RSM NEWSLETTER

Finance Bill, 2020

INTRODUCTION

The Finance Bill, 2020 was published on 5TH May 2020. The reason for publishing the Bill earlier this year than the traditional publication in mid-June is to ensure that the Bill is assented to by the President by 30th June 2020, so the proposed changes to certain taxes like VAT and Excise Tax adjustments can become effective by 1st July, to coincide with the beginning of the Government's fiscal year. Unless otherwise stated, all the changes will come into effect on the Date of Assent by the President.

TAX AMNESTY

The Bill proposes the introduction of a Voluntary Tax Disclosure Programme for a period of 3 years effective 1st January 2021. The programme enables a taxpayer to disclose the person's tax liability for the purposes of being granted relief on penalties and interest on the tax disclosed. The period covered by the programme is 5 years prior to 1st July 2020 (i.e. 1st July 2016 to 30th June 2020). The key features of the programme are:

- Full remission of interest and penalties if the principal tax is paid in the first year.
- 50% remission of interest and penalties if the principal tax is paid in the second year.
- 25% remission of interest and penalties if the principal tax is paid in the third year.
- The application is voluntary and all material facts are disclosed.
- The application shall be deduced into an agreement setting out the terms of the payment of the tax liability and the period within which the payment shall be made.
- Where the taxpayer fails to meet the terms of the payment, full interest and penalties remitted under the agreement shall become due.

- Where before the expiry of the agreement, it is discovered that the taxpayer has failed to disclose material facts, any relief granted shall be withdrawn and the Commissioner shall institute proceedings under the provisions of the Tax Procedures Act. However, a person who is aggrieved of the decision shall have a right of appeal.
- The programme shall not be applicable to a taxpayer who is under an audit or investigation, or is a party to any ongoing litigation with the Commissioner or had been notified of a pending audit or investigation.

INCOME TAX

RESIDENTIAL RENTAL INCOME (EFFECTIVE 1ST JANUARY 2021)

- The Bill proposes to increase the rental income limit subject to 10% tax from KShs 10 million to KShs 15 million

TURNOVER TAX ON TAX LOSS MAKING COMPANIES (EFFECTIVE 1ST JANUARY 2021)

- Where the installment tax liability is lower than 1% of the gross turnover of a company, a turnover tax of 1% of the gross turnover shall be paid as minimum tax. The tax is payable quarterly on 20th of the fourth, sixth, ninth and twelfth month.
- Installment tax is payable on the lower of the preceding year's tax multiplied by 110% and the current year's estimate. For individual taxpayers, installment tax is payable if the preceding years tax liability is KShs 40,000 or more.

- Persons exempt from this provision include:
    - Persons earning emoluments which are taxed at source
    - Persons paying tax under the residential rental income regime
    - Persons paying tax under the turnover tax regime
    - Persons subject to capital gains tax
    - Persons whose income is exempt from tax
    - Taxation paid by extractive industries under the Ninth Schedule of the ITA.

There are a number of challenges with this proposal:

- ***The Government is now trying to tax persons outside the ambit of Section 3 of the ITA which levies tax on gains or profits***
- ***The Government cannot on one hand give tax incentives like investment deduction and on the other hand tax the entity using a back-door method of taxation***
- ***The term "gross turnover" is not defined***
- ***It is not clear on the minimum tax regime to be applied on income taxed at source like dividends and interest where there is no installment tax payable***
- ***In case of investment holding companies, where dividend income is taxed at source, the dividend income could be subject to a further tax of 1%.***

DIGITAL SERVICE TAX (EFFECTIVE 1ST JANUARY 2021)

- The Bill proposes to introduce tax at 1.5% of the gross transaction value on the provision of services derived from or accrued in Kenya through a digital market place. The tax shall become due at the time of the transfer of payment for the service to the service provider
- In the case of a resident person or a non-resident person with a permanent establishment in Kenya, such tax shall be treated as an advance tax to be offset against the final tax liability
- A provision has been introduced under the Tax Procedures Act allowing the Commissioner to appoint an agent for the purposes of collection and remittance of digital services tax to the Commissioner.

While the aim is to tax online transactions, there are a number of challenges with this proposal:

- ***It is not clear how the tax will be collected and remitted***
- ***The due dates for the payment have not been defined***
- ***There is no amendment to Sections 10, 34, 35 and the Third Schedule of the ITA in respect to tax in relation to non-residents, which this provision is targeting.***

ALLOWABLE EXPENSES (EFFECTIVE 1ST JANUARY 2021)

The Bill proposes to disallow the following expenses against taxable profits:

- An entrance fee or annual subscription paid to a trade association which has elected to pay tax, meaning that all subscriptions to trade associations are now disallowed
- Legal and other costs, including expenditure on rating, incurred on the issue of shares or debentures to the public and listing on a securities exchange in Kenya without raising capital
- Club subscriptions paid by an employer on behalf of an employee
- Expenditure on the construction of a public school, hospital, road or any other similar social infrastructure with the approval of CS Finance.

Similar provisions were included in the Tax Laws (Amendment) Bill, 2020 and were rejected by the Parliament. These have been brought back within a month of the rejection, reflecting a lack of certainty of the tax environment in Kenya.

REMOVAL OF THE HOUSE OWNERSHIP SAVING PLAN (HOSP) TAX RELIEF (EFFECTIVE 1ST JANUARY 2021)

The Bill proposes to remove the tax relief under HOSP. The current law allowed an annual relief of KShs 96,000. The Bill does not provide a transitional clause for those already under the scheme. The proposal also makes the income earned from HOSP, now subject to 15% withholding tax. A similar provision in the Tax Laws (Amendment) Bill, 2020 was rejected by the Parliament.

This goes against the Big Four Agenda of encouraging home ownership in Kenya by the Government.

EXEMPT INCOME NOW SUBJECT TO TAX (EFFECTIVE 1ST JAN 2021)

The following income previously exempt from tax under the First Schedule of the ITA will now be subject to tax:

- Income of the National Social Security Fund
- Monthly or lump sum pension granted to a person who is sixty five year of age or more

Similar provisions were included in Tax Laws (Amendment) Bill, 2020 which were rejected by the Parliament

THE VALUE ADDED TAX ACT

DEDUCTION OF INPUT TAX

The Bill proposes to introduce a condition that input tax shall not be allowed where the registered supplier has not declared the sales invoice in a return.

This proposal negates the principal of claiming input tax as the purchaser has no way of determining if the supplier has declared output tax. Moreover, the VAT Act clearly lays the process of issuing a tax invoice and the burden to enforce tax compliance should be on KRA and not the buyer.

ZERO RATED SUPPLIES WHICH ARE NOW VATABLE

Supplies	New Rate	Old Rate
The supply of liquefied petroleum gas including propane	14%	0%
Inputs or raw materials for electric accumulators and separators including lead battery separator rolls, whether or not rectangular or square, supplied to manufacturers of automotive and solar batteries in Kenya	14%	0%

EXEMPT SUPPLIES WHICH ARE NOW VATABLE

Supplies	New Rate	Old Rate
8802.11.00 Helicopters of an unladen weight not exceeding 2,000 kgs	14%	Exempt
8802.12.00 Helicopters of an unladen weight exceeding 2,000 kgs	14%	Exempt
8802.20.00 Aeroplanes and other aircraft, of unladen weight not exceeding 2,000 kgs.	14%	Exempt
8803.30.00 Other parts of aeroplanes and helicopters	14%	Exempt
8805.10.00 Aircraft launching gear and parts thereof; deck- arrestor or similar gear and parts thereof	14%	Exempt
8805.21.00 Air combat simulators and parts thereof	14%	Exempt
8805.29.00 Other ground flying trainers and parts thereof	14%	Exempt
Materials, waste, residues and by-products, whether or not in the form of pellets, and preparations of a kind used in animal feeding of tariff numbers 1213.00.00, 1214.10.00, 2308.00.00, 2309.10.00, 2309.90.10, 2309.90.90, 2302.10.00, 2302.30.00, 2303.20.00, 2303.30.00, 2304.00.00, 2306.10.00, 2306.20.00, 2306.30.00, 2306.41.00, 2306.49.00, 2306.50.00, 2306.60.00, 2306.90.00, 2835.25.00 and 2835.26.00.	14%	Exempt
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	14%	Exempt
Tractors other than road tractors for semitrailers	14%	Exempt
Goods of tariff No. 4011.30.00 – pneumatic tyres of rubber used on aircrafts	14%	Exempt

Supplies	New Rate	Old Rate
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 approved by the Cabinet Secretary upon recommendation by the Cabinet Secretary for the time being responsible for matters relating to energy	14%	Exempt
Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating) 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	14%	Exempt
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 the spouse	14%	Exempt
Plant, machinery and equipment used in the construction of a plastics recycling plant	14%	Exempt
Hiring, leasing and chartering of helicopters of tariff numbers 8802.11.00 and 8802.12.00	14%	Exempt

OTHER CHANGES TO VAT

- Maize (corn) seeds of tariff no. 1005.10.00. becomes exempt. This was deleted by the Finance Act, 2018 and now re-inserted
- Ambulance services become exempt as part of medical, veterinary, dental and nursing services

EXCISE DUTY ACT

LICENSE

The Bill seeks to expand the definition of license by including 'a license required in the carrying out of any other activity in Kenya for which the Commissioner, by notice in the Gazette, may impose a requirement for a license.

EXCISE DUTY ON BEERS AND SPIRITS

The Bill proposes to lower the percentage of alcoholic strength from 10% to 8% for beers and spirits for the tariff category as follows:

Particulars	Rate
Beer, cider, perry, mead, opaque beer and mixtures of fermented beverages with non-alcoholic beverages and spirituous beverages of alcoholic strength not exceeding 8%	KShs 110.62 per litre
Spirits of undenatured ethyl alcohol; spirits, liqueurs and other spirituous beverages of alcoholic strength exceeding 8%	KShs 253.00 per litre

MISCELLANEOUS FEES & LEVIES ACT

IMPORT DECLARATION FEE (IDF)

Description	Current Rate	Proposed Rate
Goods imported under the East African Community Duty Remission Scheme	KShs 10,000	1.5% of the customs value
Additional import duty payable in respect of goods entered for home use from an export processing zones enterprise	N/A	2.5% of the customs value
Aircraft of unladen weight not exceeding 2,000 kg and helicopters of Heading 8802.11.00 and 8802.12.00	Exempt	3.5%
Any other goods as the Cabinet Secretary may determine are in public interest, or to promote investments which value shall not be less than KShs 200 million	Exempt	3.5%
Goods imported for implementation of projects under the special operating framework arrangement with the Government	Exempt	3.5%
Goods including materials supplies, equipment, machinery and motor vehicles for the official use by the Kenya Defence Forces and National Police	3.5%	Exempt

RAILWAY DEVELOPMENT LEVY (RDL)

Description	Current Rate	Old Rate
Currency notes and coins imported by the Central Bank of Kenya	3.5%	Exempt
Goods, including materials supplies, equipment, machinery and motor vehicles for the official use of Kenya Defence Forces and National Police	3.5%	Exempt
Goods as the Cabinet Secretary may determine are in public interest, or to promote investments whose value exceeds KShs 200 million	Exempt	3.5%

TAX APPEALS TRIBUNAL ACT, 2013

PROCEDURE FOR AN APPEAL

The Bill proposes to amend the Tax Appeals Tribunal Act to allow the appellant to rely on the grounds stated in the documents to which the decision relates. Previously it only allowed the appellant to be limited to the grounds stated in the appeal to which the decision relates.

This is for clarity and to avoid ambiguity.

THE ROADS TOLLS ACT (CAP. 407)

The Bill introduces the definition of a toll collector to include private or public toll collectors. It also includes transit toll stations under the First Schedule of this Act. It removes further the requirements for the approval by the National Assembly of agreements entered into by the Minister with qualified persons to plan design or manage a public road.

The effect of this proposal is to allow privatization of roads tolls.

THE CAPITAL MARKETS ACT (CAP. 485A)

The Bill seeks to amend Section 11 (3) of the Act to bring private equity and venture capital firms that access public funds (pensions scheme funds) under the regulatory oversight of the Capital Markets Authority in line with the Cabinet Secretary's policy pronouncement. The Bill further seeks to amend Section 18 of the Act to remove the function of payment of beneficiaries from collected unclaimed dividends when they resurface.

It also seeks to expand the application of the Investor Compensation Fund (IFC) to activities such as whistle blowing, forensic audits and other related activities that are proactive in nature as far as protection is concerned.

THE STANDARDS ACT (CAP. 496)

The Bill proposes to amend the definition of "consolidator" in Section 2 of the Act to facilitate the visibility of individual consignees for the purpose of customs declaration.

"Consolidator" *means a firm that is licensed to consolidate goods belonging to different consignees at the country of export, which shall be under one Master Bill of Lading or Master Airway Bill, and breaks the consignment into smaller consignments at the port of destination for the different consignees for the purpose of individual customs declaration.*

THE KENYA REVENUE AUTHORITY ACT (NO. 2 OF 1995)

The Bill seeks to amend the Act to provide for a legal framework for the establishment of an institution to offer capacity building and training on tax, customs and revenue administration. The Bill further proposes to amend the Act to include commissions earned by the Kenya Revenue Authority on collections made on behalf of government agencies or county governments as a source of funding for the Authority capped at 2% of the revenue collected. The Bill also seeks to amend the Act by providing for specific timelines within which the Authority can be sued to enable the Authority to effectively manage its disputes.

This amendment is meant to give legal status to Kenya School of Revenue Administration (KESRA).

The limitations of actions against KRA is in line with Section 3 of the Public Authorities Limitations Act Cap 389. However, tax disputes are catered for under specific tax statutes including the Tax Procedures Act and the Tax Appeal Tribunals Act.

THE RETIREMENT BENEFITS ACT, 1997 (NO. 3 OF 1997)

The Bill seeks to amend the Retirement Benefits Act, 1997 to enhance the supervisory role of the Authority on pension schemes by providing powers to charge a penalty of KSh 100,000 for failure to submit actuarial valuation reports within the period specified in the Regulations and a further penalty of KShs 1,000 each day the report remains outstanding.

THE INSOLVENCY ACT (NO. 18 OF 2015)

The Bill proposes to amend the Second Schedule to the Act to reduce the risk exposure on the tax revenues held by commercial banks before transfer to the Central Bank by declaring them preferential claims in the order of priority in the event of insolvency.

The effect of this proposal is to place taxes to rank in the second priority claims with the first priority claims being those of secured creditors.

INSURANCE ACT (CAP 487)

The Bill proposes a 30-day timeline for an aggrieved party to file an appeal with the insurance tribunal on the decision of the Commissioner of Insurance in a dispute.

NAIROBI

1st Floor, Pacis Centre,
Slip Road, off Waiyaki Way, Westlands
P.O. Box 349, 00606
Nairobi, Kenya

Tel: +254 20 3614000/4451747/8/9
Mobile: +254 706 347950/772 786111
Email: info@ke.rsm-ea.com
Website: www.rsm.global/kenya
Contact: Ashif Kassam (Executive Chairman)

MOMBASA

3rd Floor, Bayview Place,
Moi Avenue
P.O. Box 87227, 80100
Mombasa, Kenya

Tel: +254 41 2311778/2312640/2224116
Mobile: +254 707 613329
Email: infomsa@ke.rsm-ea.com
Website: www.rsm.global/kenya
Contact: Nihla Mazrui (Partner)

DAR ES SALAAM

16th Floor, Golden Jubilee Towers,
Ohio Street
P.O. Box 79586
Dar es Salaam, Tanzania

Tel: +255 22 2137314/15
Email: info@tz.rsm-ea.com
Website: www.rsm.global/tanzania
Contact: Lina Ratansi (Group Chief Executive)

KAMPALA

6th Floor, DTB Centre,
Plot 17/19, Kampala Road
P.O. Box 31704,
Kampala, Uganda

Tel: +256 414 342780
Email: info@ug.rsm-ea.com
Website: www.rsm.global/uganda
Contact: John Walabyeki (Managing Partner)

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