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NEWSFLASH KENYA

2024 TAX LAW CHANGES ANALYSIS

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→ Background

The National Treasury and Economic Affairs notified the public on 31 October 2024 of its intention to table before the National Assembly some 4 key proposed laws developed after receiving submissions from stakeholders and the public at large, namely: Tax Laws (Amendment) Bill, 2024; Tax Procedures (Amendment) Bill, 2024; Public Finance Management (Amendment) (No.3) Bill, 2024; and Public Finance Management (Amendment) (No.4) Bill, 2024. These Bills have since been passed by Parliament and ultimately assented by the President on 11 December 2024

In this issue we have discussed the changes in tax law contained in the Tax Laws (Amendment) Act, 2024 and Tax Procedures (Amendment) Act, 2024 whose commencement dates are all set at 27 December 2024.

→ Income Tax Act changes

Extension of definition of Royalty

Royalty payments will now include consideration for use or the right to use *any software, proprietary or off-the-shelf, whether in the form of licence, development, training, maintenance or support fees.*

Comment: This added definition brings in services which were already covered under 'management and professional fees'. In addition the inclusion of costs that are ordinarily capitalized as part of the 'intangible asset' of a software will also cause more confusion as to the application of withholding tax on services alone.

Donations to charitable or public benefit organizations

A comprehensive definition of 'donations' has been introduced to affirm the changes brought by the new *The Income Tax (Charitable Organisations and Donations Exemption) Rules, 2024.* Donation means a benefit in money in any form, promissory note or a benefit in kind conferred on a person without any consideration and includes grants.

Comment: The condition that the benefit conferred should be without consideration did not appear in the new Rules, and this definition in the parent act supersedes the Rules. The express inclusion of Grants in the definition also avoids the ambiguities which arise when they are recognized in the income statement.

Changes to taxation of Employment income

The following changes apply benefits or advantages granted to employees:

	Old (Kes.)	New (Kes.)
Tax-free limit for other employment benefits p.a.	36,000	60,000
Tax-free limit for meal benefit p.a.	48,000	60,000
Limit of mortgage interest for owner-occupied residential house p.a.	300,000	360,000
Limit for any amount paid or granted to a public officer provided for by any written law or statutory instrument, with effect from 27th July 2022, to reimburse an expenditure incurred to perform official duties, notwithstanding the ownership or control of any assets purchased	Nil	All exempt
Exempt limit of employer's contributions to registered pension scheme p.a.	240,000	360,000

In addition, the following contributions by employees now qualify as allowable deductions:

- the amount deducted in accordance with section 5(1)(a) of the Affordable Housing Act, 2024 – it replaces the now repealed affordable housing relief;
- a contribution to a post-retirement medical fund subject to a limit of Kes. 15,000 p.m.;
- contributions made to the Social Health Insurance Fund (SHIF) in accordance with section 27(a) and (b) of the Social Health Insurance Act, 2023 - it replaces the now repealed NHIF relief.

The deductible limit for employee's contributions to registered pension or provident funds has been increased from Kes. 240,000 p.a. (Kes. 20,000 p.m.) to Kes. 360,000 p.a. (Kes. 30,000 p.m).

Comment: These changes will slightly easen the tax burden imposed on employment income. The new allowable deductions are an important clarification on whether the contributions qualified for PAYE relief.

Taxation of owners and operators of digital marketplaces and platforms

The focus on taxing the digital economy has been reconfigured to focus on imposing withholding tax (WHT) on owners/ operators of digital marketplaces/ platforms who make or facilitate payments in respect of digital content monetisation, property or services. This covers intermediaries like platform owners/ operators that provide or facilitate payment services to users of their digital marketplaces/ platforms. The applicable WHT is 5% for resident platform owners/ operators, and 20% for non-residents.

Comment: This introduction shifts the responsibility for paying tax from users (buyers and sellers) to intermediaries i.e. platform owners/ operators who handle payments relating to transactions in their digital marketplaces/ platforms. In our view, the replacement of digital service tax (DST) with this WHT introduces equity in taxation of the sector since it covers both resident and non-resident platform owners.

Significant Economic Presence Tax

Another complementary law that replaces DST is the Significant Economic Presence Tax (SEPT) and it applies to non-resident service providers whose income is derived from or accrues in Kenya through a business carried out over a digital marketplace. SEPT shall be charged at a rate of 30% of the deemed taxable profit. The taxable profit shall be deemed to be 10% of the gross turnover, and taxpayer shall submit a return and pay the tax due on or before the 20th day of the month following the end of the month in which the service was offered. However SEPT will not apply where:

i. the non-resident person offers the services through a permanent establishment;
ii. an income is chargeable under section 9(2) or section 10 of the Income Tax Act (ITA);
iii. a non-resident person provides digital services to an airline in which the government of Kenya has at least 45% shareholding; or

iv. a non-resident person who has an annual turnover of less than Kes. 5 million.

Comment: This shift from Pillar 2 to Pillar 1 when taxing non-resident service providers in the digital economy will effectively double the impact of the repealed DST since applying the tax rate on 10% of gross turnover amounts to 3% tax.

Minimum top-up tax

Kenya has also surprisingly adopted a pinch of Pillar 2 by adopting the global concept of minimum top-up tax where the combined effective tax rate in respect of a covered person for a year of income is less than 15%. It is computed as follows:

$$\text{Combined effective tax rate (CETR)} = \frac{\Sigma \text{ adjusted covered taxes}}{\Sigma \text{ net income/loss for year}} \times 100$$

$$\text{Tax payable} = \left(15\%\ of\ net\ \frac{income}{loss}\ for\ year - \text{CETR}\right) \times \text{Excess profit}$$

A covered person is a resident person or a person with a permanent establishment in Kenya who is a member of a multinational group and the group has a consolidated annual turnover of EUR 750 million or more in the consolidated financial statements of the ultimate parent entity in at least 2 of the 4 years of income immediately preceding the tested year of income.

Minimum top-up tax shall not apply;
- to a public entity that is not engaged in business;
- to a person whose income is exempt from tax under paragraph 10 of the First Schedule;
- to a pension fund and the assets of that pension fund;
- to a real estate investment vehicle that is an ultimate parent entity;
- to a non-operating investment holding company;
- to an investment fund that is an ultimate parent entity;
- to a sovereign wealth fund; or
- to an intergovernmental or supranational organisation including a wholly owned agency or organ of the intergovernmental or supranational organisation.

Comment: This introduction affirms Kenya's commitment to harmonize taxes on cross-border trade in line with the OECD BEPS Action Plans.

Withholding Tax (WHT) changes

The following transactions have also been brought to tax under the withholding tax regime:

Transaction	Resident rate	Non-resident rate
Supply of goods to a public entity	0.5%	5%
Sale of scrap	1.5%	1.5%

Comment: The withholding income tax regime has been traditionally applied to services. In our opinion, this new shift to charging it on payments for supply of goods will introduce concerns of tax overpayments arising from payment delays (pending bills crisis in Government) and margins leading to lower than paid WHT.

Alterations to exempted incomes

The following exemptions under the Income Tax Act have been restated:

Payment of pension benefits from a registered pension fund, registered provident fund, registered individual retirement fund, public pension scheme or National Social Security Fund, upon attainment of the retirement age determined in accordance with the rules of the fund or the scheme:

Provided that this exemption shall also apply to—

- payment of gratuity or other allowances paid under a public pension scheme;
- payment of a retirement annuity; or withdrawals from the fund prior to attaining the retirement age due to ill health; or withdraws from the fund after the twenty years from the date of registration as a member of the fund.

Income earned by a non-resident contractor, sub-contractor, consultant or an employee involved in the implementation of a project financed through a one hundred per cent grant under an agreement between the Government and a development partner, to the extent provided for in the Agreement:

Provided that;

- the non-resident contractor, subcontractor, contractor or employee shall maintain this status for the tenure of the agreement;
- any other income not directly related to the

project earned by that non-resident contractor, sub-contractor, consultant or employee shall be subject to tax.

Comment: The exemption of pension benefits paid upon attaining retirement age has now been comprehensively restated. In addition, the conditions for exemption of contractors participating in an official aid-funded project have now been introduced to curb abuse.

Reduction of capital outlay requirement for 100% investment deduction

The cumulative investment requirement of Kes. 2 billion in locations outside Nairobi City County and Mombasa County for claiming a 100% capital allowance has been reduced to Kes. 1 billion.

Comment: This is set to further boost foreign direct investments in counties outside the two cities in Kenya.

Special Capital Gains Tax (CGT) rate for certified NIFCA transactions

The CGT rate has been reduced to 5% where the Nairobi International Financial Centre Authority (NIFCA) certifies that—

- a firm has invested at least Kes. 3 billion in at least one entity incorporated or registered in Kenya within a period of two years; and
- the transfer of the investment is to be made after five years of the date of the investment

Comment: The tax reduction will also encourage set up of investment holding enterprises, investment funds and capital-seeking start-ups within the NIFCA framework.

Late filing penalty for EPZ's

The late filing penalty for annual income tax returns of entities operating in Export Processing Zones has been harmonized and replaced with the relevant penalty under the Tax Procedures Act of Kes. 20,000.

Comment: This reaffirms the purpose of the Tax Procedures Act in preserving the principle of equity in tax processes, deadlines, fines and penalties.

→ VAT Act changes

Time of supply for exported goods

Exportation of goods will now be considered to have occurred at the point of issuance of a certificate of export or other equivalent export document by Customs. The Act further delegates the processing and documentation of VAT on exported goods to the Commissioner of Customs and the Customs law (EACCM Act).

Comment: This condition will improve compliance and adherence to processes within the automated Customs system (ITMS). It will be important for the KRA to reduce the recent downtimes experienced in the ITMS system.

Refund of permanent credits that arose on 01 July 2022

Some taxpayers whose supplies were reclassified to exempt and zero-rated by Finance Act 2022 have not been able to utilize or apply for refund of any credits that existed on 1st July 2022. They will now qualify for refund of the permanent credit upon meeting the following conditions:

- The refundable excess arose from a permanent credit position caused by the difference between the rate applicable on the 1st July, 2022 and a lower rate of tax and that such credit position existed on the date that the taxable supply became zero-rated or exempted; and
- The registered taxpayer applies to the Commissioner for relief within 6 months after 27th December 2024

On a separate note input tax will no longer be claimed by a a registered person who is a manufacturer that makes taxable supplies to an official aid funded project.

Comment: In our opinion this refund option only applies to items which were previously standard rated and later reclassified to exempt or zero-rated on 01 July 2022. Such items include:

- Bioethanol vapour (BEV) Stoves classified under HS Code 7321.11.00 (cooking appliances and plate warmers for liquid fuel)
- Plant and machinery of chapter 84 and 85 imported by manufacturers of pharmaceutical products or investors in the manufacture of pharmaceutical products
- Medical oxygen supplied to registered hospitals.
- Urine bags, adult diapers, artificial breasts, colostomy or ileostomy bags for medical use.
- Inputs and raw materials used in the manufacture of passenger motor vehicles.
- Locally Manufactured passenger motor vehicles. “locally manufactured passenger motor vehicle” shall mean a motor vehicle for the transportation of passengers which is manufactured in Kenya and whose ex-factory value comprises at least 30% of local content.
- Inputs or raw materials locally purchased or imported by manufacturers of fertilizer as approved from time to time by the Cabinet Secretary responsible for Agriculture.

For the zero-rated items we observe that a similar relief and subsequent refund still existed under Section 18 of the VAT Act.

Reclassification of items

We have tabulated the change in classifications in the next page.

Description	Old rate	New rate
All imported inputs and raw materials supplied to manufacturers of agricultural pest control products upon recommendation by the Cabinet Secretary for the time being responsible for agriculture	0%	Exempt
Agricultural pest control products	0%	Exempt
Fertilizers of Chapter 31	0%	Exempt
Inputs or raw materials locally purchased or imported by manufacturers of fertilizer as approved from time to time by the Cabinet Secretary responsible for Agriculture	0%	Exempt
The supply of denatured ethanol of tariff number 2207.20.00	0%	Exempt
Taxable goods of Chapter 5407 and Chapter 6309 imported as raw materials for manufacture of textile products in Kenya upon recommendation of the Cabinet Secretary responsible for investments, trade and industry	0%	Exempt
Transfer of a business as a going concern	0%	Exempt

→ Tax Procedures Act changes

Stay on import duty

The Act has delayed the application of import duty on the following items for a period of two years, or for such other longer period as the Cabinet Secretary may gazette:

- Imported steel billets of tariff heading 7207.11.00; and
- Imported wire rods of tariff headings 7213.91.00 and 7213.91.90

Comment: The Tax Procedures Act does not cover customs taxes and it will be interesting to gauge the legality of this intervention. This intervention stands to be challenged under the East Africa Community Customs laws and may lead to disharmony among the member states.

Reverse invoicing and exemption of payments subjected to withholding tax (WHT)

The Act has realigned the definition of an invoice with that in the published Electronic Tax Invoice Regulations. In addition, purchasers of supplies from small business owners and small scale farmers with an annual turnover of less than Kes. 5 million will be required to issue invoices on their behalf. Finally, all payments that are subject to withholding tax will not necessarily require an electronic tax invoice.

Comment: The introduction of reverse invoicing will achieve the aim of bringing small business owners and small-scale farmers to the tax net. Similarly, the law has recognized that payments already subjected to WHT may not necessarily need to comply with Electronic Tax invoicing requirements.

Extension of Tax Amnesty

The Tax amnesty on interest, penalties or fines has been extended to cover all principal tax paid by 31 December 2023, or that are subject to a payment plan that settles all outstanding principal tax by 30 June 2025.

Comment: This is a good gesture that has previously even been applied in disputes that parties have opted to discuss out-of-court.

Reinstatement of Commissioner's powers to waive unpaid taxes

The Commissioner will now be able to approve applications for waiver of unpaid taxes, with prior written approval from his Cabinet Secretary, upon determining the following:

- It may be impossible to recover an unpaid tax
- It is in public interest not to recover an unpaid tax
- There is undue difficulty or expense in the recovery of an unpaid tax;
- There is hardship or inequity in relation to the recovery of an unpaid tax; or
- There is any other reason occasioning inability to recover an unpaid tax.

Comment: The new law provides safeguards that affirm Parliament's constitutional role in tax waivers. Parliament has the powers to nullify any of the Commissioner's waiver approvals, but without prejudice to the validity of prior transactions thereunder.

Timeline for offset and refund of overpaid taxes

The Act has affirmed the utilization of overpaid taxes against outstanding tax debts and future tax liabilities such as instalment taxes and input VAT. For refund applications, income tax overpayments will be admitted within 5 years from the date of tax overpayment; and for other taxes within 12 months from the date of overpayment.

Comment: This amendment will address the concerns on reconciliation of migrated legacy debts which KRA set 31st December 2024 as the deadline for settlement of the same. It is now clear that the overpayments captured in KRA's legacy system qualify for utilization in future tax liabilities in the form of instalment tax and input VAT.

Rollout of KRA's data management and reporting system

The Act has now empowered the Commissioner to require taxpayers (on notice) to integrate their *iTax* accounts to KRA's data management and reporting system for purposes of submitting detailed transactional data electronically. The notice period shall not exceed 1 year, and the requirement only applies to businesses whose turnover exceeds Kes. 5 million.

Comment: This is a continuation of KRA's enhancement of its systems that will now allow it to obtain taxpayer's primary records/ documents electronically. Therefore, future assessment and audit review notices will be backed by primary information/ evidence already in KRA's possession.

Clarity on timelines for challenging tax decisions

The Act has clarified that when computing the periods for lodging an objection notice with the Commissioner, or appeal to either the Tax Appeals Tribunal, High Court or Court of Appeal then weekends (Saturdays and Sundays) and public holidays shall be excluded.

Comment: This is a reprieve on the side of taxpayers especially in recent incidents where notices for public holidays have even been released in less than 24 hours to the days.

→ Excise duty Act changes

Taxation of non-resident providers of excisable services through a digital platform

Any excisable service delivered by non-residents through a digital platform shall now be subject to excise duty payable by the service provider. The expected services here include:

- Digital lenders
- Telephone and internet data services
- Money transfer services by banks, money transfer agencies and other financial service providers
- Money transfer services by cellular phone service providers
- Services by financial institutions

In addition, fees charged by digital lenders (subject to a tax rate of 20%) have been defined as any fees, charges or commissions charged relating to their licensed activities but does not include interest, pre-loan interest, post-loan interest, return on loan or any share of profit or an insurance premium or premium based or related commissions specified in the insurance Act or regulations made thereunder. The lender must also have a valid digital credit providers licence issued by the Central Bank of Kenya.

Comment: The Act is not clear on the implementation and enforcement of excise duty on non-resident service providers. We also expect the taxation of non-resident service providers to even the playing field for all players.

Deadline for paying duty by manufacturers of alcoholic beverages

The timeline for paying duty by licensed manufacturer of alcoholic beverages has been extended to fifth day of the following month from the previous timeline of 24 hours upon removal of the goods from the stockroom.

Comment: This is a reprieve to the industry that has aggressively complained and lobbied for change of this seemingly difficult deadline.

The changes to the First Schedule to the Excise Duty Act, 2015 is tabulated below:

Description	Old rate	New rate
Imported sugar excluding sugar imported by a registered pharmaceutical manufacturer and raw sugar imported for processing by a licensed sugar refinery	Kes. 5 per kg	Kes. 7.50 per kg
Locally assembled electric vehicles.	20%	Exempt
Cigarette with filters (hinge lid and soft cap)	Kes. 3,825.99 per mille	Kes. 4,100 per mille
Cigarettes without filters (plain cigarettes)	Kes. 2,752.97 per mille	Kes. 4,100 per mille
Products containing nicotine or nicotine substitutes intended for inhalation without combustion or oral application but excluding medicinal products approved by the Cabinet Secretary responsible for matters relating to health and other manufactured	Kes. 1,500 per kg	Kes. 2,000 per kg

tobacco and manufactured tobacco substitutes that have been homogenized and reconstituted tobacco, tobacco extracts and essences		
Liquid nicotine for electronic cigarettes	Kes. 70 per millilitre	Kes. 100 per millilitre
Imported Fully Assembled Electric transformers and parts of tariff codes 8504.10.00, 8504.21.00, 8504.22.00, 8504.23.00,8504 .31.00, 8504.32.00, 8504.34.00	Exempt	25%
Imported printing ink of tariff 3215.11.00 and 3215.19.00 but excluding those originating from East African Community Partner States that meet the East African Community Rules of Origin	Exempt	15%
Imported Ceramic sinks, wash basins, wash basin pedestals, baths, bidets, water closet pans, flushing cisterns, urinals and similar sanitary fixtures of tariff heading 6910	Exempt	5% of custom value or KSh. 50 per kg
Imported Float glass and surface ground or polished glass, in sheets, whether or not having an absorbent, reflecting or non-reflecting layer, but not otherwise worked of tariff 7007	Exempt	35% of custom value or KSh.200 per kg
Imported ceramic flags and paving, hearth or wall tiles; unglazed ceramic mosaic cubes and the like, whether or not on a backing; finishing ceramics of tariff 6907	Exempt	5% of custom value or KSh. 200 per square meter
Coal	Exempt	2.5% of the custom value
Articles of plastic of tariff heading 3923.30.00 and 3923.90.90 *(deleted the word Imported)*	10%	10%
Imported sugar confectionary of tariff heading 17.04	Kes 40.37 per kg	Kes. 85.82 per kg
3907.99.00 Imported Saturated polyester 3905.21.00 Imported polymers of vinyl acetate/ vinyl esters 3903.90.00 Imported emulsion-styrene acrylic	Exempt	20%
Wines including fortified wines, and other alcoholic beverages obtained by fermentation of fruits	Kes. 189 per litre	Kes. 22.50 per centilitre of pure alcohol
Beer, Cider, Perry, Mead, Opaque beer and mixtures of fermented beverages with non - alcoholic beverages and spirituous beverages of alcoholic strength not exceeding 6%	Kes. 134 per litre	Kes. 22.50 per centilitre of pure alcohol Provided that, Beer, cider, perry, mead, opaque beer and mixtures of fermented beverages with non - alcoholic beverages and spirituous beverages manufactured by licensed small independent b rewers shall be subject to the rate of “KSh 10 per centilitre of

		pure alcohol; *"small independent brewer"* means manufacturers of beer, cider, perry, mead, opaque beer, wine and fortified wines and mixtures of fermented beverages with non-alcoholic beverages manufactured whose production volume does not exceed 150,000 litres per month
Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 6%	Kes. 335.30 per litre	Kes. 10 per centilitre of pure alcohol
Imported Self-adhesive plates, sheets, film, foil, tape, strip and other flat shapes, of plastics, whether or not in rolls of tariff number 3919.90.90, 3920.10.90, 3920.43.90, 3920.62.90 and 3921.19.90 but excluding those originating from East African Community Partner States that meet the East African Community Rules of Origin	N/A	25% or Kes. 75 per Kilogramme, whichever is higher
Printed paper or paperboard of tariff heading 4811.41.90 or 4811.49.00 but excluding those originating from East African Community Partner States that meet the East African Community Rules of Origin	N/A	25% or Kes. 150 per kilogramme, whichever is higher
Imported plates of plastic of tariff heading 3919.90.90, 3920.10.90, 3920.43.90, 3920.62.90 and 3921.19.90 but excluding those originating from East African Community Partner States that meet the East African Community Rules of Origin	25%	25% or Kes. 200 per kilogramme, whichever is higher
Imported paper or paper board, labels of all kinds whether or not printed of tariff heading 4821.10.00 and 4821.90.00 but excluding those originating from East African Community Partner States that meet the East African Community Rules of Origin	25%	25% or Kes. 150 per kilogramme, whichever is higher
Imported eggs of tariff heading 04.07 *excluding fertilized eggs for incubation imported by licenced incubators*	25%	25%
Imported pasta of tariff 1902 whether cooked or not cooked or stuffed (with meat or other substances) or otherwise prepared, such as spaghetti, macaroni, noodles, lasagne, gnocchi, ravioli, cannelloni, couscous, whether or not prepared	20%	Exempt

Description	Old rate	New rate
Excise duty on betting	12.5%	15%
Excise duty on gaming	12.5%	15%

Excise duty on prize competition	12.5%	15%
Excise duty on lottery (excluding charitable lotteries)	12.5%	15%
Excise duty on fees charged on advertisement on *the internet, social media*, television, print media, billboards and radio stations on alcoholic beverages, betting, gaming, lotteries and prize competitions.	15%	15%

→ Miscellaneous Fees and Levies Act changes

Increase of Railway Development Levy (RDL)

The Act has reinstated the previous RDL rate of 2 percent.

Exemptions from RDL and Import Declaration Fee (IDF)

The exemptions for supplies to security organs has been extended to the National Intelligence Service and the Defence Forces Welfare Services.
In addition, textile manufacturers will be exempted for goods of Chapter 5407 and Chapter 6309 imported as raw materials for manufacture of textile products in Kenya upon recommendation of the Cabinet Secretary responsible for industry.

The following tables highlight the additional items to be subjected to export levy:

Tariff No.	Tariff description	Export and investment promotion levy Rate
4804.29.00	Sack kraft bleached	10% of customs value
4804.39.00	Sack kraft bleached	10% of customs value

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