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KENYA TAX ALERT– AFFORDABLE HOUSING ACT, 2024

Background

On 19th March 2024, the President of the Republic of Kenya assented to the Affordable Housing Bill, whose purpose is to provide a framework for development and access to affordable housing, thereby giving effect to Article 43 (1) (b) of the Constitution of Kenya, 2010, which gives every person the right to accessible and adequate housing.

We answer some of our most frequently asked questions relating to the Act below:

What is the effective date of the Act?

Sections 4 and 5 of the Act, which imposes the Affordable Housing Levy ("AHL") and the obligations of employers is effective from the date of assent. All other provisions of the Act will be effective at such time the Cabinet Secretary prescribes by way of Gazette Notices.

In essence, the obligation to deduct and remit the levy takes effect from 19th March 2024.

What is the rate of deduction under the Act?

The rate of deduction is 1.5%.

Who is required to pay AHL?

Employers are required to deduct and remit the AHL from the gross salary of their employees, and make a further matching contribution. Further, all persons earning income that is not employment income are also required to pay the AHL.

What is the deduction made on?

For individuals earning employment income, the AHL is applicable to their gross salary. Employers are required to remit a matching amount. For those income that is not employment income, the AHL is applicable on their gross income.

When is the due date?

AHL is due by the ninth working day after the end of the month in which the:

1. gross salary was due (for employment income); or
2. gross income was received or accrued (for non-employment income).

Who should you remit AHL to?

AHL should be remitted to The Commissioner General of the Kenya Revenue Authority as it is the collector of AHL levy.

What is the penalty for late payment?

The penalty for late payment of the AHL will be 3% of the amount outstanding, for every month (or part thereof) that the AHL remains unpaid.

Can I get a waiver of penalties for late payment?

The Act does not provide for any waiver of penalties.

Are there any exemptions to the AHL?

1. Employers who remit the employee's deduction and matching payments are exempt from housing levy on their income.
2. The Cabinet Secretary responsible for the National Treasury may, upon the recommendation of the Cabinet Secretary responsible for affordable housing, exempt any income, any class of income, any person or any category of persons from the Levy by a Gazette notice.

What happens to AHL contributions I made before the Court nullified the previous affordable housing fund?

Payments made under the housing fund contributions that were recently declared unconstitutional will be deemed to have been paid to the new affordable housing fund.

Are there any income tax reliefs to persons paying AHL?

1. Matching contributions made by employers will be an allowable expense when computing the employer's taxable income.
2. A resident individual who paid the AHL levy shall be entitled to an affordable housing relief in the year of contribution. This relief shall be 15% of the contributions to the Fund capped at KES 108,000 per annum (KES 9,000 per month).

However, the relief can only be claimed once the Second Schedule of the Act has been gazetted.

Who is eligible for Affordable Housing?

The criteria for eligibility for allocation of an affordable housing unit will be set out in Regulations which are to be published under the Act. A section of this alert provides further details on publication of the Regulations.

Saving up of a deposit for the allocation of an Affordable Housing unit

If a person meets the criteria for allocation of an affordable housing unit, they may open up an interest-bearing savings account with the Fund for the purposes of accumulating the deposit for purchase of the unit. If an account holder is not allocated a unit, they may:

1. Withdraw their savings and accrued interest (upon 90 days' notice); or
2. Apply to the Fund's Board for approval of issuance of an affordable mortgage to develop a rural affordable housing unit. Under this option, the account holder would have to agree to have their Fund savings and land upon which the unit will be built to be used as collateral.



Can one sell an allocated unit?

A person may only sell their unit with the prior written consent of the Fund's Board.

What will the Regulations Cover and when will they be tabled?

The Cabinet Secretary responsible for affordable housing is required to table draft Regulations before the National Assembly within 30 days from the commencement of the Affordable Housing Act. These Regulations will only take effect:

1. Upon approval by a resolution of the National Assembly; or
2. After fifteen sitting days after submission should the National Assembly fail to approve or reject the Regulations.

The Regulations may cover a number of matters including:

1. Eligibility criteria for allocation of an affordable housing unit;
2. Criteria for exemption from payment of the levy;
3. Deposit required for the allocation of a unit;
4. Typology and dimensions for affordable housing units relative to the incomes of the individual applicants;
5. Interest rates and administration fees for loans for the acquisition of affordable housing units; and
6. Criterial for eligibility for a low interest mortgage to develop a rural affordable housing unit.

Grey areas

The Act has not addressed or defined a number of pertinent matters. This, in our view, creates the following ambiguities:

Area	Ambiguity
Commencement	<p>The Act provides that Sections 4 and 5 of the Act (requirement to deduct and remit the levy) will commence on the date of the assent (19th March 2024), while all other sections upon gazettment by the Cabinet Secretary.</p> <p>However, It is not clear whether income for the entire month of March 2024 will be subject to the levy or whether only income accrued from 19th March 2024 should be subjected to the levy. Further, there is no clear guidance of the treatment of daily/weekly wages earned and paid to casual labourers from 1st March 2024 to 18th March 2024.</p>
Definitions	<p>The Act has not defined the following terms:</p> <p>Gross salary: Whereas AHL for employed persons is on their gross salary, the Act does not define what "gross salary" includes or excludes.</p> <p>Gross income: Whereas AHL on other forms of income is on gross income, the Act does not define what the term "gross income" includes and excludes.</p> <p>Person: The Act does not define the term "person". This creates a grey area as to the treatment of certain group of persons such as retirees, non-residents, expatriates, diplomats, estates of deceased persons etc.</p>
Refunds & Overpayments	The Act does not provide for a refund mechanism for overpayments made to the fund.

Area	Ambiguity
Contributions under previous housing levy regime	Employers deducted and remitted the levy introduced by the Finance Act 2023. However, that levy was declared unconstitutional. Whereas the Act provides that all contributions under the previous housing levy regime will be deemed to have been made under this Act, it is not clear whether those prior contributions will be regarded as pre-payments under this Act.
Dispute resolution mechanisms	The Act does not provide for any procedures should a person be dissatisfied by the actions of the Housing Fund e.g demands for penalties, whether or not income is subject to the levy etc.

Conclusion

This Act provides a well-defined framework for the Affordable Housing Levy when compared to the previous Affordable Housing Levy. However, it does not define the terms “gross salary” or “gross income”. If these terms are not well defined, the resultant ambiguity may result in over or under deduction of the Affordable Housing Levy by employers or self-employed persons.

Should you have any queries concerning this alert, feel free to reach out to us.



CAVEAT

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