payable at 1% of gross turnover. The tax will be payable by the following categories of persons:

- ▶ Those whose income is not specifically exempt under the *Income Tax Act* (ITA).
- ▶ Those whose source of income does not include employment, rent from residential property, capital gains, taxpayers in extractive sector, taxpayers whose income is subject to turnover tax.
- ▶ Those whose installment tax payable in any year of income is lower than the minimum tax (We opine that the word "higher" used in the Bill should read "lower"). Consequently, where minimum tax is payable, installment taxes will not be applicable

The minimum tax will be payable in four installments by the 20th day of the 4th, 6th, 9th and 12th months of the year of income. The proposal seems to be aimed at loss making entities and follows similar legislation in countries like Tanzania, Angola, Mozambique and the Democratic Republic of the Congo.

*Effective date: 1 January 2021*

#### Introduction of digital services tax

The Bill proposes to impose a digital services tax (DST) on income from services provided through a digital marketplace in Kenya at the rate of 1.5% on the gross transactional value. The DST shall be payable via a withholding tax system. Withholding tax agents will be appointed by the Commissioner.

The tax paid under this regime by a resident person or nonresident person with a permanent establishment in Kenya, shall be offset against the income tax payable for that year of income. The COVID-19 pandemic has resulted in increased transactions concluded via the digital marketplace (e.g., online shops) and it would seem the Government is keen on capitalizing on this to generate additional tax revenues.

*Effective date: 1 January 2021*

### Widening of income threshold qualifying for residential rental income tax

The Bill proposes to increase the threshold for income qualifying for residential rental income tax from KES10 million to KES15 million. The proposal is geared towards widening the tax net with the aim of increasing revenue collection.

#### Deductibility of expenses for corporate income tax

The Bill proposes to treat the following expenses as non-deductible:

- ▶ Entrance fees or annual subscriptions to eligible trade associations and club subscriptions paid by an employer on behalf of an employee
- ▶ Capital expenditure incurred on legal costs and other incidental expenses relating to rating, authorization and issue of shares, debentures or similar securities offered for purchase by general public, as well as listing on the Nairobi Securities Exchange
- ▶ Capital expenditure incurred on the construction of a public school, hospital, road or any similar kind of social infrastructure

The *Tax Laws (Amendment) Act, 2020* sought to introduce these provisions, a move that was rejected by Parliament. The Government's motive behind this proposal is unclear especially given the challenges that a majority of taxpayers are currently facing.

*Effective date: 1 January 2021*

#### Exempt income

The Bill seeks to repeal exemptions previously granted on incomes accruing to a registered Home Ownership Savings Plan (HOSP) as well as the National Social Security Fund (NSSF).

Similar to the proposals on non-deductible expenditure, this proposal was introduced by the *Tax Laws (Amendment) Act, 2020* and rejected by Parliament.

*Effective date: 1 January 2021*

### Employment tax

#### Repeal of HOSP provisions

The Bill seeks to:

- ▶ Repeal the tax deduction available to employees and individuals who make contributions to a registered HOSP. Currently, the deduction is KES96,000 per annum (KES8,000 per month).

- ▶ Remove the tax exemption on interest income earned from the deposits made to a HOSP (current exemption is a maximum of KES3 million).
- ▶ Eliminate tax transfers between HOSPs.

If passed, these proposals will discourage savings for homes through HOSP. Again, these proposals were previously included in the *Tax Laws (Amendment) Act, 2020* but were subsequently rejected by Parliament.

*Effective date: 1 January 2021*

### **Repeal of tax exemptions provided to low-income workers**

The Bill proposes to impose tax on bonuses, overtime and retirement benefits paid to employees whose taxable employment income, before the mentioned benefits, is at the lowest tax band. The proposal disregards and diminishes the COVID-19 tax incentives that were granted to low-income earners.

*Effective date: 1 January 2021*

## **Tax Procedures Act**

### **Introduction of an amnesty program**

In a positive development, the Government, through the Bill, proposes to establish a tax amnesty program with an effective date of 1 January 2021. The program, which will run for a three-year period, will cover income taxes, value-added tax and excise duty. Under the amnesty:

- ▶ A taxpayer will need to make an application (in the prescribed form) to the Kenya Revenue Authority (KRA), disclose all related material facts, and pay the principal tax due.
- ▶ A waiver of penalties and interest will be granted to taxpayers at a rate of 100%; 50% and 25% for disclosures made within the first, second and third year of the program running respectively, provided that the relief granted does not result in a refund to the taxpayer.
- ▶ Income of a taxpayer under audit (or in receipt of an intention to audit) by the KRA will not be eligible for the program.
- ▶ Upon granting of the relief, the taxpayer and Commissioner will enter into an agreement setting out the terms of the payment. The Commissioner will also have a right to withdraw the relief if he establishes that not all material facts were disclosed, and this could lead to prosecution.

*Effective date: 1 January 2021*

### **Appointment of digital tax agents**

The Bill proposes to grant the Commissioner power to appoint and revoke the appointment of digital tax agents, to collect and remit tax on digital services. This is likely to be challenged on Constitutionality grounds.

*Effective date: 1 January 2021*

### **Value-Added Tax (VAT)**

#### **Introduction of legislation on VAT Auto Assessments (VAAs)**

The Bill proposes to amend the conditions set for deductibility of input tax to require a registered supplier to have declared the respective sales invoice in a VAT return, before the purchaser is entitled to a claim of the input tax.

The change “legalizes” the current VAAs which will result in increased instances where input VAT will be disallowed by the Commissioner. This measure is against the principle of fairness and it’s an abdication of Commissioners duty.

The requirement for a purchaser to confirm that output VAT has been declared by the seller before claiming input tax will be administratively burdensome and is currently not supported by iTax. The KRA will need to guide Taxpayers on how feasible it will be for purchasers to verify submissions of buyers.

#### **Amendment of status of various VAT supplies**

The Bill proposes to amend the VAT status of the following products from taxable (14%) to exempt:

- ▶ Maize (corn) seeds of tariff no. 1005.10.00
- ▶ Ambulance services

The Bill proposes to amend the VAT status of the following products from zero rated to the standard rate of 14%:

- ▶ The supply of liquefied petroleum gas including propane
- ▶ Inputs or raw materials for electric accumulators and separators including lead battery separator rolls whether or not rectangular or square supplied to manufactures of automotive and solar batteries in Kenya including lead battery separator rolls (whether or not rectangular or square) supplied to manufacturers of automotive and solar batteries in Kenya
- ▶ Agricultural pest control products
- ▶ The supply of liquefied petroleum gas including propane

The Bill proposes to amend the VAT status of the following products from exempt to the standard rate of 14%:

Description
8802.11.00; Helicopters of an unladen weight not exceeding 2,000kg
8802.12.00; Helicopters of an unladen weight exceeding 2,000kg
8802.20.00; Airplanes and other aircraft of an unladen weight not exceeding 2,000kg
8803.30.00; Other parts of airplanes or helicopters
8805.10.00; Aircraft launching gear and parts thereof; deck-arrestor or similar gear and parts thereof
8805.21.00; Air combat simulators and parts thereof, and
8805.29.00; other ground flying trainers and parts thereof
Specialized equipment for the development and generation of solar and wind energy, including deep cycle batteries which use or store solar power upon the recommendation of the Cabinet Secretary responsible for matters relating to energy
Goods of tariff no.4011.30.00
Taxable goods locally purchased or imported by manufacturers or importers of clean cooking stoves for direct and exclusive use in the assembly, manufacture or repair of clean cook stoves upon recommendation by the Cabinet Secretary for the time being responsible for matters relating to energy
Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heaters) barbeques, braziers, gas-rings, plate, warmers and similar non-electric domestic appliances, and parts thereof, or iron or steel of tariff numbers 7321.11.00, 7321.12.00, 7321.19.00, 7321.81.00, 7321.82.00, 7321.83.00 and 7321.90.00
One personal motor vehicle, excluding buses and minibuses of seating capacity of more than eight seats, imported by a public officer returning from a posting in a Kenyan mission abroad and another motor vehicle by his spouse and which is not exempted from Value Added Tax under the First Schedule
Plant, machinery and equipment used in the construction of a plastics recycling plant
Hiring, leasing and chartering of helicopters of tariff numbers 8802.11.00 and 8802.12.00

## ***Excise Duty Act***

### **Increase of Commissioner's powers**

The Bill proposes to give the Commissioner powers to prescribe additional activities requiring an excise license through a gazette notice.

### **Amendment of thresholds for excise duty**

The Bill proposes to amend the threshold for excise duty on the following products based on their alcoholic strength percentages:

- ▶ Beer, Cider, Perry, Mead, Opaque beer and mixtures of fermented beverages with non-alcoholic beverages and spirituous beverages of alcoholic strength not exceeding 8%. Currently, excise duty is only applicable on the such products at a rate of KES110.62 per liter provided the alcoholic strength does not exceed 10%. The proposal seeks to lower this threshold.
- ▶ Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 8%. Currently, excise duty is applicable on the product at a rate of KES253 per liter provided the alcoholic strength exceeds 10%. The proposal seeks to lower this threshold.

## Miscellaneous Fees and Levies Act

The Bill proposes to amend various fees and levies charged under the Act as follows:

### Import Declaration Fees (IDF)

Description	Current rate	Proposed rate
Goods imported under the East African Community (EAC) Duty Remission Scheme	KES10,000	1.5% of the customs value
Additional import duty payable in respect of goods entered for home use from export processing zones enterprises*	N/A	2.5% of the customs value
Aircraft of unladen weight not exceeding 2,000kg and helicopters of Heading 8802.11.00 and 8802.12.00	Exempt	3.5% of the customs value
Any other goods as the Cabinet Secretary may determine are in public interest, or to promote investments which value shall not be less than KES200 million	Exempt	3.5% of the customs value
Goods imported for implementation of projects under special operating framework arrangement with the Government	Exempt	3.5% of the customs value
Goods including materials supplies, equipment, machinery and motor vehicles for the official use by the Kenya Defense Forces and National Police	3.5% of the customs value	Exempt

\* The proposed additional import duty is supplementary to import duties on goods declared for home use levied in accordance with Section 171 of the *EAC Customs Management Act* at rates specified in the EAC Common External Tariff.

### Railway Development Levy (RDL)

Description	Current rate	Proposed rate
Currency notes and coins imported by the Central Bank of Kenya	3.5% of the customs value	Exempt
All goods, including materials supplies, equipment, machinery and motor vehicles for the official use by the Kenya Defense Forces and National Police	3.5% of the customs value	Exempt
Goods as the Cabinet Secretary may determine are in public interest, or to promote investments whose value exceeds KES200 million	Exempt	3.5% of the customs value

## Other miscellaneous amendments

Below are some notable proposed amendments to existing legislation:

### Insurance Act

The Bill has introduced a 30-day timeline for parties dissatisfied with a decision of the Commissioner of Insurance in any dispute to file an appeal with the Tribunal. The Act was previously silent on this.

### Insolvency Act, 2015

The Bill seeks to amend the *Insolvency Act* to include the KRA among preferential creditors, where all amounts collected on behalf of the KRA by a person registered under the *Banking Act*, will rank in the second priority claims with the first priority claims being reasonable expenses of the bankruptcy/liquidation.

**Capital Markets Authority Act**

The Bill seeks to bring private equity and venture capital companies that have access to public funds under the ambit of control of the Capital Markets Authority enabling Retirement Benefits Investment Schemes to invest in such companies.

**Kenya Revenue Authority Act**

The Bill seeks to amend the *Kenya Revenue Authority Act* to allow the KRA to introduce a limitation of action provision, whereby, legal actions against the Authority are to be instituted within a period of 12 months from the date of the act, neglect or default. If passed into law, this specific provision will be prejudicial mainly to stakeholders that the KRA engages with i.e., employees, suppliers, contractors, etc. However, for taxpayers most disputes are covered for under the various tax laws.

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