



JANUARY 2023 | 9.92

OVER 40 YEARS OF ACCOUNTING EXCELLENCE

Tax Alert

Implementation of new **NSSF** Rates

Fringe Benefit Tax and Deemed Interest Rate .1

Domestic Taxes – KRA Service Charter .2

Tax Alert - VAT on Exported Service .3

Tax Alert - Implementation of New NSSF Rates .5

Tax Due Dates .6



Newsletter

MBAYA AND ASSOCIATES

February 2023 | Issue 092 | Volume 9

Introduction

Greetings to you in this month of February. We appreciate the favour and blessings received and a chance to run our organizations. Our last month's edition had a lot of feedback and engagement and we hope for the same this month

This edition covers recent important developments in Kenya's tax landscape. We are grateful for your interaction and are happy to be of service to you.

On the right column of the newsletter, you will find contact details for the senior 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

In this issue



*Domestic Taxes – KRA Service
Charter » 2*

Contacts

Head Office
3rd Floor, Western Heights

Karuna Road, Westlands
P. O. Box 45390 – 00100
Nairobi, Kenya

Tel. +254(20)4443868

254 20 4448938

254 20 4446466

Fax: 254 20 4449819

Mike Mbaya | Managing Partner

Email: mike@mbaya.co.ke

Muhungi Kanyoro | Partner

Email: mkanyoro@mbaya.co.ke

Andrew Bulemi | Partner

Email: abulemi@mbaya.co.ke

Leah Nganga | Partner

Email: lwambui@mbaya.co.ke

Table of Contents »

» From the Tax Desk ».....	1
Fringe Benefit Tax and Deemed Interest Rate	1
Domestic Taxes – KRA Service Charter	2
Tax Alert - VAT on Exported Services.....	3
Tax Alert - Implementation of New NSSF Rates.....	5
Tax Due Dates	6
Instalment Tax	6
Digital Service Tax (DST)	6
Minimum Tax	6

» From the **TaxDesk** »

Fringe Benefit Tax and Deemed Interest Rate

Fringe Benefit Tax (FBT) » This is a tax applicable when employers provide loans to their employees and charge an interest lower than the prescribed rate (ITA-section 12(b)). This becomes a benefit to the employee, for which the employer needs to file and pay Fringe Benefit Tax. FBT is paid by the employer at the corporate tax rate of 30 % on total taxable value each month. The tax is payable on or before the 9th day of the following month to KRA. For the purposes of Section 12B of the Income Tax Act, the Market Interest Rate is 9%. This rate is applicable for the three months of January, February and March 2023.

Deemed Interest Rate » This is the amount of notional interest assumed to be payable by a resident person in relation to any outstanding loan provided or secured by a non-resident person, where such loan has been provided interest free. For purposes of section 16(5), the prescribed rate of interest is 9%. This is applicable for the months of January, February and March 2023.

Please note that the rates above have remained the same from the last quarter ended December 2022.

Withholding tax rate of 15% on the deemed interest shall be deducted and paid to the Commissioner by the 20th day of the month following the month of computation.

Low Interest Benefit » For purposes of section 5(2A), the prescribed rate of interest is still 9%. Which is applicable from January 2023 to June 2023 and it's an increase by 2% compared with the previous half year ended in December 2022 which was 7%.

The above rates have been published by a notice by KRA dated 17th January 2023. We hereby urge all our clients to adhere and adjust to these rates so as to remain compliant.

An example of a Fringe Benefit Tax computation: On 1st February 2023, an employee gets a loan of Kshs 2Million from his/her employer at a rate of 6%. FBT will be calculated as follows:

Loan amount: Kshs. 2,000,000
Interest charged: 6% per annum
Market Interest rate for the month: 9% per annum
Fringe Benefit Rate on saving by employee = 9% - 6% = 3% per annum
Fringe Benefit = 2,000,000 x 3% = 60,000 per Annum; i.e., Kshs. 5,000 per Month.

Fringe Benefit tax payable by the employer for the month of February 2023 is therefore Kshs. 1,500 (5,000 x 30%). The tax should be payable by the 9th of March 2023 together with the PAYE for the same month of February 2023.

The FBT computation should be done and tax paid monthly using the applicable rates until the loan has been cleared in full.

Domestic Taxes – KRA Service Charter

A customer service charter is a document that outlines how an organization promises to work with its customers along with providing insights into how an organization operates. It includes the rules by which an organization interacts with its external customers including policies, procedures and Service level agreement.

Customer service charters help organizations manage customer expectations regarding the delivery of products and services, standards of quality and conflict resolution.

A customer service charter is a valuable tool for instilling confidence in customers, demonstrating a competitive edge and promoting a commitment to healthy relationships.

Kenya Revenue Authority (KRA) has its service charter for various of its services which includes the timelines for the services to all its taxpayers. Below is a summary of some of the services as outlined in the service charter.

	PARTICULARS AND REQUIREMENTS		TIMELINE
PIN Registration	Individual PIN that does not require approval(s)	Free	Within the same day.
i) Individual PIN			
Individual Resident	Individual PIN Resident that requires approval of obligations; e.g., TOT, VAT, PAYE, Excise & DST	Free	Within 5 working days
Individual Non-Kenyan Resident	See website for PIN registration requirements for Non – residents.	Free	Within 5 working days on presentation of the required documents.
Individual Non-Kenyan non-Resident			
PIN Registration	Certificate of incorporation	Free	Within 5 working days on presentation of the required documents.
ii) Non-Individual PIN Registration.	Director/Partner/ Trustees PIN Partnership/trust deed		
Amendment of Individuals Registration Details	Amendment that does not require approvals. Provision of up-to-date information; e.g., Email address	Free	Within one day

	PARTICULARS AND REQUIREMENTS		TIMELINE
	Amendment that requires approvals. Provision of up-to-date information/ Documents; e.g., National ID in case a change of name	Free	Within 5 working days on presentation of the required Valid documents.
Exemption Certificate for persons living with disabilities (PLWDs)	Duly filled Income Tax Exemption form 1 & 2 Copy of a disability assessment Report from a government gazetted hospital PIN Certificate National ID National Council for persons with disability card Tax compliance Certificate	Free	Within 30 days upon receipt of the application at KRA.
Processing of Tax Compliance Certificate	Compliant taxpayers (Individuals/ non- Individuals) online application	Free	Within one day
	For Non-compliant Taxpayers (Individuals/Non-Individuals- submission of requisite valid supporting documents		Within one day after settling the compliance concerns

Tax Alert - VAT on Exported Services

The Value Added Tax ("VAT") treatment on exported services from Kenya is a contentious topic that has been the subject of numerous disputes between the Kenya Revenue Authority ("KRA") and Taxpayers engaged in cross-border business.

The High Court of Kenya sitting in Nairobi delivered a judgment on 21 December 2018 dismissing an appeal by the Commissioner of Domestic Taxes ("the Appellant"). The High Court held that in establishing whether or not services have been exported out of Kenya, the guiding factor should be the location of the consumer of the services and not the place where the services are performed.

The High Court also went further to determine that the taxing rights in relation to VAT on cross border supply of services are vested in the jurisdiction of the final consumer.

The main issue for determination by the court was whether the services rendered by the airfreight company were exported services as envisaged in the VAT legislation. The High Court in dismissing the Commissioner's appeal held that the services offered by the company to the Respondent were in fact exported services and that the location where services are provided does not determine the question of whether the services are exported or not.

The High Court held that for a service to qualify as an 'exported service', it matters not whether that service was performed in Kenya or outside Kenya. This is in accordance with the provisions of Section 2 of the repealed VAT legislation – Cap 476. The determining factor is the location where that service is to be finally used or consumed.

Being exported services, they were and are charged VAT at zero percentage as indicated under the Part A (1) of the Second schedule of the VAT Act 2013.

Later on, the Finance Act 2021 which became effective in July 2021, deleted the word exported services from the second schedule and added it to part II of the first schedule of the VAT ACT 2013. This meant that the status of export of taxable services changed from zero rated to exempt effective July 2021. Therefore, one could not claim the input VAT on the exported services.

This move was aimed at reducing cases of VAT refund claims and was probably a reaction to the numerous disputes on the matter of VAT on export of services.

The Finance Act 2022 which was assented into law on 21st June 2022, yet again moved the exported BPO services referred to above from part II of the first schedule to paragraph 1 of part A of the Second schedule of the VAT Act 2013. This implies that only the BPO services have been moved from exempt to zero rated.

The change has far-reaching consequences as companies exporting services will now be required to charge VAT, which will be a cost to non-resident recipients of such services, a situation that goes against the destination principle on taxation of cross-border supplies.

Where the amount of input tax that may be deducted by a registered person in respect of a tax period exceeds the amount of output tax due for the period, the amount of the excess tax shall be paid to the registered person by the Commissioner in form of a refund claim.

Additionally, the Finance Act 2022 did not define what BPO services but in business terms, these services would refer to outsourced CORE business support of operation services e.g. IT, Accounting, HR and the like. The Special Economic Zones Act (SEZ Act) defines BPO as the provision of outsourcing services to business for specific business functions or processes such as back office support services in human resources, finance, accounting and procurement among other services.

It was expected that Other than BPO services all other exported services will be chargeable to VAT with effect from 1st July 2022 when the tax became effective but this had been held back by a petition challenging the imposition of the tax. This was through a consolidated petition No. E338 dated July 8, 2022, filed by Viva Africa Consulting at the High Court. The petition sought to have Section 30 of the Finance Act 2022 declared unconstitutional citing double taxation and that its inclusion into the Finance Act 2022 was not subjected to public participation.

Through a ruling delivered by High Court Judge Hedwig Ong'undi Imbosa, on January 31 2023, the High Court threw out the petition by finding that the inclusion of the amendment into the Finance Act 2022 was constitutional. This brings to

an end the confusion and uncertainty in this area and provides clear rules of the way forward unless the decision is appealed.

Tax Alert - Implementation of New NSSF Rates

The National Social Security Fund (NSSF) ACT No. 45 of 2013 was asserted on 24th December, 2013 with the effective date of commencement being 10th January, 2014. The Act would lead to increase in the monthly NSSF contributions from the normal Kshs 400 (employer + employee) to 12% of the pensionable wages made up of two equal portions of 6% from the employee and 6% from the employer subject to an upper limit of Kshs 2,160.00/= for employees earning above Kshs 18,000.00/=

However, the implementation of the new rates was suspended following petition challenging the new rates by Kenya Tea Growers Association and others.

In September 2022, the Labour and Employment Relations Court declared the bid unconstitutional, null and void, indicating that the NSSF Act, 2013, was in breach of the Constitution as there was no public participation ahead of its enactment.

After a successful appeal at the Court of Appeal, the judges Hannah Okwengu, Mohamed Warsame and John Mativo in a ruling dated 3rd February 2023 faulted the Labour and Employment Relations Court in declaring the Act unconstitutional when it had no jurisdiction to question validity of the law as that was a preserve of the High Court. The judges gave a nod for the new rates to take effect by setting aside the ruling by the lower court.

In November 2022, the Federation of Kenya Employers (FKE) said the proposed increase in the NSSF contributions should be spread over five years so as to enable employers and employees to adjust to accommodate the new rates, further adding that it should be effected based on "statutory minimums." But NSSF through a notice dated 9th February 2023 have requested the employers to comply with the ruling immediately.

Federation of Kenya Employers (FKE) has urged the Government for meaningful stakeholder engagement sessions before the act is implemented in order to enable both workers and employers to have ample time to adjust their budgets to accommodate the sharp increases on their retirement savings.

In compliance with the ruling and the mandate to remain compliant, we advise our clients to continue effecting the new rates from the February 2023 statutory and observe the tax payment timelines which will be on or before 9th March 2023.

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

DISCLAIMER: This publication has been prepared for general guidance on matters of interest only, and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice. No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication, and, to the extent permitted by law, Mbaya & Associates, its members, employees and agents do not accept or assume any liability, responsibility or duty of care for any consequences of you or anyone else acting, or refraining to act, in reliance on the information contained in this publication or for any decision based on it.