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Newsletter

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Introduction

We are pleased to release the seventh edition of our tax newsletter. We appreciate the lively feedback and fruitful engagement we have had in the previous editions of our newsletters. This issue will summarize the key aspects of the Finance Act 2021.

On the right column of the newsletter you will find contact details for key members of our team who can help answer any questions you may have about the issues highlighted in this newsletter or any other matter.

We are interested in your feedback on the items covered and any topics you would like to see featured in upcoming issues of the newsletter.

Please provide any feedback at **tax@mbaya.co.ke**

In this issue

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» From the Secretarial**Desk** »

Disclosure of Company Beneficial Ownership Information

The registrar of companies has been updating the Beneficial owner information on the register of companies after a requirement in 2019 after the amendment of the Companies Act, 2015. The amendment introduced a requirement for every company to maintain a register of its beneficial owners and to submit a copy of this register to the Registrar.

In February 2020, Companies (Beneficial Ownership Information) Regulation 2020 was published and the submission of the register with the ROC became operational from 13 October 2020 and a deadline was set to 31st January 2021. Through a press release dated 27th January 2021, this deadline was extended by a further six months to 31st July 2021 so as to give a final grace period to submit the Beneficial Owner information.

Our secretaries, Savannah & Associates can be of help and ready to offer a helping hand. You can get us through savanna@mbaya.co.ke.

» From the Tax**Desk** »

Highlights of Finance Act 2021

The Finance Act 2021("Act") was assented into law on 29th June 2021 by his Excellency, the President of Republic of Kenya. Below are some of the key highlights;

Income Tax Act ("ITA")

Persons exempted from minimum tax 〉According to the Finance Act 2021, the following additional persons shall not pay minimum tax. If:

- That person is engaged in business whose retail price is controlled by the government.
- That person is engaged in insurance business.
- That person is engaged in manufacturing and that person's cumulative investment in the preceding four years from the date of assent is at least ten billion shillings.
- That person is licensed under the Special Economic Zones Act 2015.
- That person is engaged in distribution business whose income is wholly based on a commission.

Our take: The idea of Minimum Tax was widely opposed by the business world; the sectors listed here will no doubt welcome the relief. As currently constituted, the minimum tax still has many flaws and it is hoped that KRA will heed the call and re-look at the entire Minimum Tax proposal.

Removal of the time limit to carry forward losses 〉The Act deletes the provision restricting the carry forward of tax losses beyond the nine-year period. This means that the tax losses can be carried forward indefinitely.

Our take: The proposal is welcome and will help businesses that have been adversely affected by Covid-19 and the slowdown in the economy before then.

Returns on activities in other jurisdictions 〉The Act defines a "multinational enterprise group" as a group that includes two or more enterprises which are residents in different jurisdictions including an enterprise that carries on business through a permanent establishment or through any other entity in another jurisdiction.

According to the Act, an "ultimate parent entity" means:

- An entity that is resident in Kenya for tax purposes.
- An entity that is not controlled by another entity.
- An entity that owns or controls a multinational enterprise group.

An ultimate parent entity of a multinational enterprise group shall submit to the Commissioner a return describing the group's financial activities in Kenya, where it's gross turnover exceeds the prescribed threshold, and in all other jurisdictions where the group has a taxable presence, not later than twelve months after the last day of the reporting financial year of the group.

The return submitted shall contain the prescribed information on the group's aggregate information including information relating to the amount of revenue, profit or loss before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees and tangible assets other than cash or cash equivalents with regard to each jurisdiction in which the group operates.

Insurance relief on contributions to National Hospital Insurance Fund (NHIF) 〉 The Act has amended the section 31 of the ITA to provide insurance relief to individuals upon contribution to NHIF fund. This is to extend the insurance relief to individuals who pay premium for health insurance to NHIF.

Our take: This will have a positive impact on individual contributions to NHIF since they will enjoy a tax relief of 15% on their contributions. The effective date of this provision is 1st January 2022.

Investment allowance 〉The Act has amended the Second Schedule to the Income Tax Act which deals with Investment Allowance by: -

- Replacing the provisions on claims of investment allowance using reducing balance method with straight line method.

Our take: This is considered as positive amendment since the taxpayers can utilize the capital allowances within a short period of time and also fully depreciate the assets to zero.

- Provide for definition of the term "civil works" to be used for purposes of Investment Allowance as including: Roads and parking areas; railway lines and related structures; water, industrial effluent and sewerage works; communications and electrical posts and pylons and other electrical supply works; and security walls and fencing.

Our take: This definition provides more clarity as to what civil works cost constitutes in the cost of commercial buildings or buildings used for manufacturing for the purposes of claiming capital allowances.

- "Farm works" as used for purposes of Investment Allowance, should include: Farmhouses, labour quarters, any other immovable building necessary for the proper operation of the farm, fences, dips, drains, water and electricity supply works and other works necessary for the proper operation of the farm.

Our take: The Act has reintroduced the definition of farm works which was previously deleted by the Tax Laws Amendment Act (No 1) 2020.

Depreciation for machinery under a prospecting right 〉 The Act has amended the Ninth Schedule to the Income Tax Act to align the rate of depreciation for machinery first used to undertake exploration operations to the rate provided in the Second Schedule to the Income Tax Act which is 50% in the first year of use and the balance to be claimed on an equal instalments basis. This is a clean-up sought to make reference to the right provision in the Second Schedule.

The changes above are effective from 1st January 2022 apart from the sections which we have otherwise put in the effective date.

The following definitions that have been effected. This is aimed to provide clarity and expand on issues not covered previously. These are:

Definition of "Control" 〉 The Act provides a new definition of "Control". Section 2 of the ITA is amended and the following new definitions of control in proper alphabetical sequence are inserted. The definition of control, which is more comprehensive and wider, shall mean the following when used in relation to a person: -

- That the person holds at least 20% voting rights in company, directly or indirectly.
- A loan advanced by the person to another person constituting at least 70% of the book value of the total assets of the other person, excluding a loan from a financial institution not associated with the person advancing the loan.
- A guarantee by the person for any form of indebtedness of another constituting 70% of the total indebtedness of the other person excluding a guarantee from a financial institution that is not associated with the guarantor.
- The person appoints more than half of the board of directors of another person or at least one director or executive member of the governing board of that person.
- The person is the owner of or has the exclusive rights over the know-how, patent, copyright, trade mark, license, franchise or any other business or commercial right of a similar nature, on which another person is wholly dependent for the manufacture or processing of goods or articles or business carried on by the other person.
- The person or the person designated by that person supplies at least 90% of the supply of the purchases of another person; or in the opinion of the Commissioner, influences the prices or other conditions relating to the supply of the purchases of another person.
- The person purchases or designates a person to purchase at least 90% of the sales of another person; or in the opinion of the Commissioner, influences the price or any other condition of the sales of another person.
- The person has any other relationship, dealing or practice with another person which the Commissioner may deem to constitute control.

Our take: The purpose of the amendment was to resolve the issue of some of transactions captured in the new provision. However, the amendment didn't address the matter conclusively as it leaves the Commissioner at discretion to determine whether a transaction is related or an independent transaction.

Definition of "infrastructure bond" 〉The Act refers to the term infrastructure bond as, "A bond issued by the government for financing a strategic public infrastructure facility including a road, hospital, port, sporting facility, water & sewerage system, a communication network or energy project".

Our take: The definition has been expanded to include an energy projects. This is a welcome move to investors in the energy sectors.

Definition of "Permanent establishment" 〉The Act amends the definition of permanent establishment by expanding the scope so as to include:

- A fixed place of business through which business is wholly or partly carried on and includes a place of management, a branch, an office, a factory, a workshop, a mine, an oil or gas well, a quarry or any other place of extraction or exploitation of natural resources, a warehouse in relation to a person whose business is providing storage facilities to others, a farm, plantation or other place where agricultural, forestry plantation or related activities are carried on and a sales outlet.
- A building site, construction, assembly or installation project or any supervisory activity connected to the site or project, but only if it continues for a period of more than one hundred and eighty-three days.
- The provision of services, including consultancy services, by a person through employees or other personnel engaged for that purpose, but only where the services or connected business in Kenya, continue for a period of, or periods exceeding in the aggregate, 91 days in any twelve-month period commencing or ending in the year of income concerned.
- An installation or structure used in the exploration of natural resources; provided that the exploration continues for a period of not less than 91 days.
- A dependent agent of a person who acts on their behalf in respect of any activities which that person undertakes in Kenya including habitually concluding contracts, or playing the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the person.

Definition of "Digital marketplace" 〉The Act amends the section 3 of the ITA with the following new definition:

- Income accruing from a business carried out over the internet or an electronic network, including through a digital marketplace".

Moreover, the definition of a digital marketplace has also been amended to mean: "An online platform which enables users to sell or provide services, goods or other property to other users".

Our take: This definition seeks to broaden the tax bracket to include other online businesses that previously could not be termed to constitute digital marketplace.

Value Added Tax ACT

Definition of the term "Supply of imported services" 〉The Act amends section 2 (1) c of the VAT Act 2013 to provide more clarity on the meaning of the term particularly where a registered person is entitled to fully claim input VAT on the supplies for a tax period, he shall not be required to account for VAT on imported services.

Scope and definition of Digital Market place 〉The Act has amended the section 5 of the VAT Act 2013 to provide more clarity that supplies carried out over the internet or an electronic network including through a digital marketplace is subject to VAT.

The Act has also provided precise definition of the term "digital marketplace" to mean an online platform which enables users to sell or provide services, goods or other property to other users.

The changes above take effect from 1st July 2021.

Proposed amendments to the Tax Procedures Act

Definition of tax law 〉The Act amended the definition of 'tax law' to include the Miscellaneous Fees and Levies Act 2016.

The inclusion of the Miscellaneous Fees and Levies Act in the definition will allow the application of the Tax Procedures Act 2015 in enforcement and recovery of the unpaid fees and levies in cases of non-compliance.

Record keeping 〉The Act requires that for non-resident person carrying on business through a digital marketplace, the unit of currency in books of account, records, paper registers, tax returns or tax invoices shall be in convertible foreign currency as may be approved by the Commissioner.

However, this provision shall not apply to a non-resident person who files returns and makes payments through a resident tax representative or non-resident person with a permanent establishment.

Due Date on submission of notice of objection or tax return electronically 〉The Act now precisely states that; where a person submits a notice of objection or tax return in electronic form, the due date shall remain the date specified in the relevant tax law. This will enable the Commissioner to handle cases of electronic submission of tax objections which is currently not provided for.

This is a welcome relief for taxpayers since the due date may fall on a Saturday, Sunday or even on a public holiday and the taxpayer will comfortably lodge the objection electronically and by the due date as specified by the relevant tax law.

Introduction of penalties for non-compliance to common reporting standards 〉 The Act has introduced and provided for penalties for non-compliance with the provisions of Section 6A and 6B on common reporting standards obligations as tabulated below:

No	Non-Compliance	Penalty
1	Making false statements or omitting any information required to be included in the	A penalty of Kshs 100,000 for each false statement or omission or imprisonment for a term not exceeding three years or both unless, in the case of the information required in respect of

No	Non-Compliance	Penalty
	information return under section 6B.	another person, a reasonable effort was made by the person to obtain the information from that other person.
2	Where a reporting financial institution fails to file an information return or a nil return when required by section 6B.	A penalty of Kshs 1,000,000 for each such failure.
3	A person fails to comply with a duty or obligation under section 6B and no other penalty is prescribed.	A penalty of Kshs 20,000 and Kshs 20,000 for each day during which non-compliance continues for a period not exceeding sixty days.

This will encourage compliance among financial institutions with common reporting standards.

Commissioner remedy to seek intervention of a relevant authority in the collection of tax such as DST 〉 The Act now empowers the Commissioner to seek the intervention of a relevant authority in the collection of tax where a person who provides services over the internet or an electronic network including through a digital marketplace has not fulfilled the person's tax obligations.

The need for the Commissioner to seek for such assistance arises from the fact that DST is levied on non-residents who have no physical presence in Kenya hence it becomes difficult for the Commissioner to collect the DST from non-residents who do not comply.

Tax refund utilization by the Commissioner 〉 Where the Commissioner notifies a taxpayer that an application for a refund has been ascertained and applies the refund to the payment of an outstanding tax, interest or penalties shall not accrue on the amount applied to the payment of the outstanding tax from the date of the notification.

For the avoidance of doubt, where the Commissioner has applied a refund to the payment of an outstanding tax, if there is any outstanding tax after such application, the outstanding tax shall accrue interest and penalties in accordance with this Act.

This amendment automatically creates a tax credit which can be used to offset against future tax liabilities in the event where the Commissioner is satisfied that there is an overpayment of tax.

Additionally, the amendment does not seem to limit the type of tax that such tax credit can be offset against.

Tax Due Dates

Withholding Tax | 20th Day of the following month

Pay as You Earn | 9th Day of the following month

VAT | 20th Day of the following month

Balance of Tax on Self-Assessment | 4th Month after year end

Monthly Rental Income | 20th Day of the following month

Instalment Tax

1st Instalment |20th day of the 4th month after year end

2nd Instalment | 20th day of the 6th month after year end

3rd Instalment | 20th day of the 9th month after year end

4th Instalment | 20th day of the 12th month after year end

Kindly note that all the returns must be filed on I tax while the payments e-slips must be generated from the I-Tax platform.

Disclosure of Company Beneficial Ownership

Earliest date to be entered in the register of BOs | 21st day of February 2020

Deadline date for disclosure of company beneficial ownership | 31st day of July 2021

Digital Service Tax (DST)

20th day of the following month

Minimum Tax

Applicable where minimum tax is higher than instalment tax payable

1st Instalment |20th day of the 4th month after year end

2nd Instalment | 20th day of the 6th month after year end

3rd Instalment | 20th day of the 9th month after year end

4th Instalment | 20th day of the 12th month after year end

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