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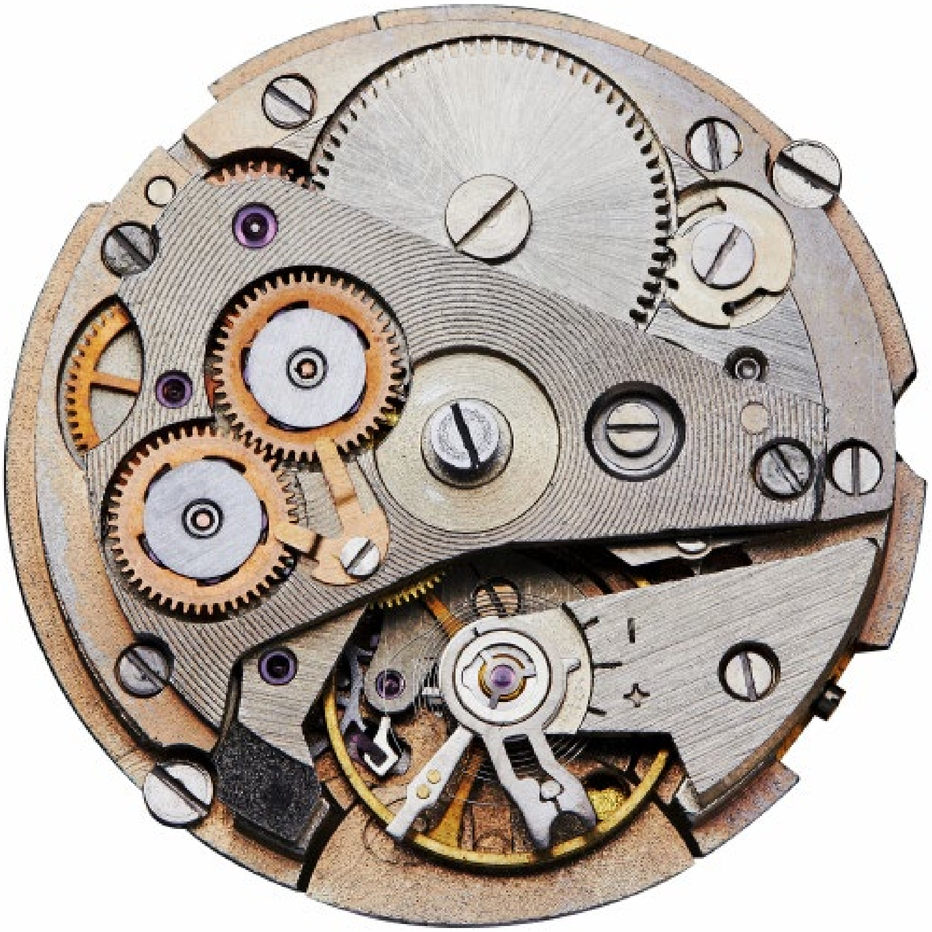

Kenya Budget Insight 2016
The Story Behind the Numbers

Introduction

The Finance Act, 2016 was assented to on 13th September 2016 bringing into effect various tax and other measures. Major changes introduced include the reintroduction of Withholding VAT vide the Tax Procedures Act, extension of transition period for petroleum products, introduction of excise duty on kerosene and cosmetics, change of excise duty tax regime on imported motor vehicle from specific to ad valorem, repeal of Withholding Tax on Gambling Winnings and tax amnesty on income earned outside Kenya among others.

The Finance Act, 2016 has introduced new taxes in the gambling industry through the Betting, Lotteries and Gaming Act. This in our opinion is aimed at making taxation of the gambling industry fairly simple to administer given the taxes are levied on the operators in the gaming industry as opposed to their customers. This also represents a move by the Government to increase its share of the takings from this industry that has witnessed rapid growth in the recent past. The introduction of excise duty on kerosene cosmetic products seeks to deter adulteration of fuel by unscrupulous dealers and to enhance revenue collection.

Additionally, The Finance Act 2016 provides for a tax amnesty on taxable foreign sourced income. This measure, in our opinion is aimed at providing an avenue for taxpayers who have not been declaring taxable foreign income to declare the same. The provision is however confusing to say the least but the intention seems clear – here is an opportunity to declare foreign income (that may well not be taxable in Kenya under current law) that has been generated from illicit gains over the years. There are several countries around the world that have granted similar amnesties.

In the sections below, we provide further details of the various tax and related measures contained in the Finance Act 2016.

Tax Measures

Corporate Tax

Deemed Interest defined

The Finance Act 2016 has amended section 2 of the Income Tax Act by inserting the definition of deemed interest and deleting the same definition from section 16 of the Income Tax Act.

The measure

Deemed interest is now defined under Section 2 to mean an amount of interest equal to the average ninety-one day treasury bill rate, deemed to be payable by a resident person in respect of any outstanding loan provided or secured by the non-resident, where such loan is provided free of interest.

Who will be affected

All taxpayers receiving interest-free loans from non-resident related parties.

When

Effective from 9 June 2016.

Our view

The tax measure aims to ensure a uniform interpretation of the term "deemed interest" by including it under definitions. The imposition of tax on deemed interest remains a punitive measure for entities which have access to group financing and makes it critical to review all intra-group financing arrangements, to ensure there is no exposure. Given the wide definition of loans, it should be noted that this provision affects many forms of indebtedness.

We are of the view that deemed interest provisions should be deleted as they punish investment. The transfer pricing rules and anti-avoidance provisions are adequate to deal with any abuse of intra-group financing arrangements.

Residential rental income tax

The Finance Act 2016 has amended the provisions of the Income Tax Act by setting the taxable threshold for application of residential rental income tax.

The measure

Under section 6A, rental income tax will now be payable by any resident person from income which is derived from Kenya for the use or occupation of residential property, and which is in excess of one hundred and forty four thousand shillings (KES 144,000) but does not exceed ten million shillings (KES 10,000,000) during any year of income.

Therefore, Kenyan tax residents earning residential rental income below KES 144,000 per annum (KES 12,000 per month) will not be subject to residential rental income tax.

Who will be affected

Tax resident property owners within the stipulated threshold who elect to be taxed under the provisions of this section.

When

Effective from 9 June 2016.

Our view

This measure is aimed at aligning the residential rental income tax to the taxation threshold set under the PAYE regime.

Regulations for residential rental income tax

The Finance Act 2015 amended the Income Tax Act by introducing a new tax regime for taxation of residential income on a gross basis. However, the regulations for the better execution of this tax measure had not been gazetted.

The Cabinet Secretary for the National Treasury has now gazetted the regulations for this tax through The Income Tax (Residential Income Tax) Regulations, 2016.

The measure

Landlords owning residential properties and whose annual residential rental income is above Kshs 144,000 but below KShs 10 million per annum will be taxed at 10% of the gross rental income. This will constitute final tax on this kind of rental income.

The Regulations also provide more clarity on how to account for residential rental tax and the procedure to be followed in electing to be taxed under normal provisions of the income tax law.

Who will be affected

All landlords earning residential rental income of more than Kshs 144,000 but less than Kshs 10 million annually.

When

Effective from 9 June 2016.

Our view

This is a move to operationalize Section 6A (2) of the Income Tax Act. It also brings clarity to the tax regime for residential rental income and to increase the compliance rate for landlords. Even though taxing of gross residential rental income makes this an expensive tax in some cases, the Regulations give landlords the option to opt-out of residential income tax and be taxed under the usual corporate or personal income tax provisions. We would however reiterate that the success of this rental tax will depend to a large extent on the effectiveness of enforcement measures employed by the revenue authority.

Tax rebate scheme for apprenticeship programs

In a bid to build a resource base of skilled manpower, the Finance Act 2015 amended the Income Tax Act by introducing a tax rebate scheme for employers who will engage and train at least 10 university graduates for a period of 6 to 12 months. However, the mechanism for the rebate was not contained in the Finance Act 2015.

The Cabinet Secretary for the National Treasury has now gazetted the Regulations for this scheme through the Income Tax (Set-off Tax Rebate for Graduate Apprenticeships) Regulations, 2016.

Who will be affected

University graduates, taxable employers.

When

1 April 2016.

Our view

This is a welcome move that not only operationalises Section 39B (2) but also gives clarity regarding the graduate apprenticeship scheme. The regulations appear practical and are expected to be easy to implement since they will confer significant benefits to employers and graduate apprentices. However, the minimum number graduates (10) for an employer to be eligible for this tax rebate might be too high for many small and medium size employers.

Sports sponsorship expenditure now an allowable deduction

The measure

The Finance Act has amended section 15 of the Income Tax Act by including expenditure incurred by a person sponsoring sports to the list of allowable deductions for income tax purposes. Subject to prior approval of the sponsorship by the Cabinet Secretary responsible for sports.

Who will be affected

Corporate sponsors of various sporting initiatives.

When

1 January 2017.

Our view

This move is aimed at promoting sport sponsorship in Kenya. It is expected that corporates will take advantage of this tax incentive and provide the much needed funds in this sector. For the expenditure to qualify for the deduction a prior approval from the Cabinet Secretary is required.

Instalment Tax

The Finance Act 2016 has amended the provisions of imposing instalment tax by deleting a part of Section 12(3) which deals with gains or profits of business in relation to stock stemming from a provision that was repealed from the Income Tax Act in 2000.

The measure

Reference to section 17(A) which was repealed in the year 2000 has now been removed.

Who will be affected

N/A

When

Effective from 9 June 2016.

Our view

This is a clean-up of the Act since the section 17(A) was repealed in 2000.

Collection of tax from persons leaving or having left Kenya

The Finance Act 2016 has repealed section 98 of the Income Tax Act which provides for collection of tax from persons leaving or having left Kenya.

The measure

The Commissioner is now empowered to issue a departure prohibition order to the Director General of the Kenya Citizens and Foreign Nationals Management Services. The Director or any officer authorized by him, would after the issuance of such an order, prevent the named person from departing Kenya including by detention and confiscation of his identity and travel documents.

Who will be affected

Tax payers leaving Kenya, winding up or in liquidation.

When

9 June 2016 though this was practically effective on 19 January 2016 when the Tax Procedures Act came into force.

Our view

This measure is largely aimed at aligning the provisions of the Income Tax Act to the Tax Procedures Act. It gives the Commissioner far reaching powers to prevent a taxpayer from travelling. Even though this is a well-intended move to curb tax evasion by non-
Kenyans, the KRA will be required to step up its efforts to maintain accurate records to avoid inconveniencing compliant taxpayers.

Repealed Sections under the Income Tax Act

The Finance Act 2016 has repealed a number of sections under the Income Tax Act as the provisions are now covered under the Tax Procedures Act.

The measure

The following sections have been repealed/deleted:

- The provisions on the maintenance of any return and records in the official languages of Swahili and English and the Kenya Shilling as the unit of currency in the income tax act;
- Section 72 of the Income Tax Act which stipulates the penalties due on failure to submit a self-assessment return or fraud in relation to a return;
- Section 75(A) of the Income Tax Act, where the Commissioner would by notice in writing require a person who in his opinion was at risk of not paying tax by reason of imminent departure from Kenya or being a company, by reason of being liquidated, wound up or cessation of business, to pay the tax on or before the due date specified in the notice;
- Section 105 of the Income Tax Act which provides for refund of overpaid tax; and
- The Thirteenth Schedule of the Income Tax Act that specifies the transactions for which a person would be required to possess a Personal Identification Number ('PIN').

Who will be affected

All taxpayers.

When

Effective from 9 June 2016.

Our view

These measures are a clean-up of the Income Tax Act following the enactment of provisions dealing with similar matters under the Tax Procedures Act, 2015.

Tax exemption on interest income earned from bonds issued by the East African Development Bank

The Finance Act 2016 has exempted interest earned on bonds issued by the East African Development Bank.

The measure

Interest income on bonds issued by the East African Development Bank has been included under the First Schedule to the Income Tax Act that specifies income exempt from tax.

Who will be affected

Investors in bonds issued by the East African Development Bank.

When

1 July 2016.

Our view

This tax measure aims to encourage investment in the East African Development Bank which will assist in raising necessary funds for the East African Community.

Capital Gains Tax exemption on transfer of assets to wholly owned family companies

The Finance Act 2015 introduced Capital Gains Tax ('CGT') exemption on transfer of assets to immediate family members although the wording of the exemption was unclear. The Finance Act 2016 provides for clearer wording of the CGT exemption on transfer of assets to immediate family members.

The measure

The Finance Act 2016 has amended Para 6(2(h) of the Eighth Schedule to the ITA to provide that the following transfers of assets are not subject to CGT:

- Between spouses;
- Between former spouses in the case of a divorce or a bona fide separation agreement;
- To immediate family; or
- To a company wholly owned by spouses or a spouse and immediate family.

Who will be affected

Property owners and families and family businesses.

When

Effective from 9 June 2016.

Our view

The proposed CGT exemption for transfers to family members or family owned enterprises would reinforce the intention of encouraging people to consolidate their family owned properties into a company.

Pay As You Earn (PAYE)

Bonuses, Overtime & Retirement Benefits

Under the current provisions of the ITA, all cash emoluments received in respect of employment or services rendered in a year of income are taxable. The Finance Act 2016 has amended the First Schedule of the Income Tax Act Cap 470 to exempt bonuses, overtime and retirement benefits made to low income employees from taxation.

The measure

The exemption of bonuses, overtime and retirement benefits shall only apply to employees whose taxable employment income before bonus and overtime allowances does not exceed the lowest tax band provided under Head B of the Third Schedule.

Who will be affected

Employees whose taxable employment income falls in the lowest tax band i.e. those earning up to Kshs. 10,164 (up to 31 December 2016) and 11,180 (w.e.f. 1 January 2017).

When

Effective 1st July 2016.

Our view

This is a welcome move for the low income earners as this lowers their tax burden and increases their disposable income. It will also cushion such workers from the high cost of living. Employers may need to review the remuneration of such employees to determine their eligibility for this benefit.

Increase of personal relief and expansion of personal income tax bands

A resident individual with taxable income was entitled to a personal relief of Kshs. 1,162 per month (i.e. Kshs.13, 944 per annum). This is a uniform relief to all resident individual taxpayers irrespective of their marital status. The personal relief has now been increased to Kshs.1, 280 per month (i.e. Kshs. 15,360 per annum).

In addition to the above, the personal income tax bands have been expanded by 10%.

The measure

The Finance Act 2016 Section 17 amends the Third Schedule of the Income Tax Act Cap 470, item 1 of Head A (Resident Personal Relief), by increasing the relief to fifteen thousand three hundred and sixty i.e. Kshs 15,360 per annum (Kshs 1,280 per month).

In addition, the individual tax bands have also been increased by 10% and the new bands are as below:

	Rate in each shilling
On the first Shs.134, 164	10%
On the next Shs.126, 403	15%
On the next Shs.126, 403	20%
On the next Shs.126, 403	25%
On all income over Shs.513,373	30%

Our view

These measures are a clean-up of the Income Tax Act following the enactment of provisions dealing with similar matters under the Tax Procedures Act, 2015.

Who will be affected

All individual taxpayers.

When

Effective date for the above amendments is 1 January 2017.

Impact of the expansion of Tax Bands on various income Level

Salary per month	Tax Payable under Current Band	Tax payable Proposed Band	Effective Percentage Change
15,000	580	413	29%
25,000	2,334	2,077	11%
50,000	8,932	7,965	11%
100,000	23,932	23,326	3%
150,000	38,932	38,326	2%
1,000.000	293,932	293,326	0%

Mortgage Relief

Part IV Section 15(1) of the ITA allows for deduction of expenditure incurred wholly and exclusively by an individual in the production of income. The deductible expenditure includes an amount of interest not exceeding one hundred and fifty thousand shillings per annum incurred by an individual in a particular year of income in respect of interest on owner occupied residential property. This applies only to loans obtained from one of the first three financial institutions specified in the Fourth Schedule and applied to the purchase or improvement of premises occupied by him during that year of income for residential purposes provided that:

- If any person occupies any premises for residential purposes for part only of a year of income the deduction under this paragraph shall be reduced accordingly; and
- No person may claim a deduction in respect of more than one residence.

The measure

The Finance Act 2016 amends the ITA provision above by increasing the allowable interest deduction to KShs 300,000 per annum (Kshs 25,000 per month).

When

Effective date for the above amendments is 1 January 2017.

Our view

This is a substantial increase in this incentive for home ownership. Coupled with the capping of bank interest rates that saw banks reduce their lending rates, tax payers are set to experience greater tax relief for mortgage interest on owner occupied property.

The increase in the allowable interest deduction on mortgage will reduce the tax liability for individual taxpayers.

All taxable individuals with mortgage loans on residential property which they occupy will realise this benefit.

Financial institutions offering mortgage products should also benefit from increased uptake if this incentive is marketed.

Withholding Tax

Withholding Tax on Rent Paid to Resident Persons

Enabling provisions for withholding Tax (WHT) on rental income payable to resident persons introduced.

The measure

The Finance Act 2015 introduced withholding tax at the rate of 12% upon payment of rent, premium or similar consideration for the use or occupation of immovable property to a resident person. However, there were no enabling provisions under Section 35 that would obligate a person to deduct such tax.

The Finance Act 2016 has therefore amended the Income Tax Act to include the provision to deduct tax on rental payments to resident persons under Section 35.

However, only agents appointed by the Commissioner in writing will have the obligation to withhold such taxes.

The Act has also reduced the withholding tax rate from 12% to 10% in order to avoid situations that would lead to refund cases arising from rental income tax, whose tax rate is 10%.

Who will be affected

Landlords, letting agents and other appointed persons.

When

Introduction of enabling provisions to apply with effect from June 2016.
Reduction of the WHT rate from 12% to 10% to apply with effect from 1 January 2017.

Our view

This is an effort to widen the tax net and there is a likelihood that the property managers and other large tenants will be appointed agents. This measure is expected to enhance compliance as regards the taxation of rental income. As with other agency taxes, it will result in additional administrative burden and risk for the appointed agents.

Repeal of Withholding Tax on Gambling Winnings

The requirement to account for withholding tax on winnings payable by bookmakers has been repealed.

The measure

Section 35 of the Income Tax Act has been amended by deleting the requirement for bookmakers to account for withholding tax on winnings payable to punters or players.

In addition to the repeal of the provisions under Section 35 Income Tax Act, the Finance Act has also deleted all the provisions in the Income Tax Act that dealt with the taxation of gambling winnings. The provisions include:

- Section 10 (1) (g) which deemed payments in respect of winnings to be income accrued or derived from Kenya;
- Section 34 (2) (i) which stipulated the final rate of tax applicable on winnings of non-resident persons; and
- Paragraphs 3 (m) and 5 (j) of the Third Schedule to the Income Tax Act, which provided the withholding tax rates applicable on winnings.

Our view

There have been difficulties with the administration of withholding tax on winnings since its first introduction in 2012 through the Finance Act No. 4 of 2012. Various amendments have been introduced but it doesn't appear like the amendments have borne fruit.

It now appears that the government has decided to do away with the withholding tax and instead levy taxes on the income of operators in the gambling industry. Given the complexities and administrative burden that the previous provisions were creating, we believe this is the right move.

Prior to the above amendments, bookmakers were under obligation to deduct tax at 20% on winnings payable to punters or players resident in Kenya. For winnings of non-resident players or punters, the withholding tax rate was 20% till 31 December 2015. Following an amendment to the Income Tax Act through the Finance Act 2015 that took effect on 1 January 2016, it was unclear as to whether winnings payable to non-resident players or punters were liable to withholding tax. This is because, no non-resident rate of tax on winnings was prescribed in the Third Schedule despite all the enabling provisions in Section 10, 34 and 35 being there.

Please refer below to the insight section explaining the amendments introduced by the Finance Act to the Betting Lotteries and Gaming Act for more information.

Who will be affected

Bookmakers and players/punters.

When

9 June 2016.

Withholding Tax Penalties

Repeal of withholding tax penalties stipulated under the withholding tax rules.

The measure

The Finance Act has deleted Section 35 (6) of the Income Tax Act which empowered the Commissioner to impose penalties as prescribed under the Income Tax (Withholding Tax) Rules, 2001 for failure by a person to properly account for withholding tax.

The withholding tax rules stipulated a penalty of 10% of the tax involved subject to a maximum of KES 1 million to a person who failed to properly account for withholding tax as required by law.

Who will be affected

All persons making payments liable to withholding tax.

When

9 June 2016.

Our view

This amendment could be interpreted as a move to harmonise the penalty regime for withholding tax with those applicable to other taxes.
The Income Tax Act under Section 72D stipulates a penalty of 20% for late payment of tax. The penalty under the withholding tax rules provided room for varied interpretations on what penalty should apply in case of failure to deduct withholding tax. The amendment could therefore be viewed as an attempt to harmonise the penalties and therefore avoid room for application of different penalties.

It is important to note that the 10% penalty provided for under the withholding tax rules was capped at KShs 1 million. However, with the amendment in the Finance Act 2016, the 20% default penalty for late payment of tax as stipulated under Section 72D would apply henceforth. This penalty is not capped and is therefore likely to be more punitive.

Income Tax Administration

Income Tax Administration Amendments

Repeal of various provisions under the Income Tax Act which were captured under the recently promulgated Tax Procedures Act 2015.

The measure

The following Income Tax Act provisions have been repealed:

Section 51 A: returns and records to be kept in official languages.

Section 72: Fines and penalties on failure to file annual tax returns.

Section 75A: Assessments based on the risk of non-payment of tax due to exit or departure from Kenya, liquidation, winding up or cessation of business in Kenya.

Section 98: Collection of tax from persons leaving or having left Kenya.

Section 105: Refunds of overpaid tax.

Thirteenth Schedule: Transaction requiring a Personal Identification Number (PIN)

Who will be affected

Tax payers and tax agents.

When

9 June 2016.

Our view

This repeal is aimed at cleaning up the Income Tax Act to remove provisions that have been properly captured in the recently enacted Tax Procedures Act, 2015.

Value Added Tax

Appointment of Value Added Tax withholding agents

Withholding VAT has been reintroduced via section 42A of the Tax procedure Act (TPA).

The measure

The Commissioner may appoint a person to withhold six percent of the taxable value on purchasing taxable supplies at the time of paying for the supplies and remit the same directly to the Commissioner. Further, the Commissioner may, at any time, revoke the appointment of a tax withholding agent if he deems it appropriate to do so.

Withholding VAT shall not apply to taxable supplies for official aid-funded projects. Being subject to withholding VAT does not relieve the supplier of taxable supplies of the obligation to account for tax as provided for in the TPA and VAT Act.

The CS has amended the effective date for the implementation of withholding VAT by withholding agents appointed under Section 25A of the VAT Act from 19 January 2016 to 9 June 2016 vide Legal Notice 117 of 21 June 2016. In addition, no penalties will be imposed on agents who failed to withhold VAT for the period following the repeal of Section 25A of the VAT Act up to 8 June 2016.

Who will be affected

Withholding VAT agents and suppliers to such agents.

When

9 June 2016.

Our view

The reintroduction of withholding VAT via the TPA serves to correct what would now appear to have been the inadvertent deletion of section 25A of the VAT Act by the consequential amendments of the TPA.

This measure now restores the legal authority for the KRA to appoint withholding VAT agents going forward. Tax payers who had already been appointed as withholding VAT agents, together with the newly appointed withholding VAT agents will be required to withhold VAT at 6% of the taxable value and remit the same to the KRA.

The Finance Bill had proposed a commencement date of 19 January, 2016 being the date when the TPA came into force. This would have resulted in retrospective application of the law considering the provision was reintroduced on 9th June 2016. The CS has vide Legal Notice 117 of 21 June, 2016 amended the effective date to 9 June 2016. This, in our view, is intended to correct what would otherwise have been an unfair application of law and whose legality would possibly have been challenged. The Legal Notice also clarifies that no penalties will be imposed on appointed agents who ceased to withhold VAT after the repeal of Section 25A of the VAT Act.

We maintain the view that the withholding VAT regime does not necessarily make inroads into widening the tax net. There are several anomalies in applying withholding VAT that are not catered for in the legislation. The regime increases the cost of doing business in the country due to its impact on cash flow for suppliers to withholding VAT agents.

Re-introduction of Withholding VAT provisions

The Finance Act 2016 has re-introduced the enabling provisions for withholding VAT.

The measure

The Finance Act 2016 has reintroduced provisions on appointment of VAT Withholding Agents: the Finance Act 2016 provides that any person who, prior to the re-introduction of this provision, was appointed to withhold tax under section 25A of the Value Added Tax Act, 2013 shall be deemed to be a person appointed as a withholding vat agent under the new provision. There are however no penalties chargeable on any such person who ceased to withhold tax for any period following the repeal of that section up to the 8th June, 2016.

- Provisions on tax amnesty on residential rental income. The provisions remain the same as originally enacted.

Who will be affected

Various tax payers and existing withholding VAT agents.

When

9 June 2016.

Our view

There was a sigh of relief when the withholding VAT provisions were deleted by the Tax Procedures Act. Even before the dust could settled, it soon became clear that the amendment would not last and the relief was short-lived when the KRA insisted that despite the changes appointed agents should continue to withhold and account for VAT. It is now clear that the KRA has had its way with the re-introduction of enabling provisions to continue operating withholding VAT and to appoint agents to account for such tax.

We hold the view that while the withholding VAT system ensures the Government collects tax in advance, its negative effect on cash flow for compliant businesses should be considered. As such its use should be limited to only cases where the risk of non-compliance is evidently high as opposed to the current blanket application.

VAT exemption for petroleum products extended by two years

Exemption of specified petroleum products which were under transition until 1 September 2016 has now been extended by two more years.

The measure

The Finance Act has extended the exemption period for petroleum products specified under Section B of Part I of the First Schedule to the VAT Act by a further two years from 1 September 2016.

Who will be affected

Petroleum industry, transport industry, manufacturers, motorists and consumers in general.

When

9 June 2016.

Our view

The Cabinet Secretary for the National Treasury had, through the 2016 Budget Statement, proposed to extend the transitional period by one year.

The extension by two years therefore comes as a welcome relief for various industries as the prices of specified exempt petroleum products will not increase due to imposition of VAT. However, there other taxes and levies on petroleum products have been increased thus denying consumers the full benefit of the current low crude oil prices.

Accommodation and Restaurant Service Charge

Service charge up to a certain threshold excluded from VAT.

The measure

Service charge paid in lieu of tips which is not more than ten percent of the price of the service will not be subjected to VAT. The service charge should be distributed to the employees of the business under a written agreement between the employer and employee.

Who will be affected

Hotels, restaurants and employees in the hospitality sector.

When

9 June 2016.

Our view

The change is part of a raft of measures initiated by the government to boost the tourism sector by cushioning the employees in the restaurant services industry.

Special Economic Zone Enterprises

Inclusion of Special Economic Zone Enterprises in the definition of imports and exports respectively for VAT purposes.

The measure

Movement of goods in and out of Special Economic Zone enterprises is now included in the definition of imports and exports respectively for VAT purposes. The special economic zone enterprises will however not be required to be registered for VAT.

Who will be affected

Special Economic Zone enterprises.

When

1 July 2016.

Our view

This is aimed at aligning the VAT Act to cover the introduction of special economic zone enterprises as per the Special Economic Zones Act, 2015.

Hotels

Definition of a hotel.

The measure

The definition of a hotel has now been introduced in Section 2 of the VAT Act to include; service flats, service apartments, beach cottages, holiday cottages and villas and other premises or establishments of a similar kind. Medical, educational/training premises and premises under a lease or license of not less than a month have been specifically excluded from this definition.

Who will be affected

Owners/ operators of serviced accommodation, holiday cottages and properties providing similar services.

When

1 July 2016.

Our view

This widens the VAT net because hotel and restaurant services are subject to VAT. Owners/ operators of the facilities included in the expanded definition of hotels will be required to account for VAT.

Fraudulent Claims of Tax Refunds

The penalties for fraudulent claims for tax refunds deleted from the VAT Act.

The measure

Penalty for fraudulent claims of VAT refunds has been deleted from the VAT Act.

Who will be affected

All VAT registered persons who lodge refund claims.

When

9 June 2016.

Our view

This is to clean up the VAT Act as similar provisions are now contained in the Tax Procedures Act (TPA).

Cancellation of VAT Registration

Deregistration from VAT.

The measure

Taxpayers applying for deregistration from VAT are deemed to have made taxable supplies of

any trading stock at hand at the time of deregistration. The deemed supply applies to the extent that the person applying for deregistration enjoyed input tax deduction on acquisition of such trading stock.

However, the VAT Act was incorrectly referenced in respect of the deeming provision and the Finance Act 2016 has sought to correct this.

Who will be affected

VAT registered persons applying for deregistration.

When

9 June 2016.

Our view

This is aimed at providing clarity in terms of VAT liability at the time of cancelling one's VAT registration status. The person applying for deregistration will have to declare output VAT to the extent that it relates to input tax credit granted on stock at hand at the date of deregistration.

Exemption of inputs used to manufacture animal feeds

Introduction of additional categories of animal feeds in the exemption schedule.

The measure

Introduction of items of tariff numbers 2302.10.00, 2302.30.00, 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 and 2306.90.00 in the exemption schedule.

Dicalcium phosphate and other phosphates of calcium under tariff numbers 2835.25.00 and 2835.26.00 respectively which are dietary supplements used in animal feeds have also been included in the exemption schedule.

Who will be affected?

Manufacturers of animal feeds.

When

9 June 2016.

Our view

The inclusion of the above items into the exemption schedule in addition to animal feeds of tariff numbers 2308.00.00, 2309.10.00, 2309.90.10 and 2309.90.90 introduced through the Value Added Tax (Amendment) Act, 2014 will lead to a reduction in the production costs for animal feeds. This in turn is likely to lead to a decrease in the selling price of animal feeds, making them affordable to farmers, hence contributing positively to the growth of the agricultural sector.

However, the list is not exhaustive and some tariff numbers covering key inputs used in the manufacture of animal feeds have been left out of the exempt schedule.

The inputs that have been left out include those of tariffs 2301.10.00, 2301.20.00, 2302.40.00; 2302.50.00, 2303.10.00, 2303.20.00, 2305.00.00 and 2307.00.00.

Motor vehicles for use in official aid funded projects

Inclusion of motor vehicles for use in aid funded projects into the exemption list.

The measure

The Finance Act Inclusion of motor vehicles in the exemption list for items that are directly and exclusively used in the implementation of official aid funded projects, upon approval by the Cabinet Secretary responsible for the National Treasury.

Who will be affected

Beneficiaries of official aid funded projects.

When

9 June 2016.

Our view

Motor vehicles for use in official aid funded projects were previously excluded from the exemption schedule. This has now been rectified and will lead to reduction of the project costs.

Goods for use by the local film producers and local filming agents

Recommendation of goods to be imported or purchased locally by the Kenya Film Commission.

The measure

The exemption of goods imported or purchased locally for use by the local film producers and local filming agents is to be approved by the Cabinet Secretary for the National Treasury upon recommendation by the Kenya Film Commission. Prior to this change, there was no requirement to obtain the recommendation of the Commission.

Who will be affected

Local film producers and local filming agents.

When

9 June 2016.

Our view

The introduction of the "recommendation" requirement in the exemption schedule for the film sector will seek to ensure that the incentive is properly utilized and not subjected to misuse.

Recreational parks

Recreational parks now aligned in the exemption regime.

The measure

Deletion of recreational parks from paragraph 55 and its subsequent anchorage as a stand-alone exemption item under paragraph 62. Taxable goods purchased or imported for direct and exclusive use in the construction of recreational parks will continue to be exempt. However, such exemption is subject to recommendation by the Cabinet Secretary responsible for matters relating to recreational parks.

Who will be affected

Contractors and developers undertaking construction and infrastructural works at recreational parks.

When

9 June 2016.

Our view

Developers and contractors of recreational parks wishing to benefit from the VAT exemption need to seek recommendation from the Cabinet Secretary responsible for matters relating to recreational parks for such exemption. Prior to this introduction, exemptions were approved by the Cabinet Secretary for the National Treasury following recommendation by the Cabinet Secretary responsible for Industrialization.

Taxable goods and services made to Special Economic Zone enterprises

Reclassification of taxable goods and services made to SEZ enterprises from the exempt schedule to the zero rated schedule.

The measure

Deletion of supplies of taxable services made to SEZ enterprises from the Exemptions Schedule and its subsequent re-introduction into the zero-rated schedule.

Who will be affected

Suppliers of taxable goods and services to SEZ entities.

When

9 June 2016.

Our view

Taxable goods and services supplied to SEZ entities will now be zero-rated. This is a welcome move that will encourage investment in the SEZs. Going forward, suppliers of goods to SEZ entities will now be entitled to claim VAT refunds.

Additions to the Exemption Schedule – Part A

Introduction of items in the Exemption Schedule – Part A.

The measure

Introduction of the following items into the exemption schedule:

- Equipment and machinery, including specialized motor vehicles, imported or purchased locally for official use by the Kenya Defence Forces, the National Police Service and military supplies;
- Direction-finding compasses, instruments and appliances for aircraft;
- Liquefied petroleum gas;
- Wheat seeds of tariff number 1001.11.00 and 1001.91.00;
- Museum and natural history exhibits and specimens and scientific equipment for public museums;
- Chemicals, reagents, films, film strips and visual aid equipment imported or purchased prior to clearance through the customs by the National Museums of Kenya;
- Taxable goods for the direct and exclusive use for construction of specialized hospitals with accommodation facilities upon the recommendation by the Cabinet Secretary responsible for health who shall issue guidelines for the criteria to be used to determine eligibility for the exemption;
- Garments and leather footwear, manufactured in an Export Processing Zone at the point of importation;
- 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;
- Inputs or raw materials locally purchased or imported by manufacturers of clean cook stoves approved by the Cabinet Secretary upon recommendation by the Cabinet Secretary for the time being responsible for energy;
- 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;
- Super absorbent polymer (SAP) of tariff number 39.06.90.0;
- Carrier tissue white, 1 ply 14.5 GSM of tariff number 4703.21.00;
- IP super soft fluff pulp – fr-fluff 310 treated pulp 488*125mm (cellose) of tariff number 4703.21.0;
- Perforated PE film 15-22 gsm of tariff number 3921.190.0;
- Spunbound non-woven 15-25 gsm of tariff number 56.03.1190.8;

Our view

The introduction of the above items into the exemptions schedule is likely to have the following impact:

- Security equipment will be cheaper hence will help bolster security measures being put in place by the Government.
- Aircraft maintenance charges likely to reduce in tandem with the exemption of the appliances
- Relief for the common mwananchi due to reduction in cost of stoves.
- Uptake of the trend towards purchasing new clothes is likely to be achieved following the exemption of garments and leather shoes from EPZs; as opposed to the second hand clothes popularly known as "mitumba."
- However, the mitumba importers will suffer from this move which is likely to affect their livelihoods. In addition, the current importers of new clothes and shoes who have to pay the import taxes will be disadvantaged where prices for goods from the EPZs are reduced.
- We further note that there are items that have been included in the exemption list that either have a wrong tariff number or whose tariff number does not exist in the East African Community Common External Tariff (EAC CET).

- Airlid paper with super absorbent polymer 180gsm/67 of tariff number 4803.00.0;
- Airlid paper with super absorbent polymer 80gsm/67 of tariff number 48.03.00.0.;
- Airlid paper without super absorbent polymer 180gsm/67 of tariff number 48.03.00.0;
- Airlid paper without super absorbent polymer 80gsm/67 of tariff number 4803.00.0;
- Pressure sensitive adhesive of tariff number 3506.91.90;
- Plain polythene film/LPDE of tariff number 39.21.19.0;
- Plain polythene film/PE of tariff number 39.21.19.0;
- PE white 25-40gsm/release paper of tariff number 48.44.51.10.0;
- ADL – 25-40gsm of tariff number 56.03.1190.8;
- Elasticized side tape of tariff number 5402.4410;
- 12-16 gsm spunbound piyropononwoven coverstock/12gsm spunbound PP non-woven SMS hydrophobic leg cuffs of tariff number 56.03.1190.8;
- Polymetric elastic 2/3 strands of tariff number 3919.90.90.10;
- Plain polythene film/PE of tariff number 39.20.10.10;
- PE white 25-40gsm/release paper of tariff number 48.10.99.00; and
- 12-16 gsm spunbound piyropononwoven coverstock/15gsm spunbound PP non-woven SSMMS hydrophobic leg cuffs of tariff number 56.03.1190.

Who will be affected

- Kenya Defence Forces and the National Police Service;
- Aircraft operators/maintenance companies;
- The general public (LPG and EPZs incentives);
- Importers of garments/footwear and worn clothing/footwear;
- National Museums of Kenya; and
- Contractors and developers of specialized hospitals.

When

9 June 2016.

Additions to the Exemption Schedule – Part B

Introduction of more services into the Exemption Schedule – Part B.

The measure

Introduction and retention of the following services into the exemption schedule:

- Entry fees into the national parks;
- The provision of services offered by tour operators on commission;
- Taxable services for direct and exclusive use for the construction of recreational parks upon the recommendation by the Cabinet Secretary responsible for matters relating to recreational parks; and
- 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.

Who will be affected

- Kenya Wildlife Services and park operators;
- Park visitors;
- Tour operators;
- Contractors and developers of recreational parks; and
- Contractors and developers of specialized hospitals.

When

9 June 2016.

Our view

The introduction of the above items into the exemptions schedule for services is likely to have the following impact:

- Park entry fees to reduce; Park operators such as Kenya Wildlife Services would need to change their approach to accounting for VAT;
- Improved tourism-related activities; and
- Cheaper access to specialized healthcare services.

This will certainly benefit the tourism industry which has been under considerable pressure of late.

Changes affecting medicaments

Medicaments of tariff 3003.20.00 included in the zero-rated schedule.

The measure

Introduction of medicaments of tariff 3003.20.00 into the zero-rated schedule – Part C, while deleting tariff 3303.20.00.

Who will be affected

Pharmaceutical companies and the general public.

When

9 June 2016.

Our view

The change will most likely lead to a reduction in the cost of medicaments of tariff 3003.20.00. This tariff covers medicaments (excluding goods of heading 30.02, 30.05 or 30.06) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale; but containing other antibiotics.

The purpose of this amendment is to correct the changes effected by the Finance Act 2015 which had introduced tariff number 3303.20.00 which does not exist in the EAC Common External Tariff.

Excise Duties

Introduction of excise duty on beauty products and kerosene

The measure

The Finance Act 2016 has introduced excise duty on the following products:

- Cosmetics and beauty products of tariff heading no. 3303, 3304, 3305 and 3307 at the rate of 10%; and
- Kerosene at KShs. 7,205 per 1,000 litres at 20 degrees centigrade.

Who will be affected

Local manufacturers, consumers, importers and petroleum marketers.

When

9 June 2016.

Our view

The introduction of excise duty on cosmetic products is a step towards harmonization of EAC tax regime on excise duty. However, the introduction of the excise duty on this rapidly growing industry may be geared towards increasing its contribution to Government coffers. Kenya has lost its petroleum products export market in Rwanda and Uganda as a result of adulteration of diesel and petrol using kerosene. Adulteration of fuel is encouraged by the relatively low price of kerosene. Kerosene has remained free of excise duty for five years following the removal of excise duty on the product in 2011 with an aim to protect low income earners against high kerosene prices. The re-introduction of excise duty on kerosene is to discourage unscrupulous traders from adulterating fuel in the country by bridging the gap between the price of kerosene and diesel. The resultant effect of the increase will be higher commodity prices for the final consumer. Whereas the prices of diesel and petrol have also been increased by KShs 6 per litre, the gap between kerosene and the other fuels has been reduced by an insignificant margin which may discourage but not entirely eliminate the adulteration of fuel.

Change of excise duty regime on motor vehicles

The measure

The Finance Act has changed the tax regime on motor vehicles from specific rate of duty and re-introduced an ad-valorem rate of 20% on the excise value of the vehicle.

Who will be affected

Consumers, motor vehicle importers.

When

9 June 2016.

Our view

The Excise Duty Act 2015 which came into effect on 1st December 2015 changed the import duty rate on motor vehicles from 20% to a specific rate based on the age of the motor vehicle. Accordingly motor vehicles below 3 years old were subject to excise duty at the rate of KShs 150,000 per unit while those above 3 years old attracted excise duty at KShs 200,000 per unit. This was viewed as unequitable and punitive to importers of used low value cars. The re-introduction of an ad-valorem rate of excise duty on motor vehicles imports will restore fairness as excise duty will be based on the value of the vehicle. On the other hand, importers of newer vehicles will have to pay more excise duty than they would have paid under the repealed regime.

Removal of excise duty on specific products

The measure

The Finance Act has removed excise duty on the following items:

- Ordinary water of tariff no 2201.90.00;
- Locally assembled motor cycles; and
- School buses for use by public schools.

Who will be affected

Consumers and vendors of tap water, Importers, public schools, local motor cycle assemblers.

When

9 June 2016.

Our view

The Excise Duty Act 2015 subjected all waters to excise duty at 5%. However, the Cabinet Secretary had not factored in the wide definition of water in drafting of this legislation. Consequently, both bottled mineral water and tap water would have been subject to excise duty. The intention of the policy makers was to charge excise duty on bottled water which is viewed as a luxury product.

In a bid to provide clarity on the matter, the Finance Act has excluded ordinary water from the ambit of excise duty. However, one could argue that due to shortage of water from public sources, even bottled water should be exempt from excise duty as it is no longer a matter of luxury but necessity.

The removal of motor cycles from the ambit of excise duty is geared towards promoting local assembly of motor cycle and is in line with the EAC duty remissions on motor cycles imported in Completely Knocked Down (CKD) form.

The government has removed excise duty on school buses for use by public schools to make them more affordable for public schools in a bid to reduce the cost of running public schools.

Excise duty exemption

The measure

The Finance Act has exempted the following goods from excise duty:

- Goods imported or purchased locally for direct and exclusive use in the implementation of official aid funded projects to the extent provided for under the financing agreement;
- Excisable goods imported for direct use in the manufacture of sanitary towels; and
- All goods including materials, supplies, equipment, machinery and motor vehicles for the official use of the Kenya Defence Forces (KDF) and the National Police Service (NPS).

Who will be affected

Suppliers of excisable goods to aid funded projects, KDF and NPS; Importers; Local manufacturers

When

9 June 2016.

Our view

Most financing agreements provide for exemption from all taxes on goods acquired for implementation of aid funded projects. This move is in line with other tax legislations that exempt taxes on goods for direct and exclusive use in aid funded projects. The Finance Act does not indicate the category of goods that will qualify for the exemption but it is expected that the change will be aligned with other tax legislation to include materials, equipment and motor vehicles for use in aid-funded projects.

The exemption of goods supplied to the KDF was previously covered under the repealed Customs and Excise Act and subsequently removed through the Excise Duty 2015. The re-introduction of the goods into the excise duty exemptions schedule is aimed at reducing Government`s spending on supplies to the armed forces.

The exemption of sanitary towels is aimed at promoting local manufacturers of sanitary towels by reducing the cost of inputs subject to excise duty.

Incorporation of Special of Economic Zones (SEZ) into the Excise Duty Act

The measure

The Finance Act has amended the definitions of import and export in the Excise Duty Act to incorporate SEZs. Movement of goods into the SEZ from Kenya will now be treated as exports while movement of goods from the SEZ into Kenya will be treated as imports.

Who will be affected

SEZ enterprises, local manufacturers, exporters, importers and consumers.

When

1 July 2016. Deletion of the provisions on erroneous refund of tax under the Tax Procedures Act.

Our view

This move is aimed at harmonizing the Excise Duty Act with the Special Economic Zones Act which provides for exemption of taxes on goods supplied to the zone .The amendment of exports to include movement of goods from Kenya into the special economic zones will mean that such goods will be exempted from excise duty.

Tax Administration Measures

Deletion of the provisions on erroneous refund of tax under the Tax Procedures Act

The Finance Act 2016 has deleted the current provisions of the Tax Procedures Act relating to erroneous refund of tax.

The measure

The deleted provisions of the TPA on erroneous refund of tax provided that interest shall be chargeable from the date when the tax was erroneously refunded until the date when the tax is paid to the Commissioner.

The amended provision stipulates that interest of 1% shall be due on the tax that was erroneously refunded from the date when the Commissioner requires a taxpayer to refund the tax. The interest due cannot exceed the tax erroneously refunded.

Who will be affected

All taxpayers.

When

1 January 2017.

Our view

This is aimed at aligning the VAT Act to the 2015 Tax Procedures Act.

Provision for waiver of interest

The Finance Act 2016 has re-introduced a provision for waiver of interest charged for late payment of tax. The provision on waiver of interest under the Income Tax Act and the VAT Act was repealed by the Tax Procedures Act.

The measure

The Commissioner may, upon an application by a Taxpayer or on the Commissioner's own motion and with the approval of the Cabinet Secretary for National Treasury, remit, in whole or in part, any penalty or interest payable by a person except a penalty imposed for tax arising from a tax avoidance scheme. The remission of interest should however be by reason of either;

- uncertainty as to any question of law or fact;
- consideration of hardship or equity; or
- impossibility or undue difficulty or expense, of recovery of tax.

Who will be affected

Taxpayers seeking waiver of interest and penalties.

When

1 July 2017.

Our view

The provision for waiver of interest had been deleted following the reduction of late payment interest from the previous 2% per month to 1% per month under the Tax Procedures Act.
This reintroduction of waiver for interest is a positive move as it addresses deserving cases, i.e. where the law is uncertain or in cases of hardship or undue difficulty.
We also believe that in a bid to encourage voluntary compliance, cases of voluntary disclosure should be included among the grounds qualifying for waiver of interest.

Tax Procedures Act

Appointment of tax representatives by foreigners

The Finance Act 2016 has introduced a new section 15A to the Tax Procedures Act, 2015 ('TPA') that provides for appointment of a tax representative by a non-resident person.

The measure

The new section 15A of the Tax Procedures Act, 2015 ('TPA') requires a non-resident person who is required to register under a tax law and who has no fixed place of business in Kenya to appoint a tax representative, in Kenya, in writing. Where a non-resident fails to so appoint a tax representative the Commissioner is empowered to appoint a tax representative for such a non-resident person.

Who will be affected

All non-resident persons who are required by any tax law to be registered in Kenya.

When

Effective from 1 July 2016.

Our view

The tax measure is intended to ensure that all non-resident persons who would be required to undertake certain tax obligations in Kenya but have no presence in Kenya are brought within the tax net.
The amendment would seem to suggest that a non-resident can carry out business in country without establishing a local entity and instead using a tax representative to account for the taxes. In practice it seems that the iTax system cannot deal with such situations. It is also unclear however how this ties in to the provisions of the new Companies Act which requires a non-resident carrying out business in Kenya to establish a legal entity in the country.

Power to demand filing of returns

The Finance Act 2016 has introduced section 24A to the TPA that empowers the Commissioner to call for returns.

The measure

The amendment gives the Commissioner the power to ask a taxpayer to furnish a return containing any such information as the Commissioner may require and within any such time that the Commissioner may prescribe. The return in this case could be of any form and in relation to any matter that the Commissioner may prescribe. The return could also be with regard to a third party.

Who will be affected

All Taxpayers.

When

1 July 2016.

Our view

The power given to the Commissioner to demand filing of returns is far reaching as the provision allows the Commissioner to seek such information from any person. It imposes additional obligations on such persons to comply with the requirements of the Commissioner, which may be onerous in some cases.

Feedback on application for extension of time to pay tax

The Finance Act 2016 has set a timeline within which the Commissioner is required to give feedback to a taxpayer on an application for extension of time to pay tax.

The measure

Section 33 (3) of the TPA has been amended to require the Commissioner to notify the taxpayer, in writing, of the decision regarding the application for extension of time within 30 days of receiving the application for extension of time.

Who will be affected

Taxpayers.

When

Effective 1 January 2017.

Our view

This provision brings certainty regarding the response from the Commissioner on applications made by taxpayers with regard to extension of time to pay tax. Although a welcome move, it should be noted that a taxpayer remains liable for late payment penalties even where an extension is granted.

Tax amnesty on income earned outside Kenya

The Finance Act 2016 provides for a tax amnesty on taxable foreign sourced income.

The measure

Under the newly introduced Section 37B of the TPA the Commissioner shall not; assess, recover or follow up taxes, penalties or interest in respect of any year of income ending on or before the 31 December, 2016, where:

- The income has been declared for the year 2016 by a person earning taxable income outside Kenya; and
- The returns and accounts for the year 2016 are submitted on or before the 31 December, 2017.

The amnesty will however not apply in respect of any tax that has already been assessed or to cases already under audit or investigation.

Who will be affected

Persons with taxable foreign sourced income.

When

1 January 2017.

Our view

At the presentation of the Budget speech the Cabinet Secretary for Finance stated that this amendment was geared towards attracting persons with foreign income to bring the money back to Kenya and reinvest.

Secondly the amendment is possibly a means for the KRA to get on record foreign source income for two probable purposes: (1) In the event that the anticipated new Income Tax Act changes the charge of tax from source based to taxation of worldwide income; and (2). To cope with the Common Reporting Standard (CRS) under the Base Erosion and Profit Shifting (BEPS) project that will become a reality over the next couple of years

Commissioner's response to notification by a payer under an agency notice

The Finance Act 2016 has stipulated the timeline within which the Commissioner should give feedback on a notification made by a person required, under an agency notice, to make payment of tax owed by a Taxpayer.

The measure

The Commissioner is empowered under section 42 of the TPA to collect tax from persons owing money to a taxpayer. A person appointed as an agent for collection of tax is however allowed under the same section to notify the Commissioner where the person is unable to comply with the requirement by the Commissioner. The Commissioner is then required to give feedback to the person on receiving the notification. However there was no timeline within which the Commissioner was required to give feedback. The Finance Act 2016, now requires that the Commissioner responds to the notification within a period of 30 days.

Who will be affected

Banks and other persons who may ordinarily hold money on behalf of taxpayers.

When

1 January 2017.

Our view

This provision is aimed at putting some checks and balances on the Commissioner. The provision does not however provide the consequence of the Commissioner not complying with the stipulated timeline.

Extension of time for making application for tax refund

The Finance Act 2016 has extended the time within which a person may make an application for a tax refund of overpaid tax from one (1) year to five (5) years, with the exception of Value Added Tax ('VAT') refunds.

The measure

Section 47 of the Tax Procedures Act, 2015 has been amended to extend the time within which a person may make an application for refund of overpaid taxes from 1 year to 5 years. The amendment however provides that it will not apply to VAT refunds which would still be required to be made within 1 year from the date when the tax became due and payable.

Further, the Commissioner is now required to respond in writing indicating his decision on the refund application within 90 days of receiving the application.

Who will be affected

All taxpayers.

When

1 January 2017.

Our view

The amendment is fair as it gives a taxpayer a similar amount of time to make an application for refund as the Commissioner would be allowed to amend a taxpayer's assessment. The amendment is a welcome move as it will save taxpayers from being time barred in making legitimate claims for tax refunds.

It is difficult to justify the exclusion of VAT refunds from the extended time frame but this could possibly be due to the numerous changes on classification of goods and services as either exempt, zero rated or taxable.

The provision for a timeline within which the Commissioner should give a refund decision is also a positive move as it should speed up the handling of refund applications.

Tax Appeals Tribunal

Amendment to the Tax Appeals Tribunal Act, 2013.

The measure

The Finance Act 2016 has amended the Tax Appeals Tribunal Act, 2013, to provide for the qualifications of the Secretary to the Tribunal and the appointment of a clerk to the Tribunal. The Finance Act also provides for the procedure to be applied when extending the time within which a taxpayer may file a Notice of Appeal and the Commissioner when filing the Statement of Facts.

The Commissioner will be required to serve the appellant with a copy of the statement of facts and other relevant documents within two working days from the date of submission to the Tribunal.

The Commissioner will also be allowed to apply to the Tribunal for an extension of the time required to submit the statement of facts and other relevant documents to the Tribunal.

The Appellant will be allowed to be represented by an advocate if he so wishes.

Who will be affected

Taxpayers, KRA and tax agents/ advocates.

When

1 January 2017.

Our view

The above measures are aimed at streamlining the operations of the Tax Appeals Tribunal and also ensuring equity by specifying timelines for the KRA as well as the option to request the Tribunal for extension of timelines.

Appointment of tax Agents

The Finance Act 2016 has introduced an additional requirement for individuals and partnerships seeking to be registered as tax agents.

The measure

Under the newly introduced Section 19(3) an individual or partnership seeking registration as a tax agent shall, in addition to other requirements stated under the Tax Procedures Act, be required to obtain a recommendation for registration from the Tax Agents Committee.

Who will be affected

Firms and individuals offering tax services.

When

1 January 2017.

Our view

This provision is aimed at introducing checks on persons seeking appointment as Tax Agents. They will now have to go through some form of vetting by the Tax Agents Committee.

While this measure is reasonable, what should be considered is the established of an independent professional body to register and regulate tax professionals as opposed to the current arrangement where they are registered, and by extension regulated, by the revenue authority.

Timeline for payment of refunds

The Finance Act 2016 has introduced a timeline within which the Commissioner is required to pay a tax refund.

The measure

The Commissioner is required to repay overpaid tax within a period of 2 years from the date of application. Where the Commissioner fails to comply with this requirement the amount due shall attract an interest of 1% per month or part thereof of such unpaid amount after the period of two years.

Who will be affected

Tax payers with tax overpayments.

When

1 January 2017.

Our view

The issue of refunds, particularly VAT refunds, has been a major obstacle for taxpayers with significant impact on their cash flows. This measure is a welcome move as it should assist in speeding up the payment of refunds to taxpayers. Currently, the Commissioner makes payments of refunds when funds "become available". However, we are of the view that in order to ensure equity, the interest should apply from the date the refund application was approved (taking into account the 90 day period the Commissioner is given to review and decide on a refund). This is because taxpayers are charged interest for late payment from day one after the due date. Furthermore, taxpayers with refunds owing from the KRA are not given favourable consideration when faced with penalties and interest for any taxes due.

Betting and Gambling

New Betting, Lotteries and Gaming Taxes

Introduction of new taxes in the gambling industry.

The measure

The Finance Act has introduced new tax measures in the gaming industry aimed at taxing operators.

Through amendments to the Betting Lotteries and Gaming Act, the following taxes have been introduced:

- Betting tax - will be levied at 7.5% on the gaming revenues of licensed bookmakers;
- Lottery tax – will be levied at 5% on the lottery turnover of persons licensed to promote a lottery;
- Gaming tax – will be levied at 12% on the gaming revenues of persons carrying on a gaming business; and
- Prize competition tax – will be levied on the cost of entry to a premium-rated competition at the rate of 15% on the total gross turnover of licensed persons.

The above taxes need to be accounted for by operators and paid to KRA by the 20th of the month following the month of collection.

For the purposes of computing betting tax and gaming tax, the term "gaming revenue" has been defined to mean gross turnover less the amount paid out to customers as winnings.

Who will be affected

Licensed bookmakers, persons authorized to promote a lottery, persons carrying on a gaming business and persons licensed to promote a premium rated prize competition.

When

1 January 2017.

Our view

We consider that the introduction of new taxes in the gaming industry is aimed at meeting two objectives: simplifying taxation of the industry and enhancing collection of revenue from this rapidly growing sector. These taxes should be fairly simple to administer given they are levied on the turnover of operators in the gaming industry as opposed to their customers. It is therefore expected that collection of taxes from the industry will increase in line with the growth witnessed in the industry in the recent past.

The introduction of additional taxes could however result into a huge tax burden for the industry. This is because there is no clause that exempts gaming companies from corporation tax. The new taxes together with the corporate income taxes could therefore be prohibitive. It will not be easy for operators to shift the taxes to its customers as it is levied on gross income less winnings paid out.

Financial Sector

Banking Act

Credit information sharing.

The measure

The Finance Act has introduced various amendments to the Banking Act to allow Saccos and utility companies to participate more effectively in the credit information sharing framework.

Who will be affected

Borrowers, Saccos, public utility companies and any other institutions mandated to share credit information under any written law.

When

1 January 2017.

Our view

Although this is a well-intended move to ensure a complete credit profile of borrowers and ultimately reduce the risk of bad debts, there is a high risk of inaccurate data finding its way into the system given the history of numerous disputes with some utility companies on incorrect bills.

CBK's powers to place banks under statutory management

The measure

The Finance Act has introduced a provision in the Banking Act that requires the Central Bank to consult the National Treasury Cabinet Secretary before placing a bank under statutory management. The provision has been introduced as an amendment to Section 34 (2) of the Banking Act.

Who will be affected

Banking institutions.

When

1 January 2017.

Our view

This amendment is in our view aimed at limiting the discretion of the Central Bank governor in deciding to place a bank under statutory management.

Higher penalties for non-compliant financial institutions

The measure

The Finance Act has raised the maximum penalties that can be imposed for violating the Banking Act. In the case of institutions, the maximum penalty has been raised from KES 5 million to KES 20 million. The penalty in respect of natural persons has been raised from KES 200,000 to KES 1 million. Additional penalties of KES 100,000 per day will be charged each day the violation continues.

Who will be affected

Banking institutions, credit reference bureaus and individuals.

When

1 January 2017.

Our view

The measures are aimed at enhancing compliance with the Banking Act and prudential guidelines within the banking sector. While positive, it is recognized that these measures are not, by themselves, sufficient to guarantee stability in the sector.

Capital Markets Act

Regulation of online foreign exchange trading

The measure

The Act has introduced amendments to the Capital Markets Act to facilitate the issuance of regulations to govern online foreign exchange trading which would strengthen governance of players and provide protection to consumers.

Rules and regulations will be formulated by the National Treasury Cabinet Secretary to regulate the operations and supervision of online forex trading activities and online forex brokers. In addition, online forex brokers will be required to obtain licenses from the Capital Markets Authority in order to undertake online forex trade.

Who will be affected

Online forex brokers.

When

1 January 2017.

Our view

There has been an increase in online foreign exchange trading in Kenya. This increase necessitated regulation.

Legal framework for commodity exchange market introduced

The measure

The Finance Act has amended the Capital Markets Act by introducing the legal framework for the establishment of a commodity exchange market in Kenya. The framework mirrors those of securities that are traded on the Nairobi Securities Exchange.

Approval of the Capital Markets Authority is needed before one carries on a business of a commodity exchange. As with securities exchange, a person applying to the Authority to carry out a business as a commodities exchange needs to be a limited liability company whose liability is limited by shares or as prescribed by the Authority. In addition, the applicant's board of directors should be constituted in a manner prescribed by the board. It should also have made and adopted rules in compliance with the Capital Markets Act and any regulations made thereunder.

Other provisions relating to licensing requirements, change of rules and the penalties for breach of the provisions of the Capital Market Act for securities exchange markets will also apply to commodities exchange markets.

Who will be affected

Capital Markets Authority, investors and farmers.

When

1 January 2017.

Our view

The introduction of the legal framework for commodities exchange markets should boost Kenya's profile as the financial hub in the region. Only Ethiopia and Rwanda currently have commodities exchange markets in the region.

It is expected that the establishment of a commodities exchange market in the country, will save farmers from low prices of unscrupulous middlemen.

Kenya Deposit Insurance

Members of the Kenya Deposit Insurance Corporation.

The measure

The Act has introduced the following amendments to the Kenya Deposit Insurance Act, 2012:

- The Chief Executive Officer of the Kenya Bankers Association has been included as a member of the board of the Kenya Deposit Insurance Corporation (KDIC); and
- The National Treasury CS has been restricted from appointing persons who are public officers or members of any institution licensed by the Central Bank of Kenya to the KDIC board.

Who will be affected

Kenya Deposit Insurance Corporation, public officers or institutions licensed by CBK.

When

1 January 2017.

Our view

This move is aimed at avoiding conflicts of interest among members of the Board of Directors of KDIC and, thereby, enhancing good governance in the Corporation.

Miscellaneous

Retirement Benefits Act

Amendments to strengthen retirement benefit institutions.

The measure

The Finance Act has introduced the following amendments to the Retirement Benefits Authority Act, 1997:

- Removal of annual licensing for institutions licensed by the Retirement Benefits Authority (RBA). In its place, non-renewable perpetual licenses which RBA can withdraw, if necessary, will now apply. In addition, annual fees to be paid by licensees will be prescribed by RBA from time to time;
- Retirement benefit institutions are now required to submit to RBA audited financial statements, a list of the directors and top management, any changes in clientele and any further information as required by RBA by 30th September of every year; and
- Retirement benefit institutions are now required to communicate any changes in shareholding, directorship or top management to RBA within thirty days of the change.

In addition to the Finance Act changes, the National Treasury Cabinet Secretary has also made amendments to the Retirement Benefits Regulations through Legal Notices 99 to 101 and LN 107. Below is a summary of the amendments:

Legal Notice 99 – The Retirement Benefits (Individual Retirement Benefits Schemes) Regulations, 2000

- Introduction of a paragraph in Regulation 9 that protects Trustees from victimization, unfair removal from office or discrimination; and
- Regulation 20 is amended to the effect that scheme funds should now vest to a member immediately and not within 5 years as initially stipulated.

Legal Notice 100 – The Retirement Benefits (Minimum Funding Level and Winding up of Schemes) Regulations, 2000

Regulation 8A is deleted and replaced with the following regulation:

- The liquidator shall be required, in the preparation of the preliminary accounts, to provide for the distribution of surpluses identified which shall be on a 50-50 basis between the members and the sponsor.

Legal Notice 101 – Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000

- Introduction of a provision in Regulation 8 that protects Trustees from victimization, unfair removal from office or discrimination;
- Introduction of a paragraph in Regulation 14 that allows a member to make additional voluntary contributions in respect of funding of a medical fund to be accessed at retirement;

Our view

This is a move to have checks and balances on the management of Retirement Benefit institutions by the managers, custodians and administrators of the funds.
Retirement benefit institutions will need to have in place audited accounts by 30 September.

- Regulation 19 is amended to allow a member to transfer a portion of his/her benefits to a medical-cover provider where he/she has been unable to build a post-retirement medical fund from additional contributions; and
- Regulation 20 is also amended to the effect that benefits will now fully vest in a member immediately on commencement of pensionable service and not within 1 year of pensionable service as earlier provided.

Legal Notice 107 – Retirement Benefits (Forms and Fees) Regulations, 2000

- Table G of the Regulations has been replaced by a new table that stipulates the maximum percentage of aggregate market value of total assets of scheme or pooled funds that can be invested by a scheme. Worth noting from the table is that the maximum percentage that can be invested in non-listed debt securities has been reduced from 30% to 10%.

Who will be affected

Retirement benefit schemes, contributors/members and trustees.

When

The Finance Act changes are effective 1 January 2017.
Changes introduced by Legal Notices 99 through 101 and LN 107 effective 9 June 2016.

Companies Act

Repeal of the provision that required shareholders of foreign companies to cede at least 30% of their shareholding to Kenyan citizens in order for the companies to be registered in Kenya.

The measure

The Finance Act has amended the Companies Act, 2015 by deleting Section 975 (2) which required foreign companies wishing to register offices or branches in Kenya to demonstrate that at least 30% of their shareholding is held by Kenyan citizens by birth. The penalty for failure to comply with this provision was KES 5 million.

Who will be affected

Foreign companies wishing to register offices or branches in Kenya.

When

1 January 2017.

Our view

This move should be lauded since it has been reported in some quarters that some foreign companies were opting to register their offices in other neighboring companies in order to avoid the prohibitive local ownership requirement under the new Companies Act.

Investors viewed this provision as unfriendly as it left them with only the option of incorporating a subsidiary as their vehicle of business in Kenya.

Public Finance Management

Second term for members of the Accounting Standards Board.

The measure

The Act has introduced amendments to the Public Finance Management Act, 2012, to provide for the possibility of a second term of three years for members of the Accounting Standards Board. Currently, members are not allowed to serve for more than three years.

Who will be affected

Members of the Accounting Standards Board.

When

1 January 2017.

Our view

This move is aimed at protecting the institutional memory and ensuring continuity in the affairs and business of the Board.

Alcoholic Drinks Control Act 2010

Repeal of Section 68A.

The measure

The Act has repealed Section 68A of the Alcoholic Drinks Control Act 2010 which was introduced through an amendment Act that was assented on 14 May 2015 but took effect on 4 June 2015.

Section 68A empowered the National Treasury Secretary to implement tax policies and grant remission of duty to locally manufactured alcoholic drinks so as to promote compliance of such drinks with the law. Further, the section provided for remission of excise duty at 90% on beer made from sorghum, millet or cassava grown in Kenya subject to certain conditions being fulfilled.

Who will be affected

Manufacturers and sellers of alcoholic drinks.

When

9 June 2016.

Our view

This move is aimed at aligning the Alcoholic Drinks Control Act with the recently enacted Excise Duty Act 2015.
There Government continues to grapple with the challenge of developing an appropriate tax policy for alcoholic beverages especially those targeted at the low end of the market to ensure promotion of safe but affordable alternatives. This calls for greater involvement of stakeholders in determining the impact of policy measures and applying lessons of experience to refine policy.

Consumers Protection Act

Exemption of bilateral or multilateral foreign financial institutions from certain provisions of the Act.

The measure

The Finance Act has introduced an amendment under the Consumers Protection Act which excludes bilateral or multilateral foreign financial institutions from the provisions of Section 62.

Section 62 of the Consumers Protection Act provides among other things that a borrower can repay the full outstanding balance under a credit agreement without any prepayment charge or penalty.

Prior to the Finance Act 2016 amendment, the provisions of Section 62 were applicable on all credit agreements except where the National or the County Government is the principal borrower or guarantor or where the borrower is a public entity.

Who will be affected

Bilateral or multilateral foreign financial institutions.

When

1 January 2017.

Our view

It is likely that this amendment has been introduced in order to attract more foreign lenders into the market and increase access to affordable credit

Special Economic Zones Act

Tax exemptions to special economic zones enterprises, developers and operators.

The measure

The Finance Act has deleted the provisions under the Special Economic Zones Act that provide for tax exemptions to enterprises established in special economic zones, developers and operators. Instead, the Act has introduced a proviso that indicates the exemptions to special economic zones enterprises, developers and operators will be granted under the respective tax laws.

Who will be affected

Special economic zones enterprises, developers and operators.

When

9 June 2016.

Our view

This amendment serves to clear the confusion regarding the exemption status of enterprises operating under special economic zones. The Special Economic Zones Act provided blanket exemption from all taxes for all SEZ transactions but the enterprises will now be subject to the specific provisions of the various tax acts relating to exemptions.

Convention and conference facilities included as special economic areas

The measure

The Finance Act has amended subsection 6 of Section 4 of the Special Economic Zones Act and included convention and conference facilities as an area that can be declared to be a special economic area.

Who will be affected

Investors wishing to set up convention or conference facilities.

When

9 June 2016.

Our view

This amendment is in our view aimed at boosting conference tourism that has been on the rise recently in Kenya.

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