MAY 2022

THE MGK NEWSLETTER

PROPOSED TAX CHANGES AS INCLUDED IN THE FINANCE BILL 2022

BY THE MGK TEAM

Introduction

The 2022/2023 Kenyan budget was read in parliament on 7th April 2022. This was a departure from previous years where the budget statement would be tabled in parliament in the month of June. This was necessitated by the coming general elections scheduled for the 9th August 2022. The theme of this year's budget is "accelerating economic recovery for improved livelihood".

Despite the economic disruption caused by the covid pandemic and the ongoing war in Europe, the government projects the country's economic growth to stabilize at 6% a slight recovery from the 5% posted in the year 2021. This year's budget of KES 3.3 trillion is an increase from the 3.1 trillion budget for the year 2021. In order to raise the proposed revenues to finance the various programs, the government through the Finance Bill 2022 proposed various tax measures outlined in details hereunder.

Income tax Act (ITA) Amendments/Proposals

Section 2 of the income tax act has been amended by inserting the following new definition.

- Fair market value - Comparable market price available in an open and unrestricted market between independent parties acting at arm's length and under no compulsion to transact.
- Financial derivate – A financial instrument whose value is linked to the value of another instrument in a transaction to be settled at a future date.
- Permanent home – A place where an individual resides or is available to that person for residential purposes in Kenya or where the individual's personal or economic interests are closet.

These definitions are to bring clarity to the various sections of the Act where these terms have been used.

Taxation of gains from financial derivatives

Sections 3, 9, 34, 35 and the third schedules have been amended to bring to tax the gains made by a non-resident person who enters into a financial derivate contract with a resident person. The rate of tax will be at 15% and the resident person will bear the responsibility of withholding the taxes upon payment of the gains to the non-resident.

Digital Service tax

Non-resident persons with permanent establishment in Kenya have been exempted from the provisions of the digital service tax by amending section 12 E of the income Tax Act.

Expenses allowable and disallowable for tax purposes (section 15 and 16 of ITA)

- **Donations** - Individual or institution making any donations to charitable organizations (whose income is exempt from tax under paragraph 10 of the first schedule) or to a project approved by the CS Finance will now enjoy a deduction of such expenses.
- **Interest restriction** – Microfinance institutions will now be exempted from the interest restriction rule set at 30% of EBITDA. They will now enjoy a full deduction of interest on their income as is the case with financial institutions..

Ascertainment of gains and profits of business in a preferential tax regime

Gains made by a resident person who carries on business with a non-resident individual located in a
preferential tax regime shall be deemed to be those amounts which could have been expected had the
transaction been conducted by independent persons dealing at arm's length;

Multinational Enterprises

Various amendments have been proposed in relation to multinational enterprises bringing much enhancement and clarity to various proposal as introduced by prior Finance Acts. Below are highlights of the amendments;

1. Multinational enterprises to notify the Commissioner not later than the last day of the financial year whether it is the ultimate parent entity or surrogate parent entity or the identity of the constituent entity if it is neither the parent nor surrogate;

2. Multinational enterprise with gross turnover of 95 billion to file a country by country report with the commissioner as well as file a master and local file;

3. The information to be included in country by country report, master and local file including due dates;

4. Offenses and penalties for failure to file the various returns/files with the commissioner; and

5. Provision in relations multinational enterprises will be applicable from the year of income 2022 onward.

Capital Gain Tax

The finance Bill, 2022 proposes to amend section 34 1 (J) of the income tax Act so as to increase the rate of capital gains tax from 5% to 15%. This is an attempt by the Treasury at aligning the Kenyan CGT rate with other EAC member states as currently Kenyan rate still remains the lowest in the region and to also further tap on the tax revenues in the real estate sector.

Remission of penalties

Section 37 (3) dealing with remission of tax has now been deleted. Going forward, any application of remission of tax will be dealt with as provided for in the Tax Procedure's Act, 2013.

Digital Service Tax

The third schedule is proposed to be amended by increasing the rate of the digital tax from 1.5% to 3% of the gross transaction value.

Exempt Incomes

The Finance bill proposes to amend the first schedule of the Income tax act by bringing to tax the incomes or principal sum of registered family trust.

Independent Power Producers

Upon ascent of the bill, machinery used for generation, transformation and distribution of electricity by independent power producers will henceforth be eligible for investment deduction allowance. Before it was only limited to those supplying to the national grid.

Independent Power Producers

The third schedule of the Income Tax Act has been amended by introducing a new paragraph 1(B) aimed at restricting the accelerated capital allowance deduction of 100% to only hotel building, building used for manufacture and machinery for manufacture. This is only applicable to investments outside the Nairobi and Mombasa municipality and meeting the other criteria as set under paragraph 1A.

VAT amendments/proposals

Below are the proposed amendments to the various sections of the VAT Act, as contained in the Finance
Bill, 2022.

1. Section 10 has been amended to exclude suppliers who provide services over the internet from reverse VAT;

2. Section 17 has been amended to provide clarity on the allowable period and requirements for claiming input VAT. Taxpayers will henceforth now be required to provide further documentation to support the input VAT claimed. This is over and above the documents previously required i.e valid tax invoice, custom entry forms, credit and debit notes;

3. Section 22 amended to bring penalties and interest levied with regards to imported goods under the ambit of TPA, 2015. Previously these were levied as provided for in the EACCM Act, 2004. In duplum rule to apply;

4. Section 30 which was dealing with refunds of taxes paid erroneously has now been repealed. Refund of taxes paid erroneously will henceforth fall under the TPA, 2013;

5. Section 34 has been amended to exclude suppliers of imported digital services from the Registration threshold requirement of KES 5 million. This means that even where they do not meet this threshold but meet the other requirements then they will have to register for VAT.

Proposed changes to the first and second schedules of the VAT Act in relation to various goods and services

Item	Current status	Proposed changes
Goods supplied for exclusive use in construction & equipping of specialized hospital	Exempt (any approval already granted before commencement will continue to apply until supply made in full)	Vatable
Supply of maize, cassava, wheat and meslin flour	Exempt	Vatable (vatable status to take effect after six months of assent)
Taxable services for use in construction of specialized hospital with accommodation facility upon recommendation of the CS	Exempt (any approval already granted before commencement will continue to apply until supply made in full)	Vatable (vatable status to take effect after six months of assent)
Plant and machinery imported by manufacturers of pharmaceutical products upon recommendation by the cabinet secretary for health	Vatable	Exempt
Medical oxygen supplied to registered hospital	Vatable	Exempt
Urine bags, adult diapers, artificial breasts, colostomy or ileostomy bags for medical use	Vatable	Exempt
Inputs and raw materials used in manufacture of passenger motor vehicles	Vatable	Exempt
Locally manufactured passenger motor vehicles whose total value comprise at least 30% of parts designed and manufactured in Kenya	Vatable	Exempt
Supply of maize, cassava, wheat and meslin flour	Zero rated	Vatable
Protection apparel, clothing accessories and equipment for use in registered hospitals and clinics or by county government and local authorities in fire fighting	Zero rated	Vatable

Tax Procedures Act (TPA), 2013 amendments/proposals

The Finance Bill 2022 proposes the following amendment to the TPA, 2013 so as to streamline it to the various tax legislation and give the Commissioner powers to attach property for taxpayers who fail to pay taxes.

1. Section 31 of the TPA is amended to provide a six month time limit of claiming of input VAT;

2. Section 40 is amended to give the Commissioner powers to attach properties situated in Kenya as security for unpaid tax upon notifying the Registrar in writing. Property has been defined to include land, building, aircraft, ship, motor vehicle or any other property the Commissioner may deem sufficient.

3. TPA has been amended by deleting section 47 and replacing it with a new section. This section deals with offset or refunds of overpaid tax. The amendments are to enhance and streamline the current procedures in relation to refunds or offset of overpaid taxes with regards to the various tax legislations.

Tax Appeals Tribunal amendments/proposals

The Finance Bill 2022 proposes to amend the Tax Appeals Tribunal Act, 2013 by deleting the current provision and replacing it with a new section. Under the new provision a taxpayers dissatisfied with the decision of the Tribunal may appeal to the high court within 30 days or longer periods as the high court may allow. However they will be required to deposit with the Commissioner an amount equaling to 50% of the taxes in dispute. This amount is refundable where the court rules in favor of the taxpayer.

Excise Duty Act amendments/proposals

The Finance Bill 2022 has introduced various amendments with regards to how Excise duty is to be administered in Kenya. Below are the summaries of the highlights;

- Commissioner given power to exempt specified products from inflationary adjustment through a notice in the Kenyan Gazette;
- Penalties and interest as levied in the Excise Act will now fall under the ambit of the Tax Procedures Act. In duplum rule to apply; and
- Introduced the following rates in relation to the below goods and services.

Table below.

Items	Current rate	Proposed rate
Fruit juices (including grape must) and vegetable juices, unfermented and not containing added spirit whether or not containing added sugar	12.17 per litre	13.30 per litre
Cosmetics and beauty products of tariff heading No. 3303, 3304,3305 and 3307	10%	15%
Bottled or similarly packaged waters and other non-alcoholic beverages not including fruit or vegetable juices	6.03 per litre	6.60 per litre
Beer, cider, perry, mead, opaque beer and mixtures of fermented beverages with non-alcoholic beverages and spirituous beverages of alcoholic strength not exceeding 6%	121.85 per litre	134 per litre
Powdered beer	121.85 per KG	134 Per KG
Wines including fortified wines and other alcoholic beverages obtained by fermentation of fruits	208.20 per litre	229 per litre
Spirits of undenatured ethyl alcohol, spirits liqueurs and other spirituous beverages of alcoholic strength not exceeding 6%	278.70 per litre	335.3 per litre
Cigars, cheroots, cigarillos containing tobacco or tobacco substitutes	13,906.04 per KG	13,296.6 Per KG
Cigarette with filters (hinge lid and soft cap)	3,447.61 per mille	3,825.99 per mille
Cigarettes without filters (plain cigarettes)	2,507.74 per mille	2,752.97 per mille
Other manufactured tobacco and manufactured tobacco substitutes homogenous and reconstituted tobacco, tobacco extracts and essences	9,734.45 per KG	10,707.88 per KG
Motorcycles of tariff no 8711 other than motorcycle ambulances and locally assembled motorcycles	12,185.16 per unit	13,403.64 per unit
Imported sugar confectionary of tariff heading 17.04	36.74 per KG	40.37 per KG

White chocolate, chocolate blocks, slabs or bars of tariff nos. 1806.31.00, 1806,32.00 and 1806.90.00	Shs. 200 per KG	Shs. 242.29 per KG
Jewellery of tariff heading 7113 and imported jewellery of tariff heading 7117	10%	15%
Glass bottles (excluding glass bottles for packaging of pharmaceutical products)	N/A	25%
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 tobacco and manufactured tobacco substitutes that have been homogenized and reconstituted tobacco, tobacco extracts and essences	1,200 per KG	2,500 per KG
Inserting the expression 3923.90.90 immediately after 3923.30.90 appearing the tariff description "Articles of plastic of tariff heading 3923.30.00 and 3923.30.90	10%	10%
Adding new tariffs numbers 0710.10.00, 2004.10.00 and 2005.20.00 immediately after the tariff "Imported potatoes, potato crisps and potato chips of tariff heading 07.01"	25%	25%
Electronic cigarettes and other nicotine delivery devices	N/A	40%
Liquid nicotine for electronic cigarettes	N/A	Shs. 70 per millitre
Ice cream and other edible ice whether or not containing cocoa of tariff number 2105.00.00	N/A	15%
Amount staked or wagered in betting	7.5%	20%
Amount staked or wagered in gaming	7.5%	20%
Amount charged or paid to participate in prize competition	7.5%	20%
Amount paid or charged to buy lottery (excluding charitable lotteries)ticket	7.5%	20%
Excise duty on fees charged on advertisement by television stations, print media, billboards and FM radio stations on alcoholic beverages, betting and gaming, lottery and prize competitions	N/A	15%

Exempt excisable goods

The second schedule of the Excise duty Act, 2015 has been amended to exclude the following goods
from excise duty.

- Fertilized eggs of tariff numbers 0407.11 and 0407.19 imported by hatcheries upon recommendation by the CS of Livestock;
- Neutral spirit imported or purchased locally by registered pharmaceutical manufacturers upon approval by the Commissioner; and
- Locally manufactured passenger motor vehicles.

Disclaimer

While we have taken care to prepare the above information, the same should be used for guidance
purposes only. Adequate professional advise should be sort where needed. The firm will not take any

- responsibility for any decision made based on the above information.

Team

For any clarification on the above kindly contact our Tax Service members on the below contacts:

Jeremiah Mvera – Tax Manager
Telephone: 254 724 814 751
Email: JMvera@mgkconsult.co.ke

Bearice Kamau – Tax & Outsourcing Partner
Telephone: +254 721 281 430
Email: BKamau@mgkconsult.co.ke

James Gichuru – Audit Partner
Telephone: 254 722 100 337
Email: JGichuru@mgkconsult.co.ke

Daniel Muhia – Managing Partner
Telephone: +254 722 875 999
Email: DMuhia@mgkconsult.co.ke