The 2023
Finance Bill

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The 2023 Finance Bill Analysis

The 2023/2024 Finance Bill ("Bill") was tabled in parliament on 28th April 2023 and it contains the tax measures the government intends to implement so as to raise revenue to finance the various projects as contained in their manifesto. We have discussed below some of tax proposal contained therein. Except where the effective date has been stated, all the other provisions will come into effect on 1st July 2023 if the Bill is approved by parliament and assented to by the President.

Income Tax Act Proposals:

Definition of Winning

The Bill introduces a new definition of winning to mean payout from a betting, gaming, lottery, prize completion, gambling or similar transaction without deducting the amount staked or waged. This is an attempt to provide clarity as to what constitutes winning subjected to withholding tax as previously this has been an area of contention between KRA and the Betting Gaming and Lottery Companies.

Digital Content Monetization

The Bill seeks to expand the tax base by bringing payment made to digital content creators to the ambit of withholding tax. If this proposal is retained, payments made to digital content creators for offering advertisement, sponsorship, affiliate marketing, subscription services, merchandise sales, crowd funding through electronic media or channel will attract withholding tax at 15%.

Effective Date: 1st January 2024

Deferment of Foreign exchange losses

Prior to 2022 Companies which were thinly capitalized and had foreign exchange losses arising from loans advanced by foreign related entities were required to defer such foreign losses until thin capitalization reverses. The 2021 Finance Act introduced a new rule with regards to interest restriction, however it did not provide clarity as to the treatment of foreign exchange losses arising from interest paid or payable to non-residents. The Bills seeks to remedy this by ensuring that Companies whose gross interest paid or payable to a non-resident person exceeds 30% of the Company's EBITDA and has foreign exchange losses, can defer such losses to three subsequent years.

Employment income

The Bill proposes the following changes with regards to employment income:

1. Travel allowance paid to employees will be treated as reimbursement and therefore excluded in calculating the gains and profit chargeable to tax provided that the same have been advanced to perform official duties and are in accordance to the standard mileage rates approved by the Automobile Association of Kenya;
2. Any amount paid to a public officer as reimbursement incurred in performing official duties will be excluded in calculating amounts chargeable to tax;
3. Club entrance and subscription fees paid by employers on behalf of their employees will constitute gains and profit chargeable to tax;

Benefit chargeable to tax with regards to employee share ownership plans will only materialize when the employee exercises the option to shares offered. This is an attempt at cleaning up the Income Tax Act to align it to amendment brought by previous Finance Act (**Effective Date**: 1st January 2024); and

4. Benefit accrued by employees of startup Companies who are offered Company shares instead of cash payment will be deferred and taxed within 30 days the earlier of:
   - Expiry of five (5) years from end of award of share;
   - Disposal of share by employee; or
   - Date employee ceases to be an employee of start up

*A start up company has been defined to mean a company incorporated in Kenya with an annual turnover of not more than 100 Million, not involved in management, professional or training business, not formed as a result of restructuring or splitting of an exciting entity and has been in existence for a period of not more than five years.

Tax on Repatriated Income

Repatriated income of non-resident person who carry on business in Kenya through a permanent establishment shall be subject to an additional tax computed as follows:

R=A1+(P-T)-A2

Where:

R is the repatriated profit
A1 is net assets at beginning of the year
P net profit for the year in accordance with GAAP
T is tax payable on chargeable income; and
A2 is the net assets at end of year

Effective Date: 1st January 2024

Withholding tax on non-resident payments

Withholding tax deducted on non-resident payments will not be refundable or available for offset against such income in the event of audit adjustments.

Effective Date: 1st September 2023

Turnover Tax

The income threshold for Companies to be under turn over tax regime has been reduced to incomes between five hundred shillings to fifteen million shillings. Previously the threshold was one million shillings to fifty million shillings. Additionally, the Bill seeks to increase the rate of tax from 1% to 3%.

Digital Asset Tax (DAT)

The Bill seeks to introduce digital asset tax payable by any person who derives an income from the transfer or exchange of digital assets. The owner of the platform or person who facilitates the exchange will be liable to deduct tax at 3% on the transfer or exchange value of the DAT and will be payable by

both residents and non-residents persons. DAT will be payable within 24 hours after making the deduction.

Digital asset has been defined to mean "*anything of value that is not tangible and cryptocurrencies. Token code, number held in digital form and generated through cryptographic means or otherwise, by whatever name called, providing a digital representation of value exchanged with or without consideration that can be stored, transferred or exchanged electronically including non-fungible token or any other token of similar name called*".

Effective Date: 1st September 2023

Allowable Deduction

Any amount considered as diminution in value for any implement, utensil or similar article which cannot be categorized as machinery or plant and which deduction cannot be claimed under the Second Schedule of the income tax Act will be an allowable deduction at the rate of one hundred per cent in that year of income.

Disallowable Deduction

Any expenditure incurred for a year of income and where the invoice relating to the expense is not generated from an electronic tax invoice management system unless so exempted will not be allowed for tax purposes while calculating the gains and profit chargeable to tax.

Effective Date: 1st January 2024

Interest Restriction

The Bill has restricted the disallowed interest in excess of 30% EBITDA to only interest paid or payable to non-residents. Previously, excess interest on loans payable or paid to resident and non-resident were disallowed for tax purposes.

Going forward, this provision will also be applicable to manufacturing Companies whose cumulative investment in the current period or preceding five years before commencement of this section is at least five billion shillings. Before such companies had been exempted.

The excess interest disallowed above will be available for deduction within three subsequent years provided that the EBITDA threshold is so maintained.

Payment made to non-residents Directors

Payments incurred outside Kenya by non-residents and in particular expenditure in respect of remuneration paid to non-resident directors (non-whole time) in excess of KES 150,000, executive and general administrative expenses were not allowed for deduction while calculating gains and profit chargeable to tax by businesses carried in Kenya. Going forward such expenses will be allowable for deduction.

Members, clubs and trade association

Gross receipts on revenue accounts excluding joining fees, welfare contributions and subscription in relation to members, club and trade association shall be deemed income from business and therefore chargeable to tax.

Sales promotion, marketing and advertising services

The Bill seeks to amend section 35 to bring payments made in respect of sales promotion, marketing and advertising services in excess of KES 24,000 under the ambit of withholding tax. The proposed rate of tax is 5%. Before such payments did not fall under the ambit of withholding tax.

Effective Date: 1st January 2024

Rental withholding tax agent

The Bill seeks to give the Commissioner powers to appoint person (s) responsible with receiving rental income on behalf of owner(s) of premises as withholding agents. Those appointed as agents will be required to deduct and remit tax to KRA within 24 hours after the deduction is made. Moreover, the Bill proposes to reduce the withholding tax rate from 10% to 7.5%.

Residential rental income tax

Resident individual and Companies with annual gross turnover rent of between KES 288,000 to 15 million have been deducting tax on the gross rent at 10%. The rate of tax is set to reduce to 7.5% Should the proposal in the Bill sail through.

Effective Date: 1st January 2024

Payments exempted from tax

The first schedule of the Income Tax Act is amended to exempt the following payments from tax:

- Royalties and interest paid to non-resident person by a company undertaking the manufacture of human vaccines;
- Investment income from a post-retirement medical fund; and
- Payment in the form of funds transfer from a post-retirement medical fund to a medical insurance cover provider.

Individual tax rate

The individual tax rates have been amended to include a tax rate of 35% for any payment exceeding KES 500,000.

Corporation tax rates (Effective Date: 1st January 2024)

1. The Bill proposes to reduce the non-resident income tax rate from 37.5% to 30% beginning with year of income 2024;
2. Likewise, the Bill Proposes to tax company undertaking the manufacture of human vaccines at 10%

3. The corporate tax rate of 15% has been extended for a further five years for local motor vehicle manufactures meeting the specified local content threshold.

Advance Tax on Motor Vehicle

Below are the proposed rates of advance tax on motor vehicles:

Type of MV	Proposed rates	Current rates
Vans, pick ups, truks, prime movers, trailers and lorries	KES 3,000 per tonne per year or KES 5,000 whichever is the higher	KES 1,500 per tonne per year or KES 2,400 whichever is the higher
Saloon cars, station wagons, mini buses, buses and coaches	KES 100 per passenger per month or KES 5,000 per year whichever is the higher	KES 60 per passenger per month or KES 2,000 per year whichever is the higher

Effective Date: 1st January 2024

VAT Act Proposals

Petroleum Products

Section 5 of the VAT Act, 2013 is amended by deleting paragraph (aa), essentially taxing petroleum products at 16% instead of the previous rate of 8%;

Liquefied petroleum gas (LPG)

Should this proposal be maintained, LPG will be exempted from VAT. Currently LPG is taxed at 8%.

Compensation on loss of taxable supplies

Compensation made with regards to loss incurred on taxable supplies where input tax had been claimed shall be treated as taxable supply subject to VAT.

VAT Registration threshold

Person(s) supplying imported digital services over the internet or electronic network or through a digital marketplace will be required to register for VAT whether or not their taxable supplies meet the registration threshold of five million shillings. This is aimed at aligning the Act to amendment (s) introduced previously.

Keeping of records

The Bills seeks to amend section 43 to clarify that the records required to be maintained by the VAT Act can be maintained elsewhere and not in Kenya only.

Proposed amendment to the first schedule (exempt supplies)

The Following supplies will now be exempted from VAT:

1. Input and raw material supplied to pharmaceutical manufactures for manufacture of medicaments subject to prior approval;

2. Input and raw material supplied to manufactures of agricultural pest control subject to prior approval;
3. Agricultural pest control products;
4. Transportation of sugarcane from farms to milling factories;
5. Input and raw material supplied to manufactures of fertilizer subject to prior approval;
6. All teas sold for the purpose of value addition before exportation subject to prior approval;
7. The exportation of taxable services; and
8. Transfer of a business as a going concern;

The following supplies have been removed from the exempt schedule and will be vatable at 16%:

1. Taxable services for direct and exclusive use for the construction of tourism facilities, recreational parks of fifty acres or more, convention and conference facilities upon the recommendation by the Cabinet Secretary responsible for matters relating to recreational parks;
2. Taxable services for direct and exclusive use for the construction of specialized hospitals with accommodation facilities upon recommendation by the Cabinet Secretary responsible for health, who shall issue guidelines for the criteria to determine the eligibility for the exemption. Any prior approval granted before commencement of this section will continue to apply.

Proposed amendment to the second schedule (zero rated supplies)

The following supplies have been deleted from the second schedule and will henceforth be exempted from VAT;

1. Inputs or raw materials (either produced locally or imported) supplied to pharmaceutical manufacturers in Kenya for manufacturing medicaments, as approved from time to time by the Cabinet Secretary in consultation with the Cabinet Secretary responsible for matters relating to health;
2. All inputs and raw materials whether produced locally or imported, supplied to manufacturers of agricultural pest control products upon recommendation by the Cabinet Secretary for the time being responsible for agriculture;
3. Agricultural pest control products;
4. Transportation of sugarcane from farms to milling factories
5. The exportation of taxable services in respect of business process outsourcing;
6. Inputs or raw materials locally purchased or imported by manufacturers of fertilizer as approved from time to time by the Cabinet Secretary responsible for Agriculture.

The following supply will be zero rated

1. Inbound international sea freight offered by a registered person

Tax Appeals Tribunal Proposals

The Finance Bills seeks to introduce a new requirement before a Company can lodge an appeal with the tribunal. If this proposal is maintained, taxpayers will be required to deposit an amount or security equivalent to 20% of the disputed tax. This is a departure from the ruling of the Supreme Court which ruled that any requirements that a party deposits money or cost as a condition precedent before the hearing of a case is unconstitutional.

Excise Duty Proposals

Adjustment for inflation

The Bill seeks to amend the Excise Duty Act by repealing section 10. The Commissioner will no longer have powers to adjust the Excise Duty rates for inflation.

Excise stamps and other markings

A person will have committed an offence liable upon conviction to a fine not exceeding five (5) million shillings, imprisonment for a term not exceeding three (3) years or both if:

1. Deface or print over an excise stamp;
2. Is in possession of excisable goods with no stamps affixed;
3. Acquires stamps without authority of Commissioner
4. Print or counterfeit excise stamps; and
5. Selling excisable good without stamps.

Payment of excise Duty

Excise duty on Betting and gaming offered through a platform or other medium shall be remitted to the Commissioner within twenty-four hours from the closure of transactions of the day i.e midnight of that day.

Rates of Excise Duty

The First schedule of the Act is amended in Part I to include the following goods under the ambit of Excise Duty:

Item/Good	Proposed rate of Excise Duty	Current Excise Duty Rate
Imported Fish	Sh 100,000 per metric tonne or 20% whichever is higher	Not provided
Powdered juice	Sh 25 per KG	
Sugar excluding sugar imported or locally purchased by a registered pharmaceutical manufacturer	Shs. 5 per kg	Not provided
Human hair and other products of heading 6703	5%	Not provided
Wigs, false beards, eyebrows and eyelashes, switches and the like, and other products of heading 6704	5%	Not provided

Artificial nails of tariff no. 3926.90.90	5%	Not provided
Imported cement	10% of the value or shs. 1.50 per kg, whichever is higher	Not provided
Imported furniture excluding furniture originating from East African Community Partner States that meet the East African Community Rules of Origin	30%	Not provided
Imported cellular phones	10%	Not provided
Imported paints, varnishes and lacquers of heading 3208, 3209 and 3210	15%	Not provided
Imported Test liner of heading 4805.24.00	25%	Not provided
Imported fluting medium of heading 4805.19.00	25%	Not provided

Part II of the First schedule has been amended to introduce new rates as follows:

Type of service	Proposed Excise Duty rate	Current Excise Duty rate
Telephone and internet data service	15%	20%
Money transfer services by banks, transfer agencies and other financial providers	15%	20%
money transfer services by cellular phone service providers	15%	12%
Betting	20%	7.5%
Gaming	20%	7.5%
Prize competition	20%	7.5%
Duty on lottery	20%	7.5%
Fees charged on advertisement on television, print media, billboards and radio stations on alcoholic beverages, betting, gaming, lotteries and prize competitions	15%	Not Provided

- Excise duty will be applicable at 20% on any amounts charged in respect of digital lenders. Previously, only fees fell under the ambit of Excise duty.

Tax Procedures Act Proposals

Electronic Tax invoices

The Bill seeks to give the Commissioner power to establish an electronic system through which electronic tax invoices may be issued and records kept.

Effective Date: 1st September 2023

International Tax Agreements

Commissioner has been given powers to recover or collect tax claims pursuant to any international Tax agreements entered into by the Government of Kenya;

Relief because of difficult in recovery of tax

The Commissioner will no longer have powers to offer relief to taxpayers who are unable to pay taxes. This is in line with the government initiative that everyone should pay taxes.

Effective Date: 1st September 2023

Relief on interest, penalties and fines on tax debt

The Bill introduces a new section stopping the Commissioner from recovering interest, penalties and fines on tax debt provided that the principal tax due has been paid before 31st December 2022.

Where the principal tax has not been paid, the taxpayer can enter into a payment plan, pay the principal tax by 30th June 2024 and apply for an amnesty on the interest, penalties and fine.

Appointment of Value Added Tax Withholding Agent

Appointed VAT withholding agent will be required to remit any tax withheld within three days after the deduction has been made. Before they were required to remit these amounts by the 20th of the following month.

Appointment of rental tax agents

The Commissioner has been given powers to appoint rentals withholding tax agent who will be responsible with collection and remittance of rental income tax

Data Management Reporting System

The Bill seeks to give to give the Commissioner power to establish a data management and reporting system for submission of electronic documents including detailed transactional data. Some of the electronic documents will include invoice, payment records for both goods and service, royalty lump sum payments records among other documents.

Effective Date: 1st September 2023

Penalty for failing to comply with electronic tax system

Where a taxpayer fails to issue an electronic tax invoice as required by a tax law, the Commissioner may issue a notice requesting for reasons for non-compliance. If the Commissioner is not satisfied with the reasons given, the taxpayer will be liable to a penalty of one million shillings or an amount equal to ten time the amount due whichever is the higher.

Effective Date: 1st September 2023

Miscellaneous Fees and Levies proposals

Import Declaration Fees

The Bill seeks to reduce import declaration fee from the current rate of 3.5% on custom value of goods to 2.5%. The previous rate of 1.5% levied on certain select goods has also been removed.

Export and Investment promotion levy

A new levy called export and investment levy has been introduced on the importation of the below goods:

Tariff Number	TARIFF Description	Export and investment promotion rate
2523.10.00	Cement Clinkers	10% of the customs value
7207.11.00	Semi-finished products of iron or non-alloy steel containing, by weight, (including square) cross-section, the width measuring less than twice the thickness	10% of the customs value
7213.91.10	Bars and rods of iron or non-alloy steel, hot-rolled, in irregularly wound coils of circular cross-section measuring less than 14mm in diameter of cross section measuring less than 8 mm	10% of the customs value
7213.91.90	Bars and rods of iron or non-alloy steel, hot-rolled, in irregularly wound coils of circular cross-section measuring less than 14mm in diameter; othe	10% of the customs value
4804.11.00	Uncoated kraft paper and paperboard, in rolls or sheets; Kraft liner; Unbleached	10% of the customs value
4804.21.00	Sack kraft paper; Unbleached	10% of the customs value
4804.31.00	Other kraft paper and paperboard weighing 150 g/m2 or less: Unbleached	10% of the customs value
4819.30.00	Sacks and bags, having a base of a width of 40 cm or more	10% of the customs value
4819.40.00	Other sacks and bags, including cones	10% of the customs value

Effective Date: 1st September 2023

Railway Development Levy

The Railway development levy has been reduced from 2.5% to 1.5% on the custom value of the goods.

Other Miscellaneous Proposals

The Following Act (s) have been amended to insert new sections as follows:

Betting, Gaming and Lotteries Act

The taxes levied by this Act will henceforth be collected in accordance with the Tax Procedures Act.

Housing fund

The Bill proposes to amend the Employment Act by introducing a new section requiring an employer to deduct 3% of the employee's monthly basic salary and remit the same to the National Housing Development Fund. Employers are also required to match this contribution with a similar amount provided that the sum of employer and employee does not exceed five thousand shillings in a month. The due date of making these contribution is on the 9th of the following month after deduction has been made.

Conclusion

The above proposals have been tabled in parliament for discussion as well as participation from the general public. The MGK Tax Service is available to provide more clarity as to how these proposals will affect your business.