



In this issue:

Introduction	1
Corporate Tax	2
PAYE Tax	3
Stamp Duty	4
Value Added Tax	5

Tax Laws (Amendment) Act 2018

Tracking the changes

The Tax Laws (Amendment) Act (TLAA) was assented into law on 18 July 2018. The Act contains some new provisions that were not contained in the Finance Bill 2018.

This alert provides a summary of the key provisions and effective dates.

The alert is structured according to the tax heads and sectors affected and provides insights on how the changes introduced could impact your business.

Corporate Tax

Definition of 'winnings'

The measure

The Tax Laws (Amendment) Act (TLAA) 2018 provides the definition of 'winnings' for income tax purposes directly in the Income Tax Act (ITA).

Previously, the ITA assigned 'winnings' the definition provided in the Betting, Lotteries and Gaming Act, wherein 'winnings' is defined as "winnings of any kind and a reference to the amount or to the payment of winnings shall be construed accordingly".

Per the amendment, 'winnings', for purposes of the ITA, is now defined as "the positive difference between payouts made and stakes placed in a given month, for each player, payable to punters by bookmakers licenced under the Betting, Lotteries and Gaming Act".

Who will be affected

Punters (players) in the Betting, Lotteries and Gaming industry.

When

01 July 2018

Compensating tax

The measure

The TLAA introduces a new paragraph (56) in the First Schedule, Part A of the ITA which provides exemption from payment of compensating tax accruing to power producers with a power purchase agreement.

Who will be affected

Power producers with power purchase agreements.

When

01 July 2018

Our view

The definition of 'winnings' directly in the ITA is positive on multiple fronts. First, defining 'winnings' directly in the ITA simplifies tax legislation as previously one would have to revert to the Betting, Lotteries and Gaming Act for the definition.

Second, the definition of 'winnings', as provided by the TLAA, is more robust than that provided in the Betting, Lotteries and Gaming Act. This ensures clarity in the tax legislation.

Third, the definition takes into account the stakes placed by a punter. This means tax is not applied on the gross winnings but on the net gain. The tax treatment is expected to ease the tax burden placed on punters but on the other hand, it may cause implementation challenges for bookmakers when determining the net gain.

Our view

Under this measure, power producers with a power purchase agreement will not be required to pay compensating tax on untaxed profits which would arise from having significant investment deduction claims that such producers are likely to make. Compensating tax has been a big issue for power producers due to the huge capital investment required in this industry, which creates tax losses and consequently, compensating tax where dividends are paid. This move appears to be targeted at reducing the overall tax burden faced by power producers, and thereby incentivise independent power producers to set up and/or expand their operations.

However, the above measure may soon be made obsolete if provisions of the Finance Bill 2018, which seek to repeal the compensating tax regime, are passed into law without any amendments. The Finance Bill 2018 proposes to repeal the current compensating tax regime and replace it with corporation tax on distributions made out of untaxed profits.

Taxation of winnings

The measure

Sections 34(1), 34(2), 35(1) and 35(3) of the ITA, that cover payments subject to withholding taxes, have been amended to introduce a new paragraph titled 'winnings', immediately after paragraphs 34(1)(l), 34(2)(h), 35(1)(h) and 35(3)(g).

Similarly, TLAA amends Head B, Third Schedule of the ITA 2014 by introducing a new subparagraph under paragraphs 3 and 5 which sets the withholding tax rate with respect to winnings at 20%. The tax withheld on winnings received by resident persons will be a final tax.

Who will be affected

Punters (players) in the Betting, Lotteries and Gaming industry.

When

01 July 2018

PAYE Tax

Affordable Housing Relief

The measure

A new provision under Section 30A of the ITA, providing for affordable housing relief deduction, has been introduced as follows:

A resident individual who satisfies the Commissioner that in a year of income he/she is eligible to make an application under an affordable housing scheme approved by the Cabinet Secretary in charge of housing, has applied for and is awaiting the allocation of a house under such a scheme, in addition to saving for a purchase under such a scheme is entitled to a personal relief to be referred to as "affordable housing relief."

The amount of the affordable housing relief to be granted shall be 15% of gross emoluments up to a limit of KES 108,000 per annum.

However, an individual who has been allocated a house under the affordable housing scheme and has been subject to an affordable housing relief, shall not be re-eligible for a subsequent relief.

Who will be affected

All individual taxpayers.

When

01 July 2018

Registered Home Ownership Savings Plan

The measure

The TLAA amends Section 22C(2) ITA by:

- Deleting the expression "forty-eight" and substituting the same with the expression "ninety-six"; and
- Deleting the word "four" and replacing the same with the word "eight".

Who will be affected

Taxpayers contributing to a registered home ownership savings plan.

When

01 July 2018

Our view

This measure seeks to bring winnings under the taxation net. Similarly, it provides for the imposition of withholding income tax on winnings paid to non-resident taxpayers not having a permanent establishment in Kenya.

Per amendments to Head B, Third Schedule of the ITA, the withholding income tax rate applicable in relation to winnings is 20%, both to resident and non-resident taxpayers.

Our view

The increase in types of personal reliefs claimable by tax residents is a welcome move, as it will reduce the tax liability for the qualifying individual taxpayers who participate in such affordable housing schemes and encourage saving towards affordable housing.

However, the relief availed is limited to one house under the scheme i.e. individuals, who are allocated a house under the affordable housing scheme and have each been subject to affordable housing reliefs, are not eligible for subsequent reliefs.

Our view

We note that the TLAA increases the allowable tax deduction accorded to taxpayers contributing to a registered home ownership savings plan from a maximum of KES 48,000 annually (KES 4,000 per month) to a maximum of KES 96,000 annually (KES 8,000 per month).

This represents a doubling of the maximum relief available to taxpayers contributing to a registered home ownership plan, and is a welcome change.

Noting that affordable housing is a key tenet of the Government of Kenya's Big 4 Agenda, this change is likely targeted at further incentivising taxpayers to participate in the affordable housing scheme.

Stamp Duty

Valuation of Immovable Property on transfer/sale

The measure

The TLAA amends the Stamp Duty Act by deleting Section 10 (1) and substituting it with the below:

- The Collector of Stamp Duty shall refer to the Chief Government Valuer **or a registered and practicing valuer** appointed by the Chief Government Valuer any conveyance or transfer on sale of any immovable property before or after registration of the relevant instruments in order to determine the true open market value of such property as at the date of the conveyance or transfer for purposes of ascertaining whether any additional stamp duty is payable.

However, the substituted paragraph above largely mimics the repealed section, with the change being the inclusion of **‘or a registered and practicing valuer’**.

Who will be affected

The Collector of Stamp Duty and taxpayers seeking to transfer or sell immovable property.

When

01 October 2018

Exemption from Stamp Duty

The measure

TLAA amends the Stamp Duty Act by introducing a new paragraph, Section 117(1)(l), which provides for exemption from stamp duty under this Act for purchase of a house by a first time home owner under the affordable housing scheme.

Who will be affected

Taxpayers purchasing a house for the first time under the affordable housing scheme.

When

01 October 2018

Our view

By introducing the statement **‘or a registered and practicing valuer’**, the valuation of immovable property to determine the true market value of said property can now be carried out by either the Chief Government Valuer, **or a registered and practicing valuer appointed by the Chief Government Valuer**.

This move is seemingly targeted as easing the Chief Government Valuer’s burden to value immovable property on transfer.

Our view

This is seen as a welcome move as it seeks to exempt the purchase of a house by first time home owners under the affordable housing scheme from stamp duty. In comparison, home purchasers currently pay between 2% and 4% of the value of the property as stamp duty.

By exempting the above item from stamp duty, it is expected that participation in the affordable housing scheme by potential first time home owners will be stimulated, keeping in mind that affordable housing is a key pillar of the Big 4 Agenda.

Value Added Tax

Exemption of transfer of business as a going concern

The measure

Exemption of transactions relating to the transfer of a business as a going concern by a registered person to another registered person.

Who will be affected

Registered persons transferring businesses as going concerns.

When

01 July 2018

Our view

Whereas previously zero rated, exemption of transactions relating to transfers of businesses as going concerns is likely to negatively impact recoverability of input tax incurred on taxable supplies acquired in the period of transfer. Exemption would require that the transferor restricts his/her deductible input tax to that portion that can be attributed to taxable purchases.

As the transfer value (which is to be treated as exempt from VAT) is likely to be significantly higher than normal trading income, it is likely that deductible input tax in the period of transfer of business will be significantly reduced. This also applies to VAT suffered on costs incidental to the sale such as legal fees.

Non-deductible input tax will become an added cost to the transferor.

Exemption of supply of natural water by National, County Governments or an approved person

The measure

Exemption of natural water, excluding bottled water, by a National Government, County Government, any political sub-division thereof or a person approved by the Cabinet Secretary for the time being responsible for water development, for domestic or for industrial use.

Who will be affected

The relevant government agencies and common Mwananchi.

When

01 July 2018

Our view

The move to exempt natural water (excluding bottled water) supplied by approved government agencies impacts the recoverability of input tax suffered by such agencies.

Such input tax may be material where approved agencies engage in construction works for upgrade or expansion purposes. Otherwise, input tax suffered in this regard may be relatively minimal where it is only incurred on operations.

All the same, it will be expected that such agencies expense or capitalise input tax suffered on taxable purchases (whether capital or operational in nature) incurred to supply natural water. This could indirectly have a bearing on the cost of water to the Mwananchi.

Exemption of articles of apparel, clothing accessories and equipment specially designed for safety or protective purposes

The measure

Exemption of articles of apparel, clothing accessories and equipment specially designed for safety or protective purposes for use in registered hospitals and clinics or by county government or local authorities in firefighting.

Who will be affected

Suppliers of the above-mentioned items.

When

01 July 2018

Our view

The move to exempt such items may have little impact where they are imported from other countries. However, should such apparel be manufactured locally, any input tax suffered during manufacture will become non-deductible, as input tax, on the part of the seller. It is therefore likely that suppliers to qualifying institutions will factor the additional cost relating to non-deductible VAT in their pricing thereby leading to an increase in the price of these items.

Exemption of taxable goods supplied to marine fisheries and fish processors

The measure

Exemption of taxable goods supplied to marine fisheries and fish processors upon recommendation by the relevant state department.

Who will be affected

Suppliers of the taxable goods to marine fisheries and fish processors.

When

01 July 2018

Our view

The zero rating of taxable goods supplied to marine fisheries and fish processors was part of the Coastal Fisheries Revival Package aimed at facilitating primary, secondary and ancillary marine fisheries processing/production and was introduced through the Finance Act, 2017.

The move to exempt taxable goods to marine fisheries and fish processors is likely to disincentivise the sector due to added costs relating to non-recoverable VAT.

Exemption of maize flour, cassava flour and wheat flour

The measure

Exemption of maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour by more than 10% in weight.

Who will be affected

Local mwananchi, millers and bakers.

When

01 July 2018

Our view

Initially, maize (corn) flour and wheat or meslin flour were exempt from VAT. However, due to the impact of the severe drought experienced in 2017 on food prices, the Government moved to zero rate these items with the hope that zero rating would reduce food prices.

While a move to exemption may result in increased prices for these necessities, it is likely that the heavy rains experienced during the long rains season (March to May) will result in bounty harvests for Kenyans. Increased supply of substitute foods from the farms may cushion Kenyans against price increases arising from the move to exempt these basic food commodities from VAT.

Exemption of goods imported by returning citizens/persons changing residence

The measure

Exemption of goods imported by returning residents and persons on first arrival who are bonafide changing residence from outside Kenya, now moved from the zero-rated to exempt schedule.

Who will be affected

Returning citizens and persons changing residence (on first arrival).

When

01 July 2018

Our view

We do not foresee a significant impact on returning residents/persons changing residence from this change.

Exemption of taxable goods for emergency relief purposes

The measure

Exemption of taxable goods for emergency relief purposes for use in specific areas and within a specified period, supplied to or imported by the Government or its approved agent, a non-governmental organization or a relief agency authorized by the Cabinet Secretary responsible for disaster management.

Who will be affected

Suppliers of goods to relief agencies, non-governmental organizations and approved agents operating in the emergency relief space.

When

01 July 2018

Our view

Due to this change, local suppliers to government or its agencies, for relief goods, will suffer non-deductibility of input tax incurred on their taxable purchases. However, the impact is likely to be minimal where the relief goods are imported.

Agricultural pest control products now taxable at the general rate (16%)

The measure

Agricultural pest control products have been removed from the schedule of zero rated supplies, effectively making them taxable at the general rate of 16%.

Who will be affected

Farmers.

When

01 July 2018

Our view

Agricultural pest control products were exempt from VAT until 3 April 2017 when the VAT status of such products changed to zero-rated. This change was effected through the Finance Act, 2017. At the time, this was lauded as a move towards ensuring affordability and accessibility of pest control products to farmers.

The move to make the products taxable at the general rate will make them more expensive. This may in turn have an indirect negative bearing on food security, a key pillar in the Government's Big 4 Agenda.

It would also seem that there is a mix-up in the VAT status of inputs for manufacture of such products. Paragraph 90 of the First Schedule (introduced through the Finance Act, 2017) exempts inputs for the manufacture of pesticides from VAT. On the other hand, Paragraph 16 of the Second Schedule (also introduced through the Finance Act, 2017) zero-rates all inputs and raw materials whether imported or produced locally supplied to manufacturers of pest control products. There is need to correct this.

Zero rating of inputs for electric accumulators and separators used in the manufacture of automotive and solar batteries

The measure

Zero rating of inputs and raw materials for electric accumulators and separators, including lead battery separator rolls, whether or not rectangular or square, supplied to manufacturers of automotive and solar batteries.

Who will be affected

Manufacturers and consumers of batteries.

When

01 July 2018

Our view

Zero rating of the inputs for manufacture of automotive and solar batteries is likely to lead to a reduction of the prices of batteries, owing to the manufacturers being in a position to recover the input tax and not having to pass over the costs to the consumers.

This change will promote local manufacturing of the batteries in line with the Big 4 Agenda and hopefully bring down the cost of solar powered batteries that are used to power up alternative sources of energy.

Amendments proposed in the Bill but not included in the Act

The measure

The Tax Laws Amendment Bill had proposed to include a number of items in the exemption schedule but we note that some of these items have been deleted from the Act. While the below items had been proposed for exemption in the Bill, they have been excluded from the Act and therefore maintain their zero-rated status:

- Taxable supplies, imported or purchased for direct and exclusive use in the construction of a minimum of five thousand housing units, by a licensed special economic zone operator, developer or enterprise upon recommendation by the Cabinet Secretary for the time being responsible for housing;
- Taxable supplies, imported or purchased for direct and exclusive use in the construction of a hotel and/or conference facility by a licensed special economic zone operator, developer or enterprise upon recommendation by the Cabinet Secretary for the time being responsible for tourism;
- 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;
- Liquefied Petroleum Gas (LPG);
- Ordinary bread; and
- Milk and cream, not concentrated nor containing added sugar or other sweetening matter, of tariff numbers 0401.10.00, 0401.20.00, 0401.40.00 and 0401.50.00

Additionally, the Bill had proposed to delete Part C of the Second Schedule to the VAT Act, 2013 (deals with zero-rated medicaments) and move all items of medicaments listed therein to the exemption schedule. This proposal has been dropped and the medicaments maintained in Part C.

The move to retain the zero-rated status of the above listed items is a welcome one and this will contribute to ensuring that these products, some of which are basic/essential commodities, remain affordable for the common Mwananchi.

Who will be affected

Suppliers of the above products.

When

01 July 2018

Our view

Maintenancance of the above items in the zero rating schedule is likely to ensure that prices of the commodities remain low. This is because the suppliers will still be in a position to recover the input tax incurred in generation of the supplies.

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