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Happy Holidays

M&A

OVER 40 YEARS OF ACCOUNTING EXCELLENCE

Tax Incentives on Renewable Energy

Cont'd...

Newsletter

MBAYA AND ASSOCIATES December 2022 | Issue 090 | Volume 8

Introduction

As the year draws to a close, we are pleased to release the twelfth edition of our tax newsletter for the year 2022. We have had some lively feedback and fruitful engagement throughout the year and for that we are very grateful. In this final issue, we will summarize the Implementation of TIMS management, provide a Tax Alert on Minimum tax, and discuss tax incentives on renewable energy and the last article on the Personal Finance series.

As this is our last edition allow us to take this opportunity to wish you, and your families a happy festive season. Go ahead, take a deserved break, spend time with family and enjoy the festive season safely.

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 what topics you would like covered in the future. Please provide any feedback at tax@mbaya.co.ke

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Implementation of Tax Invoice Management System (TIMS)

Through a public notice dated 24th November 2022, the Kenya Revenue Authority (KRA) reminded the public and all VAT registered taxpayers that they are required to acquire and install the TIMS compliant Electronic Tax Registers (ETRs). KRA informed all VAT registered taxpayers are required to fully transition to the new ETRs to generate and electronically transmit their validated tax invoices to KRA in compliance with the VAT (Electronic Tax Invoice) Regulations, 2020. Taxpayers experiencing challenges in complying with TIMS requirements are encouraged to report the same to KRA through their Tax Service Office (TSO) for facilitation. An updated list of suppliers is available on the KRA website or through this link: Approved-ETR-Suppliers--Manufacturers-as-at-28.11.2022

Tax Alert

Appellate Court Reinstates the High Court Orders to Declare Minimum Tax Unconstitutional

On 20th September 2021, the High Court of Kenya delivered a judgement in the case of Stanley Waweru- Chairman & 3 others (Suing as Officials of Kitengela Bar Owners Association) v National Assembly & 2 others, Constitutional Petition Nos. E005 of 2021 (Consolidated with petition No 1. of 2021).

In this judgement, the High Court declared that the 'minimum tax' provisions in the Kenya Income Tax Act to be unconstitutional. The Petitioners in the case had sought a declaration that Sec (12D) of the Income Tax Act which imposed a 'minimum tax' was unconstitutional for the following reasons:

- Minimum tax does not fall within the category of taxes that can be imposed by the National Government as per the Constitution;
- Minimum tax contravenes the principle of fairness and just sharing of the burden of taxation as embraced by the Constitution;
- Minimum tax is discriminatory in nature;
- Minimum tax is riddled with ambiguity, uncertainty and contradictions contrary to principles of taxation;
- Minimum tax infringes on the right to property and economic and social rights provided for in the Constitution; and,
- The same being a money bill, the senate ought to have been involved in its enactment.

The Petitioners also sought a declaration that the minimum tax 'guidelines' issued by the KRA were null and void for failure to comply with the Statutory Instruments Act.

The Court made a finding that minimum tax did lend itself to a possibility of double taxation.

Such a system cannot be said to be fair and equitable as envisaged by the Article 201(b)(i) and (ii) of the Constitution. The Court was also of the view that taxpayers genuinely in a loss-making position run the risk of being sacrificed at the altar of taxpayers who dishonestly conceal their profits. It took issue with the National Assembly and Kenya Revenue

Authority's ("KRA") approach of subjecting everyone with the exceptions of a few to minimum tax instead of putting systems to detect the dishonest entities.

This was found to be a contravention of the right to dignity as enshrined in Article 28 of the Constitution as it fails to take into consideration the circumstances under which taxpayers find themselves in a loss-making position.

Unsatisfied with the judgement, the Kenya Revenue Authority appealed the judgement on 25 grounds, summarized into 7 thematic issues.

In his judgment issued in Nairobi on 2nd December 2022, the judge dealt with each of them. The appellant in instituting minimum tax wanted to net off the net tax evaders, by placing all loss-making entities under the appellant's bracket (as they nonetheless benefitted from infrastructure maintained by the government), and prevent tax evaders from escaping their fair share of tax liability.

The judge agreed with the respondent that levying of Minimum Tax on gross turnover as opposed to gains or profit would lead to a situation where a loss-making tax payer, would bear a heavier burden than other taxpayers contrary to **Article 201 of the Constitution**.

The learned Judge pointed out that the appellant was well equipped with the necessary mechanisms to carry out auditing in order to determine entities that are avoiding payment of tax. He shared the same sentiments with the respondent on this aspect that punishing entities who are already battling with a stifled economy because of a few miscreants is the epitome of unfairness.

It was noted that the appellant also failed to differentiate between tax evaders/avoiders, and those who are unable to pay taxes due to genuine losses in their businesses and he used the same rationale by lumping them all together.

Having carefully considered the record of appeal as put to the court, the impugned judgment, the statute law on taxation as amended, the respective written and oral submissions of the parties, and the cited authorities, the court reached the inescapable conclusion that the appellant's appeal fails and is hereby dismissed. Accordingly, judgment of the High Court of Kenya at Machakos (G. V. Odunga, J.) dated 20th September 2021 is hereby upheld and each party in the appeal directed to bear its own costs.

What the Ruling means for Taxpayers

The decision by the Court means that the minimum tax provisions in the Income Tax Act are no longer enforceable.

KRA has not indicated any intention to appeal the case but in the absence of the supreme court providing a stay of the judgement, taxpayers will not be required to pay any 'minimum tax' at least for now and into the foreseeable future.

This is a welcome reprieve to the business community more so to taxpayers in a loss-making position who otherwise would have had to pay from their capital or reserves (or borrow) to meet their minimum tax obligations.

Tax Incentives on Renewable Energy | Continued...

In our last issue, we discussed the various aspects of tax incentives and some of the different laws and policies imposed by various governments to enhance tax incentives. In this issue, we share with you how various African Countries have taken various steps to create tax incentives on the renewable energy as follows: -

- **Kenya** | The Kenya Finance Act, 2021 amends the First Schedule of the Value Added Tax Act to exempt taxing of solar and wind energy specialized equipment. This was after a VAT of 14% was imposed on solar equipment in 2020, which made solar products unaffordable and discouraged the realization of universal electrification. The new law puts back the country on track the road to attaining green energy.
- **Rwanda** | The Rwanda Investment Code provides for a seven-year tax holiday for investment for energy projects producing at least 25 MW. The investment should be of at least 50 million USD and the investor should contribute at least 30% of this investment in the form of equity in these sectors. The Minister for Finance and planning provides a list of clean energy equipment exempted from VAT.
- **Madagascar** | The Madagascar Tax Code of 2015 provides for the following tax incentives of renewable energy;

i. Reduction in corporate income tax equivalent to 50% of the investment;
ii. Exempt of VAT on equipment used in the production of renewable energy. The equipment includes wind power generators, hydropower generators, solar water heaters and solar PV panels
iii. Investment in equipment can be depreciated at an accelerated rate of 30% of net value, with exception of building.

- **South Africa** | The Country's Income Tax Act provides for a number of fiscal incentives that are advanced to the renewable energy sector. These include allowances for

i. Energy efficiency savings (Section 12L)
ii. Capital allowance for machinery used in the production of renewable energy (Section 12B);
iii. Exemption of certified emission reductions (Section 12K)
iv. Allowance for industrial policy projects (Section 12I)
v. A host of tax incentives for the proposed special economic zone SEZs (Section 12R).

- **Malawi** | Amendments to the Malawi Customs and Excise (Tariffs) Order provides for zero rate VAT on solar panels, solar batteries, solar inverters, solar bulbs, solar regulators, solar accumulators and energy efficient bulbs.
- **Sierra Leone** | The Finance Act provides that the importation of photovoltaic system equipment and low energy or energy efficient appliances for resale or use by third parties shall be duty free for a period of three years.

Positive Impacts of Tax Incentives in Renewable Energy

Tax incentives are geared to promoting a specific sector and achieving certain objectives. As for tax incentives on renewable energy in the energy sector, the following are some of the positive impacts;

a) Increasing energy access of marginalized areas with limited connection to the national grid network.
b) Enabling the affordability of off grid energy access solutions to low-income rural communities.
c) Enabling job creation in the renewable energy sector. The income tax from the jobs increases tax revenue of the country.
d) Increased access to energy provides for productive economic potential for the individuals and in turn increases socio economic activities.
e) Increased access of renewable energy to home owners, mid-size entrepreneurs and the informal sector.
f) Eliminates the expenditure on non-renewable sources of energy and hence increase individual savings.
g) Creates positive impacts on the environment and the levels of carbon emission.

Personal Finance

From our last editions we have discussed 6 of the steps to consider in achieving a good level of financial freedom. The last point being on how to have a grip on your taxes, you will now be able to carefully have control of the net earning s after tax which you should reinvest.

In this edition, we check on the last point in this series which is "***how to protect yourself***"

This is one of the most important aspects in personal finance Protecting what you have really sacrificed so as to make a saving on. It will make little or no sense to make a budget, reduce some of your expenses, make a saving, re-invest the saving, manage your taxes and then fail to protect all that you have saved.

Additionally, protecting yourself is a positive way of ensuring that your later days are well secured, the days that you will not have the energy to reinvest but you can use the reinvested amount to cater for your bills with ease.

It is at this point that Investing makes it possible for your money to work for you. In a sense, your money has become your employee, and that makes you the boss. You'll want to keep a close watch on how your employee, your money, is doing.

Choosing someone to help you with your investments is one of the most important investment decisions you will ever make. While most investment professionals are honest and hardworking, you must watch out for those few unscrupulous individuals. They can make your life's savings disappear in an instant.

Make sure the investment professional that you choose and her firm are registered with the regulators and licensed to do business. On top of this, please confirm whether the investment professional or her firm have ever been disciplined, or whether they have any complaints against them and that the professional is indemnified in case of a loss so that you can get compensated in case of such incident.

Still, you may be asking for serious losses if, for instance, you invest in a small, thinly traded company that isn't widely known solely on the basis of what you may have read online. One simple phone call to your regulator could prevent you from squandering your money on a scam.

Be wary of promises of quick profits, offers to share "inside information," and pressure to invest before you have an opportunity to investigate. These are all warning signs of fraud. Ask your investment professional for written materials and prospectuses, and read them before you invest. If you have questions, now is the time to ask.

- How will the investment make money?
- How is this investment consistent with my investment goals?
- What must happen for the investment to increase in value?
- What are the risks?
- Where can I get more information?

It's always a good idea to write down everything your investment professional tells you. Accurate notes will come in handy if ever there's a problem.

Some investments make money. Others lose money. That's natural, and that's why you need a diversified portfolio to minimize your risk. But if you lose money because you've been cheated, that's not natural, that's a problem.

Finally, you need to cover your investments. An insurance cover will go a long way to protect you from an impending loss. This will be over and above the indemnity from your professional and it ensures that your investments are covered from all angles. You however need to sit down with them and negotiate for better terms to your satisfaction after which the insurer will provide a cover at a certain percentage and this will be to a good extent an expense worth to consider as it can really help you in time of need.

Having done this, you will have taken steps to protect yourself and your business from risks of loss. When you protect your savings, you secure your future.

You need such a service? Get in touch with us and we can begin your journey to financial freedom. We have always enjoyed to receive your feedback and as always, we are happy and grateful to be of service to you and your organization.

We, the Mbaya Family appreciate you for being our valued client.
We are grateful for the interactive sessions and the feedback that we have received to help us improve our services.
As the year comes to a close, we are grateful to God for sustaining us and all our clients through the year. We thank you for all your support. In this festive season, let us all celebrate God's goodness by being considerate of those in need.
We wish everyone of you a happy festive season as we look forward to a better and brighter 2023.

« Keep in touch with us in our final publication this year and lean more on personal financing. You need such a service? Get in touch with us and we can begin your journey to financial freedom. »

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.

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