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Tax Briefly
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Tax Changes in the Statute Law (Miscellaneous Amendments) Act, 2017

Keeping you informed

The legislature passes annual amendments to various laws through the Statute Law (Miscellaneous Amendments) Act ("SLA"). Typically, the amendments passed under this Act cover other laws excluding amendments to tax laws since the annual Finance Act contains the major amendments to tax laws.

The SLA, 2017 however contains amendments to the various tax laws including: the Income Tax Act ("ITA"), the Value Added Tax Act, the Excise Duty Act and the Miscellaneous fees and Levies Act.

Importantly, the amendments to tax laws under the SLA, 2017 have now come into force, the Act having commenced application from **4 May 2017.**

This alert focuses purely on changes to tax legislation.

Our view

The Finance Act, 2017 has not yet been gazetted although the Finance Bill 2017 was gazetted on 3 April 2017. The amendments contained in the SLA 2017 were not contained in the Finance Bill 2017.

Presumably, Parliament sought to bring additional tax amendments through the SLA 2017 since the same were not contained in the Finance Bill 2017. Noting the keen interest expressed by Parliament to pass these amendments, even after the Finance Bill, 2017 was issued, it would seem that the Government is adamant in effecting the changes.

There was always doubt on whether with the Budget being read in March and an election in August, there would be sufficient time for a Finance Bill to be enacted by the current Parliament. The use of SLA 2017 appears to be one way round this issue.

Changes to the Income Tax Act (ITA)

Exemption of The National Hospital Insurance Fund (NHIF) income from tax

The SLA 2017 has introduced an amendment to the First Schedule of the ITA to include the income of the NHIF to the list of income which is exempt from tax in Kenya. The exempt income will consist of all contributions and other payments into and out of the Fund and monies invested under section 34 of the NHIF Act, 1998.

Our view

The NHIF has undergone a number of changes in the recent past to make it an efficient and effective health care insurer. The impact of these changes has been largely positive with more Kenyans now able to access much needed specialized care and health services to deal with illnesses.

The government's move to exempt the NHIF's income from income tax is welcome as it will hopefully leave the NHIF with more resources to fulfil its mandate and contribute to the wellbeing of its members.

Capital expenditure on construction of Liquefied Petroleum Gas (LPG) storage facilities

The SLA 2017 has introduced paragraph 24C in Part V of the Second Schedule to the ITA to provide for investment deduction on capital expenditure incurred on the construction of LPG storage facilities with a minimum capital investment of KES 4 billion and a minimum storage capacity of a total value of 15,000 metric tonnes. The investment deduction shall be equal to 150% of the capital expenditure and shall be granted in the first year of using the LPG storage facilities for storage of LPG.

Our view

The government has on many occasions reiterated its commitment to ensuring access to affordable, clean and safe energy to Kenyans. In keeping with this commitment, the government has recently introduced a raft of tax measures aimed at making clean energy such as LPG affordable.

We see this as a welcome move that will spur investment in LPG storage facilities that will ultimately make the resource more affordable. However, a lot of Kenyan households purchase their LPG cylinders from established marketers who may not benefit from this corporate incentive in the short term since it is limited to new facilities. As a result, this and a host of other factors such as the VAT measures discussed below may prevent the benefits of the incentive from trickling down to the final consumer for whom they are intended. Perhaps a uniform income tax incentive for both existing and new LPG storage facilities would be more effective.

Changes to the Third Schedule – tax incentive for housing developers

The Finance Act 2016 introduced a lower corporation tax rate for housing developers to attract more investors into this sector and address the prevailing housing challenges. The reduced rate of 15% was applicable to those who developed at least 400 units.

The SLA 2017 has amended item 2(i) under Head B of the Third Schedule to the ITA by further reducing the threshold to qualify for this incentive to 100 units. A developer who constructs at least 100 units annually will therefore be entitled to the reduced tax rate of 15%.

Our view

We see this as a welcome move since the minimum number of units qualifying for the incentive is more practical and attainable. This will ensure that more developers qualify for the incentive and hopefully, the benefit of affordable housing will be realized by more home buyers.

Initial indications from the KRA at the time of introducing this incentive through the Finance Act 2016 were that the target was low-income housing implying that the developers eligible for this incentive were those that developed housing specifically for low income earners. However, these indications are not reflected in the ITA changes passed in the Finance Act 2016 and now the SLA 2017. What is clearly missing is a definition of affordable housing, without which it is possible that all developers will benefit. Clearly this is not the intention of the legislation.

Though this incentive may encourage developers into this area of investment, there is no guarantee that the effects will lead to more affordable housing and indeed address the problem of housing shortage.

Changes to the VAT Act, 2013

The SLA 2017 seeks to amend the list of exempt goods and services as follows:

The introduction of paragraph 30A in Part I of the First Schedule of the VAT law. Para 30A will henceforth exempt taxable supplies, procured locally or imported, for the construction of LPG facilities with a minimum capital investment of four billion shillings and a minimum storage capacity of fifteen thousand metric tonnes.

Such exemption is upon approval by the Cabinet Secretary for National Treasury upon recommendation by the Cabinet Secretary responsible for Energy.

Similar exemption has also been extended to taxable services procured locally or imported for the construction of LPG storage facilities. This change has been effected through introduction of Paragraph 28 Part II of the First Schedule to the VAT law.

Our view

The government has in the recent past devised a number of tax measures to enhance access by Kenyans to clean, safe and efficient household energy and also preserve forests and curb diseases associated with the use of wood and charcoal for household energy.

Through the Finance Act, 2016 the government zero rated LPG. The VAT status of LPG was however changed to exempt through the Finance Bill, 2017 effective 3 April 2017.

Exemption indicates government's intention to lower the prices of VAT without creating cases of VAT refund claims which were previously occasioned by the zero rating of LPG. However, we note this is likely to result in higher prices than zero rating as input tax suffered on operational expenses by players in the sector will become sunk costs which will in turn impact the selling price of LPG.

The exemptions introduced through the SLA 2017 target potential investors in the LPG subsector and are geared towards making construction of LPG storage facilities less costly. It is worth noting that such exemptions will only apply where one has met the set criteria, and obtained the necessary approvals.

Changes to the Excise Duty and Miscellaneous Levies Acts

First Schedule of the Excise Duty Act, 2015

The First Schedule of the Excise Duty Act, 2015 has been amended to exclude locally assembled motor vehicles from the ambit of excise duty. The Excise Duty Act 2015 imposed excise duty on motor vehicles of tariff headings 87.02, 87.03 and 87.04 at a specific rate of KES 150,000 per unit for vehicles less than 3 years old and KES 200,000 per unit for vehicles more than three years old. This was however amended vide the Finance Act 2016 that reintroduced an ad valorem rate of 20%. The Finance Act further exempted from excise duty school buses for use in public schools that fall under the above mentioned tariff headings. The SLA 2017 Miscellaneous Amendments have further exempted from excise duty locally assembled motor vehicles of tariff headings 87.02, 87.03 and 87.04.

Our view

Going by the recent launch of the Volkswagen vehicle assembly line in Thika and the planned set up of an assembly plant by Peugeot in Kenya, coupled with the existing vehicle assembly plants, the exemption in our opinion is a move aimed at spurring the growth of motor vehicle assembly industry in Kenya. It is hoped that this will directly lead to a reduction in the prices of vehicles assembled in Kenya, which may in turn see a change in consumer preferences towards new vehicles. The overall impact would encourage adoption of the "Buy Kenya Build Kenya" initiative and an increase in employment opportunities. This measure is also in line with the existing import duty remission granted on imported unassembled motor vehicles.

Second Schedule of the Miscellaneous Fees and Levies Act (MFLA), 2016

The Second Schedule of the MFLA, 2016 has been amended to exempt from Import Declaration Fee (IDF) and Railway Development Levy (RDL), *any other goods, as the Cabinet Secretary may determine that are in public interest, or to promote investments, whose value exceed two hundred million shillings.*

Our view

The exemption from RDL and IDF on goods that are of public interest is expected to make affordable, items that would be deemed to be of public interest. It is however unclear which goods will be deemed to be of public interest. The exemption of IDF on goods for use in investment is a re-introduction of the law which previously granted the Commissioner powers to exempt IDF on any other goods but which had been revoked with the coming into effect of the MFLA 2016. Based on the provisions of the repealed Customs & Excise Act, the National Treasury has in the past exempted from IDF goods imported for implementation of specific capital projects including goods imported by Oil and Gas Companies for their exploration activities. This measure is in line with the Government spirit of promoting capital investments in the country. This would be in addition to the investment deductions already granted under the ITA.

It will however be important for the National Treasury to provide guidelines on the criteria that will be used to determine whether an item would be deemed to be of public interest and the application procedures thereon to ensure that these exemptions are processed.

Other changes

Though our alert is limited to changes affecting tax, the SLA 2017 effected changes to other legislation such as The Insurance Act, The Kenya Information and Communications Act, 1998, The Public Officer Ethics Act, 2003, The Competition Act, 2010, the Companies Act, 2015 among others that you should familiarize yourself with.

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