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NEWS ALERT

FINANCE BILL 2018

INTRODUCTION

Following the reading of the Budget Statement for the financial year 2018/19 by the Cabinet Secretary for the National Treasury, The Finance Bill, 2018 **("the Bill")** has gone through Parliamentary vetting and is currently awaiting the President's Assent. Under the Provisional Collection of Taxes and Duties Act, the provisions of the Bill will come into force on different dates between 1 July 2018 and 1 January 2019.

We have carried out an in depth analysis of the Bill and have noted the following:

a. The President's Big Four Agenda (Food Security, Affordable Housing, Manufacturing, Universal Healthcare) is alive and kicking and this is highlighted in different sections of the Bill. For example, 130% of the electricity expenses incurred by the manufacturers will now be deducted from their taxable income. In addition, plant and machinery used for the manufacture of goods, parts imported or purchased locally for the assembly of computers, goods used in construction and equipping of hospitals with more than 50 bed capacity will be exempt from excise duty;
b. Stiffer penalties have been imposed to discourage non-compliance and in some instances to discourage production of counterfeit goods;
c. The Government's appetite to expand its tax base has increased. The Bill introduces the presumptive tax which will target small business owners and informal businesses. It also increases taxes on money transfers made through the bank and mobile money transfers; and
d. The Sports, Arts and Social Development Fund has received a major boost since all the tax collected from the taxes charged on money transfers and from betting, lotteries and gaming activities will be remitted to this fund.

The specific changes are as follows:

CHANGES TO THE INCOME TAX ACT (ITA)

	SUBJECT	CHANGE	COMMENTS	EFFECTIVE DATE
1.	**Introduction of Demurrage Charges**	The Bill proposes to amend Section 2 of the ITA to introduce new charges known as "demurrage charges" to mean a penalty paid for exceeding the period allowed for taking delivery of goods, or returning of any equipment used for transportation of goods. This will affect ship operators. It is a Withholding Tax (WHT) which will be at the rate of 20% of the gross amount payable.	a. It is likely that the cost associated with the introduction of WHT on demurrage paid out to non-residents will be passed on to the end consumer thereby making the port of Mombasa non-competitive. b. The description of demurrage is quite wide and may even apply to delay of taking delivery of goods from an inland warehouse.	1st July 2018
2.	**Dividend Income Redefined**	The definition of the Dividend Income under Section 7 of the ITA has been changed in its entirety to include: (i) any cash or asset is distributed or transferred by that company to or for the benefit of that shareholder or any person related to that shareholder;	a. This definition covers a loan owed by a shareholder to a third party is settled by the company on behalf of the shareholder b. It also covers transfer of business or assets between two related companies to take	1st July, 2018

		(ii) the shareholder or any person related person to that shareholder is discharged from any obligation measurable in money which is owed to that company by that shareholder or related person; (iii) the amount is used by that company in any other manner for the benefit of the shareholder or any related person to that shareholder; (iv) any debt owed by the shareholder or any person related to that shareholder to any third party is paid or settled by that company; and (v) the amount represents additional taxable income or reduced assessed loss of that company by virtue of any transaction with the shareholder or related person to such shareholder, resulting from an adjustment.	advantage of tax losses in one of the entities.	
3.	**Compensating Tax Scrapped**	Compensating tax which was charged at a punitive rate of 42.86% on untaxed profits has been scrapped and has been replaced with a new tax at the rate of 30% on dividends paid out from untaxed income.	a. While the removal of compensating tax is a positive step, the dividend tax provision may result in juridical double taxation and will still result in a claw back of the	1st January 2019

			incentives intended to encourage investment into Kenya. b. The dividend received by a resident company from its wholly-owned subsidiary will now be considered to be untaxed income and any distribution of such dividend will trigger tax at 30%. This will effectively subject the holding company groups to a combined corporation tax of 60%. c. If this proposal is implemented, Kenya will become an unsuitable environment for holding companies. This may result in the relocation of holding companies to jurisdictions that have favourable tax practices. d. Foreign sourced dividends will be subject to tax at 30%. This provision contradicts section 3 (1) of the Income Tax Act which	

			provides that only income accrued and derived in Kenya should be subject to tax. e. It will be impractical for a company to separate the dividend that it receives from different sources of income in order to determine the dividend that arises from non-taxed profits. f. Companies that have claimed capital allowance will be taxed if they distribute dividend when they are in a tax loss position. g. Due to the repeal of the dividend tax account, a company will not be able to carry forward or utilize its tax credits.	
4.	**Withholding tax on insurance premium payments to non-resident persons**	The WHT will be at the rate of 5% of the gross premium payable with an exception of insurance premiums paid for the insurance of an aircraft.	Insurance companies will transfer this cost to the policy holders which will make insurance even more expensive than it currently is.	1st July, 2018
5.	**Turnover Tax Scrapped and**	Presumptive tax will be chargeable to resident persons whose annual turnover from business	This is a move to expand the tax base. Just like the Turnover Tax this targets small businesses	1st January, 2019

	replaced with Presumptive Tax	does not exceed KES 5,000,000. The tax will be charged at the rate of 15% of the single business permit/trading licence fee issued by a County Government and will be payable at the time of application and payment for the business permit/trade licence (in the case of new business owners) and at the time of renewal of the business permit/trade licence (in the case of existing business owners).	and the informal sector and ensures that they are also contributing to the income taxes collected in the economy. It is also a move by KRA to leverage the network and wide coverage that the County Governments have to ease and increase tax collection.	
6.	**Cheaper Electricity for Manufacturers**	30% of the electricity costs incurred by manufacturers is now tax exempt in addition to the other electricity expense.	Essentially, this means that 130% of the electricity expenses incurred by the manufacturers will be deducted from the taxable income. This will reduce the production costs for the manufacturers significantly. This is in line with the President's Big 4 Agenda to promote manufacturing in the country.	1st January, 2019
7.	**Clarity on Capital Gains Tax (CGT) for Insurance Providers**	Section 19 of the ITA which deals with the taxation of Insurance Companies is amended to provide for CGT. CGT at the standard rate of 5% is payable for property	This seeks to clarify CGT payable by General Insurers and Life Insurers. Life Insurers are exempt from CGT since they are required by	1st July, 2018

		transferred by an insurance company other than property connected to life insurance	the law to own and trade in real estate as a means of investing the policy holder's premiums	
8.	**Taxation of projects with Special Operating Framework Agreement**	The rate of tax of a company engaged in business under a special operating framework arrangement with the Government will be the rate provided in the agreement.	This is a tax incentive to encourage foreign investors to engage in business with the government without having to change the tax laws for each agreement.	1st January, 2019

CHANGES TO THE VALUE ADDED TAX ACT

	SUBJECT	CHANGES	COMMENTS	EFFECTIVE DATE
1.	**Extension of the Submission Date of VAT Returns has been deleted**	Previously one would write to the Commissioner to get an extension of time to submit their VAT returns after the 20th day of the following month. This is no longer an option as one must file on or before the 20th day of the next month or they will be fined KES 10,000/-	There was no provision for the extension of time for submitting of returns on the iTax platform. This provision just codifies it to make it official	1st July, 2018

2.	**Taxation of mobile cellular services**	The definition of the taxable value for mobile cellular services has been deleted to exclude excise duty. Following the deletion, excise duty will now apply on the value of the service together with the applicable taxes, duties and levies, effectively increasing the tax base by 10% or 12% for money transfer services.	This will increase the charges levied on mobile cellular services. Telecommunication companies will definitely transfer this cost to the consumers.	1st July, 2018
3.	**Re-introduction of VAT on Petroleum Products**	VAT on petroleum products was introduced in the VAT Act, 2013 but deferred for a period of three years. The deferral was extended for a further period of 2 years which will expire on 1 September 2018. The Finance Bill, 2018 has not proposed a further extension and VAT will automatically apply to the petroleum products when the current deferral expires. All petroleum products including kerosene, petrol, diesel, aviation spirit were all zero rated but will now be charged VAT at the rate of 16%	This will have a ripple effect increasing the price of nearly all goods and services in Kenya. As it is, a significant portion of the price of fuel in Kenya comprises of taxes. It would be unfair to increase the taxes further, and it is therefore our proposal that Parliament should intervene to ensure that fuel remains exempt, not just as a transitional measure but as a guaranteed exempt provision.	2nd September, 2018
4.	**Additional Tax Exemptions**	The following goods will now be tax exempt: a. Plant and Machinery used for the manufacture of goods	This is in line with the President's Big 4 Agenda to promote local industries and universal healthcare.	1st July, 2018

		b. Specialized equipment for the development and generation of solar and wind energy including the batteries used for the storage of solar power c. Parts imported or purchased locally for the assembly of computers d. Goods used in construction and equipping of hospitals with more than 50 bed capacity		

CHANGES TO THE TAX APPEALS TRIBUNAL ACT

	SUBJECT	CHANGES	COMMENTS	EFFECTIVE DATE
1.	**Adjournment of Proceedings**	The proceedings of the Tribunal now do not have to be stopped or adjourned if one of the members of the panel is not available or has stopped	This is a welcomed change as cases will now be expedited at the tribunal	1st July, 2018
2.	**Alternative Dispute Resolution (ADR) at the Tribunal**	ADR is now an option for resolution of a tax dispute and not part of the 90 days period provided for the Tribunal to hear and determine tax disputes	This will promote quick and amicable resolution of tax disputes. It will also decrease the backlog of cases at the Tribunal	1st July, 2018

CHANGES TO THE EXCISE DUTY ACT

	SUBJECT	CHANGES	COMMENTS	EFFECTIVE DATE
1.	**Inflation Adjustments**	The adjustment for inflation shall be made once every year	Previously it was every two years. This will make the adjustment more in touch with the prevailing times	1 July 2018
2.	**Suspension of a Licence without notice**	The Bill proposes to give the Commissioner power to cancel a licence without giving notice where the licensee: a. Has engaged in fraud; b. Is found to be in possession of counterfeit excise stamps; c. Has goods bearing counterfeit excise stamps; or d. Has violated any regulations relating to health and safety, standards or packaging of goods.	Currently, the Commissioner must give a 21-day notice before suspending a licence which is reasonable. This provision gives the Commissioner a lot of discretion which leaves room for abuse. In addition, violations of regulations relating to health and safety, standards or packaging of goods are the mandate of other State Agencies such as KEBS and therefore this amounts to duplicity of roles	1 July 2018
3.	**Funding of the Sports, Arts and**	The Bill makes it mandatory for the Commissioner to pay into Sports, Arts and Social Development Fund	This explains the increase in excise duty charged on money transfers by cellular	1 July 2018

	Social Development Fund	established under the Public Finance Management Act to support social development and universal health care, from excise duty collected from the following: a. 16% of the funds generated from excise duty charged on money transfer by cellular phone service providers; and b. All the excise duty collected on money transferred by banks, money transfer agencies and other financial service providers.	phone service providers, money transfer agencies, other financial service providers, and the robin-hood tax charged on bank transfers of funds above KES 500,000/- This is indicative of the Government's support of the youth and their projects in Sports, Art	
4.	**Stiffer Penalties**	The penalty for manufacturing excisable goods without a license or importing excisable goods requiring an excise stamp is double the excise duty that would be payable. The Bill proposes to set a minimum penalty of KES 5,000,000.	This is an effort to discourage manufacturing of counterfeits and non-compliance with the provisions of the Act	1 July 2018
5.	**Forfeiture of Goods**	The Bill proposes to provide for forfeiture of any plant, excisable goods, any materials or finished goods in respect of which an offence has been established in addition to any other penalties set.	Similar to the stiffer penalties proposed this is an effort to discourage manufacturing of counterfeits and non-compliance with the provisions of the Act	1 July 2018
6.	**Increase in Rates of Tax for Money Transfers by Cellular**	Money transfer services by cellular phone service providers (as a percentage of the excisable value) will now be 12% from 10%	There has been exponential growth of Money Transfers by Cellular Phone Service Providers and has promoted more	1 July 2018

	Phone Service Providers		financial inclusion for low income earners. But this has increased the governments appetite in taxing these services. However, the service providers are transferring all of this additional tax burden to its consumers and making these transfers more expensive. This might have an impact on the gains made on financial inclusivity in the country.	
7.	**Robin-hood Tax**	Excise duty on money transferred by banks, money transfer agencies and other financial service providers shall be 0.05 percent of the amount transferred in case of money transfer of five hundred thousand shillings or more.	We laud the Government for making efforts to create funds that will address social issues since all the amounts collected will be remitted to the Sports, Arts and Social Development Fund. However, the proposed provision as it stands will result in massive instances of multiple taxation of the same amount of money. Instances are such as: a. **Advocate's client accounts:** Where the selling price is deposited in the case of	1 July 2018

			a conveyancing transaction, the amount will be subjected to the Robin hood tax on transfer into the Advocate's account and on transfer to the Seller's account by the Advocate. b. **Collective investment funds:** Fund managers usually carry out various transactions in the execution of their role. When the fund manager seeks to invest money say in Treasury Bonds or Bills, this money will be subject to the tax on transfer, when it is purchasing shares, the same money will be subject to the Robin hood tax. c. **When Banks as collecting agents** of the tax are remitting the tax to the KRA collection account, they will be subjected to the Robin hood tax. d. **For people who earn a monthly salary of more than KES 500,000/-** after tax	

			the transfer of their salary will be taxed both PAYE and this proposed tax.	

CHANGES TO THE TAX PROCEDURES ACT

	SUBJECT	CHANGES	COMMENTS	EFFECTIVE DATE
1.	**Responsibility of tax representatives clarified**	For taxpayers with more than one tax representative, each representative is responsible for only the tax obligations that they have been appointed for.	It's great that the Bill has clarified this because previously, for taxpayers with more than one tax representative, every tax representative was responsible for all the tax obligations of the taxpayer whether or not they were appointed for it. This reduces exposure and promotes accountability for each tax representative	1st July, 2018
2.	**Submission of Tax Returns**	It provides for changes to the application for extension of time to submit a return: a) Monthly returns:15 days before the return is due; and b) Annual returns: 30 days before the return is due.	The changes provide clarity on the submission of applications for extensions, of time for submitting tax returns.	1st July, 2018

		The Commissioner will now be obliged to respond to applications within reasonable time and at least 5 days before the return is due. The current provisions do not provide timelines for the application and response by the Commissioner.		
3.	**Tax Amnesty**	The Finance Act, 2016 amended the Tax Procedures Act, 2015 and introduced a tax amnesty on foreign income earned as at 31 December 2016 which was declared and repatriated to Kenya by 31 December 2017. This deadline was subsequently extended to 30 June 2018 and the Bill now proposes to extend the deadline further, to 30 June 2019. The extension also covers income received in the year 2017. Where there are no funds have been transferred within the period of the amnesty, there shall be a five-year period for remittance but a penalty of 10% shall be levied on the remittance. The new Section 37B also proposes an amendment which provides that the funds transferred under the amnesty shall	The Cabinet Secretary indicated that this extension has been informed by the low uptake of the amnesty due to concerns that amnesty applicants may be subject to further investigations with regards to the source of funds being repatriated. It is not clear exactly how the Government will be able to tell one source of funds from the other. This proposed amendment is likely to create an avenue for people to clean their money especially bearing in mind that there is nothing preventing the	1st July, 2018

		be exempt from the provisions of the Proceeds of Crime and Anti-Money Laundering Act, 2009 and any other Act relating to the reporting and the investigation of financial transactions. The Commissioner shall not question the source of the funds unless the funds are from terrorism, poaching or drug trafficking.	removal of the money from Kenya once the amnesty has been granted.	
4.	**Late Payment and Submission Interests and Penalties**	Late Payment of Tax will attract 2% per month interest instead of the current rate of 1% and a penalty of 20% of the tax due In addition, the penalties for late filing of tax returns will now be as follows: a) VAT and Excise Duty Returns – Higher of 5% the tax due or KES 10,000 b) Non-individual returns - Higher of 5% of the tax due or KES 20,000; and c) Individual returns – Higher of 5% of the amount due or KES 2,000.	These stiff penalties have been put in place to promote compliance	1st July, 2018

5.	**Penalty Waivers**	The Commissioner can now waive tax penalties that are below KES 1.5 Million without consulting the Cabinet Secretary in charge of Finance	Processing of waivers will now be faster	1st July, 2018

CHANGES MISCELLANEOUS FEES AND LEVIES ACT

	SUBJECT	CHANGES	COMMENTS	EFFECTIVE DATE
1.	**Exportation of copper waste and scrap metal**	Exportation of copper waste and scrap metal will attract 20% export levy	This is to discourage exportation of scrap metal so as to promote local manufacturing	1st October, 2018
2.	**Goods exempt from import declaration fee**	The Bill proposes to amend the Second Schedule to the Act by exempting goods imported for implementation of projects under a special operating framework arrangement with the Government from import declaration fee.	This is in line with the VAT and excise duty exemptions provided for similar goods under proposed amendments to the VAT and Excise Duty so as to encourage foreign investors to participate in government projects	1st October, 2018

OTHER NOTABLE CHANGES

	SUBJECT	CHANGES	COMMENTS	EFFECTIVE DATE
1.	**Fit and Proper Test for Licence Applicants under the Betting, Lotteries and Gaming Act**	The Bill stipulates the criteria to be used by the Betting Control and Licensing Board (the Board) in determining whether an applicant is suitable to hold a license or permit under the Act. The following will be taken into consideration: a. The financial status or the insolvency of the applicant; b. The educational or other qualifications or experience of the applicant; c. The status of any other license or approval granted to the applicant by any financial regulator; d. The ability of the applicant to carry on the regulated activity, competently, fairly and honestly; and e. The reputation, character and financial integrity of the applicant.	The government is exercising its consumer protection role in the gaming industry	1st October, 2018

		The proposed amendment further provides for the applicant to be heard by the Board prior to determining whether the applicant is fit and proper for the purposes of the Act.		
2.	**Remittance of gaming taxes to the Sports, Arts and Social Development Fund**	There is also a new provision requiring the Commissioner General to remit all taxes collected from betting, lotteries and gaming into the Sports, Arts and Social Development Fund established under section 24 of the Public Finance Management Act, 2012.	This is a move to ensure that all the funds collected from the betting, lotteries and gaming industry are used for sports and social development	1st July, 2018
3.	**Introduction of National Housing Development Fund in the Employment Act**	Section 31 of the Employment Act has been amended by the introduction of the National Housing Development Fund (NHDF) deductions. Under the new provision, the employer and employee will each contribute 0.5% of the employee's gross monthly earnings subject to a maximum of KES 5,000 to the NHDF.	The deductions from employees and the employers will be directed to the promotion of affordable housing. The direct benefit to the employee and its implementation is however unclear. It also does not include self-employed persons which burdens a small section of the tax payers	1st January 2018

4.	**Abolition of the Interest Rate Cap**	The Bill proposes to repeal Section 33B of the Banking Act, which gives the Central Bank the power to set the interest rate caps.	Numerous studies have shown that the Interest rate caps have had a negative impact on the economy since lenders have been more strict on lending instead of being an incentive to grant loans to SMEs as intended.	1st October, 2018
5.	**Dissuasion of Non-Compliance in the Retirement Benefits Act**	The Bill proposes to amend the Act by requiring employers who fail to remit an employee's contributions to the respective schemes to pay contributions and interest accrued to the scheme within a specified period. Non-compliant employers will be liable to a penalty equivalent to the higher of 5% of the unremitted contributions or KES 20,000. This amount will be payable within 7 days from the receipt of the notice.	This is an effort to increase compliance by employers whilst also protecting the employees' savings for their retirement. It will likely result in a reduction in instances where employers make deductions on their employees but do not remit the same to the relevant schemes.	1st October, 2018

The Tax team is always available to provide more insight to the provisions of this Bill. Should you have any queries or need clarifications on the contents of this alert, please contact Mr. Mohamed Abdullahi, the Tax Partner, Mr. Silas Gitari, the Managing Partner or Gakii Kaburu, the Tax Associate.

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