



Tax Alert

High Court temporarily suspends the implementation of "Robin Hood Tax"

The High Court on 19 July 2018 issued a conservatory order delaying the implementation of excise duty introduced by the Finance Bill 2018 in Paragraph 6, Part II of the First Schedule of the Excise Duty Act, 2015 ("EDA") until such a time a proper definition of "money transferred by banks" is provided and sufficient time allowed for alteration of computer systems operated by banks to charge excise duty.

The Cabinet Secretary ("CS") for National Treasury in his 2018-19 budget speech had proposed the introduction of "Robin Hood Tax" in the form of excise duty of 0.05% on money transferred by banks if the transferred amount is KES 500,000 or more, with the effective date being 1 July 2018.

Background

Following the proposal by the CS for National Treasury in his 2018-19 budget speech to **introduce "Robin Hood Tax" on money transfers**, the Finance Bill 2018 proposed to amend the EDA by introducing a provision to impose excise duty on money transferred by banks, money transfer agencies and other financial service providers at the rate of 0.05% of the amount transferred in case of money transfer of KES 500,000 or more.

The provision poses a number of **difficulties in terms of interpretation** as well as **practical application**. In view of these difficulties, the Kenya Bankers Association ("KBA"), representing the banking industry, filed an application at the High Court seeking to suspend the implementation of this provision. The KBA submitted to the Court that clear guidelines are required on what constitutes "money transferred by banks". Further, the industry envisages

implementation hurdles since the provision would require changes in the banks' software; and the changes would take time because most of the software vendors are based outside Kenya.

The Attorney General, being the first respondent, disputed KBA's request for the orders on grounds of the motion not meeting the threshold for granting of conservatory orders. The second respondent, the KRA, contended that the concept of "money transferred by banks" was not a new concept in the banking sector and therefore banks would be in a position to comply even in the absence of a definition. The KRA further noted that some banks had already communicated to their customers on their intention to implement the new provision, implying that they clearly understood the wording of Paragraph 6.

In granting the conservatory orders sought by KBA, Hon. Lady W. Okwany noted that KBA's quest for clarification of the impugned paragraph cannot be taken lightly bearing in mind that banks handle clients' monies and are expected to provide detailed account of any deductions therein, whether in respect of bank charges or taxes. The judge further made reference to various case laws requiring clarity in tax laws and requested both KRA and the Attorney General to serve replying affidavits within 14 days. The hearing is scheduled for 17 September 2018.

Our view

The conservatory orders provide relief to both the industry and taxpayers given the potential adverse impact of imposing the tax on various transactions without clarity on which transfers are taxable. For instance, it is not clear whether the provision would capture internal transfers, say from one client account to another, interbank transactions, and other transactions that may involve movement of funds on behalf of the same beneficiary.

Given that the conservatory order delays implementation of "Robin Hood Tax" until such a time when the conditions stipulated by the Court are met, there will be no liability backdated to 1 July upon reinstatement of the provision.

We are of the view that the National Treasury and the KRA should engage all affected stakeholders, especially financial institutions, to resolve the underlying issues to enable a smooth implementation of "Robin Hood Tax".

Furthermore, we believe the basis for the tax should be carefully considered to avoid unintended consequences such as the negative impact of settlement of obligations, flow of funds or multiple taxation of the same income base.

Conclusion

The suspension of this provision, and subsequently the suspension of the Finance Bill 2018 provisions, reinforces the need for meaningful engagement with key stakeholders on significant changes in tax policy as well as practical measures to collect tax. Most taxes are collected through the agency arrangement and as such, it is important to ensure that the burden of collection is not made more onerous due to uncertainty in legislation or impractical and/ or costly collection measures.

It is hoped that the Treasury will move fast to address the issues at hand while engaging the industry to agree on suitable modalities for compliance going forward.

Should you have any question on this, kindly contact your relationship manager at Deloitte who will be more than glad to offer you guidance and assistance as necessary.

Regards,

Fred Omondi

Tax & Legal Leader, Deloitte East Africa



Deloitte Place
Waiyaki Way, Muthangari
P. O. Box 40092 - GPO 00100
Nairobi, Kenya

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