Finance Act, 2020

ALGERIA
ETHIOPIA
GUINEA
KENYA
MADAGASCAR
MALAWI
MAURITIUS
MOROCCO
MOZAMBIQUE
NIGERIA
RWANDA
SUDAN
TANZANIA
UGANDA
ZAMBIA

UAE
Introduction

The Finance Act, 2020 (the Finance Act) was assented to by President Uhuru Kenyatta on 30 June 2020 to make amendments to a raft of laws in Kenya, including the Income Tax Act (CAP 470), the Value Added Tax Act, 2013, the Tax Procedures Act, 2015, the Miscellaneous Fees and Levies Act, 2016 and the Excise Duty Act, 2015 among other miscellaneous amendments. Most of the amendments relating to income tax have an effective date of 1 January 2021 while other amendments will be effective on 1 July 2021. The rest of the amendments came into force on the date of assent on 30 June 2020.

As previously advised in our Legal Alert on the Finance Bill, 2020, the amendments in the Finance Act can be seen to target an increased tax base with the introduction of minimum tax and the digital service tax as well as disallowing certain categories of expenses in the computation of taxable income. We also note that a vast number of changes which were earlier proposed by the Tax Laws (Amendment) Bill, 2020 but were eventually deleted by the Tax Laws (Amendment) Act, 2020 were considered a second time in the deliberations leading to the assent of the Finance Act. Following the changes introduced by the Tax Laws (Amendment) Act, 2020, we continue to see the systematic removal of tax exemptions and incentives that were available to specific sectors such as the energy sector. We also see changes in the VAT exemption regime that have been motivated by the COVID-19 pandemic.

We summarise in this legal alert the key amendments in the Finance Act as well as their potential impact to business.

1. Win for landlords: widened band for rental income subject to tax

*Effective Date: 1 January 2021*

The Finance Act increases the amount of rental income that qualifies for Residential Rental Income (RRI) Tax to income between KES 288,000 and KES 15 million (approx. USD 2,700 and USD 140,300) per annum. Previously, residential rental income accrued in or derived from Kenya by resident persons was subject to RRI Tax at the rate of 10 percent where the rental income is between KES 144,000 and KES 10 million (approx. USD 1,300 and USD 93,500) per annum.

The increased limit from KES 10 million to 15 million (approx. USD 93,500 to USD 140,300) allows landlords earning higher rents of up to KES 15 million to qualify for RRI Tax which is a simpler mode of compliance. Landlords whose residential rental income does not qualify for RRI are required to maintain books of account and compute the profit which will then be subjected to income tax, which can prove cumbersome to landlords. This is therefore a welcome move as it allows more landlords to qualify for RRI tax even as they grapple with the challenges brought about by the COVID-19 pandemic.

As for the increased lower threshold from KES 144,000 to KES 288,000 (approx. USD 1,300 to USD 2,700), the National Assembly’s Financial Committee was of the view that this amendment was necessary to match the lower Pay As You Earn (PAYE) rates introduced by the Tax Laws (Amendment) Act, 2020.

2. Introduction of Minimum Tax

*Effective Date: 1 January 2021*

The Finance Act amends the Income Tax Act by introducing minimum tax which will be payable at the rate of 1 percent of the gross income of a person. The minimum tax shall not apply to exempt income under the Income Tax Act or to income that has been taxed elsewhere either as PAYE, Income Tax, RRI Tax, Turnover Tax, Capital Gains Tax or under the specific taxation regime for companies in the extractives industry.

The minimum tax will be paid in instalments which will be due on the 20th day of each period ending on the fourth, sixth, ninth and twelfth month of the year of income, similar to the timelines for instalment taxes. The amendment provides that persons whose instalment taxes in a year of income are lower than 1 percent of their gross revenue are exempted from the instalment tax regime. Instead, they will be required to pay the minimum tax in four equal instalments. This means that 1 percent of the gross turnover will be the least amount of tax payable by any person in any year income including entities in tax losses. Although there appears to be a drafting error on the new section 12D (1) (c) in relation to instalment taxes, the intention appears to be for taxpayers whose instalment taxes are lower than the minimum tax to pay minimum tax and in which case they will be exempt from the instalment tax regime. Due to the drafting error, we have written to the KRA for
clarification. We will update you, our clients, once we have received feedback from the KRA on this.

The amendment is expected to have far reaching effects especially on businesses which are negatively affected by the COVID-19 pandemic and are currently in financial distress as they are likely to be required to pay 1 percent of any income earned as minimum tax. Entities with high revenues but low margins will also be adversely affected as they may be required to pay tax while they would have ordinarily either paid a lower tax or not been in a tax paying position from a corporate tax perspective. Further, entities in tax losses arising out of reliance on various capital allowances will also be required to pay the minimum tax eroding any benefits realised from the capital allowances.

Despite this being the case, the National Assembly’s Finance Committee retained the provisions on minimum tax on the basis that it was to ensure that companies that report perennial tax losses contribute towards provision of infrastructure by the Government.

We would have expected the Government to put in place measures to cushion low margin businesses and entities which are in a tax loss position as a result of claiming capital allowances. Additionally, start-ups in their first year of operation will have a tax obligation to settle under this new minimum tax provision. Furthermore, noting that there are years where a business may enter into a tax loss position through unforeseen socio-economic conditions, such as COVID-19, it may have been ideal for the law to only apply where a company has had a continued loss position for a number of years.

While the introduction of minimum tax may be well intended, the blanket application of this tax without taking into account the basis on which the tax loss has arisen will have an impact on the ease of doing business in Kenya and Kenya’s attractiveness as an investment destination.

3. New tax for the digital sector

Effective Date: 1 January 2021

The Finance Act introduces a Digital Service Tax (DST) on income accruing from a “digital marketplace”, at the rate of 1.5 percent of the gross transaction value.

Previously, and during the on-going global tax discussions on taxation of digital services, the Finance Act, 2019 introduced the taxation of income accruing through a digital marketplace. The Finance Act, 2019 amended the Income Tax Act to include the definition of a “digital marketplace” which means “a platform that enables direct interaction between buyers and sellers of goods and services through electronic means.”

Due to administrative challenges and the lack of a clear framework to administer tax on digital services, not much headway has been made in taxing the digital economy globally. Earlier this year, the Organisation for Economic Co-operation and Development (OECD) had committed to reach an agreement on a consensus based solution for taxation of digital services by the end of 2020. Various jurisdictions such as France and the United Kingdom have proposed various forms of digital services tax, which have resulted in threats of sanctions by the United States as such taxes are viewed as being aimed at large American technology companies. It is hoped that Kenya will not face similar adverse actions.

To ease in collection of the tax, the Finance Act also amends the Tax Procedures Act, 2015 to give powers to the KRA to appoint agents for purposes of collection
and remittance of DST. Such agents could be payment service providers and banks. The tax will be due at the time of the transfer of the payment for the service to the service provider.

The DST will be a form of advance tax for resident persons and non-resident persons with a permanent establishment in Kenya as they will be able to offset the DST paid against their total tax due for a year of income. There are a number of unclear issues, for example, whether withholding tax obligations (especially for non-resident persons) would still be applicable on such income and modalities for collection and payment of the tax, especially where multiple transactions are undertaken daily (yet the tax is required to be paid upon “transfer of payment for the service”).

The Finance Act, 2019 also empowered the Commissioner to issue regulations on the operations of the DST, which are yet to be issued. We hope that the regulations, once issued, will provide more clarity on the scope of the DST. It is expected that the DST can only be fully operationalised once these regulations are issued.

4. Changes in the allowable deductions in the computation of taxable income

Effective Date: 1 January 2021

Deductibility of certain expenses

The Finance Act amends the Income Tax Act by deleting the following tax allowable expenses:

a. entrance fees or annual subscriptions paid to a trade association (in that year of income) which has made an election to be deemed to carry on a business charged to tax;

b. expenses on legal costs and other expenses incurred on issue of shares for purchase by the general public;

c. expenses incurred on legal costs and other expenses in listing on the Nairobi Stock Exchange; and

d. club subscriptions paid by an employer on behalf of an employee.

The removal of the legal and other costs incurred by companies when they undertake Initial Public Offers (IPOs) or when they list in the Securities Exchange is likely to have a negative effect on the companies undertaking such processes as they incur significant expenses in retaining various professionals such as lawyers, accountants and other transaction advisors. It would be expected that since the number of listings at the NSE has not been impressive, tax incentives for listing should be enhanced and not reduced.

Demise of the Home Ownership Savings Plan

Effective Date: 1 January 2021

A Home Ownership Savings Plan (HOSP) is a savings plan established by an approved institution and registered with the Commissioner of Domestic Taxes for receiving and holding funds in trust for depositors. A HOSP aims to benefit first-time home owners by allowing the depositors to deduct the contributions made to a registered HOSP from their tax computations for a maximum of 10 years.

The Finance Act repeals the provisions in the Income Tax Act relating to HOSP which will effectively mean that there will be no tax deduction allowed in respect
to contributions made to a registered HOSP. Further, the Finance Act revokes the tax exemption status of the income of a HOSP that is usually administered under various financial institutions.

This proposal was also brought forward by the Tax Laws (Amendment) Bill, 2020 but was rejected in the enacted Act as the belief of the National Assembly’s Finance Committee was that deleting this provision will discourage savings to invest in the housing sector which in effect contradicts the Big Four Agenda.

This notwithstanding, in deliberating the provisions of the Finance Bill, 2020, the National Assembly’s Finance Committee concluded that there has been a low uptake of HOSP because most people prefer arrangements that allow for the occupation of a house while paying for it rather than saving to buy a house. Additionally, the Committee stated that the Government has introduced various affordable housing initiatives such as an affordable housing scheme relief and mortgage interest deduction to encourage individuals to own a home which is what most individuals would prefer.

5. Removal of tax exemptions on certain classes of income

Effective Date: 30 June 2020

The Finance Act subjects employment income received as bonuses, overtime and retirement benefits (for employees whose taxable employment income before the bonuses and allowances does not exceed the lowest tax band which is currently KES 24,000 (approx. USD 224)) to income tax by revoking their exempt status.

The exemption on employment income not exceeding the lowest tax band is no longer relevant as there would be no tax due on this income not exceeding KES 24,000 (approx. USD 224) pursuant to the changes in the PAYE bands and personal relief introduced by the Tax Laws (Amendment) Act, 2020.

In conclusion, we note that there were proposals in the Finance Bill, 2020 in relation to the Income Tax Act that were rejected by the National Assembly. We summarise these proposals below:

<table>
<thead>
<tr>
<th>Proposal by the Finance Bill, 2020</th>
<th>Current position by virtue of the Finance Act, 2020</th>
</tr>
</thead>
<tbody>
<tr>
<td>To disallow expenses incurred on the construction of a public school, hospital, road or a similar kind of social structure from allowable expenses in the computation of taxable income from being deductible.</td>
<td>The proposal was deleted from the Finance Act meaning that these expenses will continue to be deductible. The National Assembly’s Finance Committee maintained this provision so that this can encourage companies to invest in corporate social projects.</td>
</tr>
<tr>
<td>To revoke tax exempt status and subject the income of the National Social Security Fund (NSSF) to tax.</td>
<td>The Finance Act did not retain this proposal meaning that income from NSSF will continue to be exempt from income tax.</td>
</tr>
<tr>
<td>To tax monthly or lump sum pension payments to persons above 65 years of age.</td>
<td>After the public outcry regarding this proposal, it was eventually deleted in the Finance Act meaning pension payments remain tax exempt.</td>
</tr>
</tbody>
</table>
6. Clean up the amendment to retain CGT exemption for certain machinery

Asset such as machinery, motor vehicles, furniture and others which are subject to wear and tear have always been exempt from Capital Gains Tax (CGT). The exemption is contained under Paragraph 3(2) of the Eighth Schedule to the Income Tax Act which refers to certain machinery under the Second Schedule as exempt. However, with the repeal of the Second Schedule by the Tax Laws (Amendment) Act, 2020, Paragraph 3(2) of the Eighth Schedule referred to a wrong Paragraph of the new Second Schedule effectively compromising the exemption. The amendment is therefore introduced as a clean-up measure to ensure there is reference to the correct Paragraph of the new Second Schedule and to maintain the exemption.

Amendments to the Value Added Tax, 2013 (No. 35 of 2013) (The VAT Act)

1. Legitimizing VAT Auto Assessments

*Effective Date: 30 June 2020*

Previously, in order for a person to claim for input VAT, they were only required to provide documentation to support their claim, such as original tax invoices or customs entries. The Finance Act introduces further requirements, to the effect that taxpayers will also be required to have proof that the supplier declared the amount of input VAT being claimed in their VAT return and that such VAT return has been filed with the KRA. This therefore increases the compliance requirements for taxpayers as they would need to follow up with their suppliers to ensure they include the invoices issued in their VAT return filings.

This amendment effectively legitimizes the VAT Auto Assessment (VAA) programme, whereby KRA has been asking taxpayers to provide reconciliations to support inconsistencies where their suppliers do not declare the invoices issued to them in their returns. The legitimacy and reasonableness of the VAA programme has been questioned as recently as in the decision of the Tax Appeals Tribunal in Shreeji Enterprises (K) Limited v. The Commissioner of Investigations & Enforcement, 2020 (eKLR). In this case, the Tax Appeals Tribunal held that the KRA cannot introduce additional criteria which are not founded in law as a basis for denying an input tax claim by a taxpayer. We now expect to see KRA being more aggressive with the VAA programme and especially in disallowing VAT refund applications filed by taxpayers.
2. Changes in the VAT exemption regime

**Effective Date: 30 June 2020**

<table>
<thead>
<tr>
<th>Now subject to VAT at 14% (previously VAT exempt)</th>
<th>Now exempt from VAT (previously subject to VAT at 14%)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Aviation sector</strong></td>
<td><strong>Health sector</strong></td>
</tr>
<tr>
<td>Purchase of certain types of helicopters, aeroplanes and aircraft gear and parts including tyres</td>
<td>Supply of ambulance services</td>
</tr>
<tr>
<td>Leasing and hiring of helicopters</td>
<td></td>
</tr>
<tr>
<td><strong>Energy sector</strong></td>
<td><strong>Agriculture sector</strong></td>
</tr>
<tr>
<td>Specialised equipment for the development and generation of solar and wind energy, including deep cycle batteries which use or store solar power</td>
<td>Maize (corn) seeds of tariff no. 1005.10.00</td>
</tr>
<tr>
<td>Taxable goods locally purchased or imported for direct and exclusive use in the assembly, manufacture or repair of clean cook stoves</td>
<td></td>
</tr>
<tr>
<td>Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating) barbeques, braziers, gas-rings, plate warmers and similar non-electric domestic appliances</td>
<td></td>
</tr>
<tr>
<td><strong>Agricultural sector</strong></td>
<td></td>
</tr>
<tr>
<td>Tractors other than road tractors for semitrailers</td>
<td></td>
</tr>
<tr>
<td><strong>Public servants</strong></td>
<td></td>
</tr>
<tr>
<td>One motor vehicle for a returning public officer from a foreign posting in a Kenyan mission</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Now subject to VAT at 14% (previously zero rated)</th>
<th>Now zero rated (previously VAT exempt)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Energy sector</strong></td>
<td><strong>Agricultural sector</strong></td>
</tr>
<tr>
<td>Supply of liquefied petroleum gas (LPG) including propane</td>
<td>The supply of maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour by more than 10% in weight provided that this shall be in operation for six (6) months from the date of assent (30 June 2020)</td>
</tr>
<tr>
<td>Supply of inputs of raw materials for electric accumulators and separators including lead battery separator rolls supplied to manufacturers of automotive and solar batteries in Kenya</td>
<td></td>
</tr>
</tbody>
</table>
The VAT changes set out above continue to effect the systematic removal of tax exemptions provided to certain industries, especially the energy sector. The withdrawal of these tax incentives and exemptions will have a negative effect on the attractiveness of Kenya as an investment destination and it demonstrates a lack of fiscal certainty, which is considered keenly by investors.

Further, other exemptions to incentivise investors in clean energy and recycling of plastics have been withdrawn and this may have a negative impact on environmental conservation efforts.

The introduction of VAT on LPG will increase the cost of living as LPG is used as the main energy source for many urban homes. It will make LPG which is a recommended source of energy for home use less accessible to many Kenyans who are already facing financial distress in light of the harsh economic effects of the COVID-19 pandemic. However, there is some respite as the change relating to LPG is expected to take effect from 1 July 2021.

The Finance Act has also postponed the coming into force of the changes affecting the aviation sector to 1 July 2021 and this can be seen as a measure to spare the sector which has been adversely affected by the COVID-19 pandemic.

Further, the Finance Act has temporarily zero-rated maize flour to make it cheaper for six (6) months after which it will revert to its VAT exempt status. Maize seeds are now VAT exempt from previously being subject to VAT at 14 percent. These amendments are alive to the fact that maize and maize flour are a staple food in many Kenyan homes and need to be affordable to Kenyans especially during the COVID-19 pandemic.

The Tax Laws (Amendment) Act, 2020 revoked VAT exempt status for goods imported or purchased locally for direct and exclusive use in the implementation of projects under a special operating framework arrangement with the Government. The Finance Act introduces a transitional provision which has the effect of permitting VAT exemption for these goods to continue for existing projects for the remaining period of the agreement with the Government. This is a new addition that was not included in the Finance Bill, 2020.

We also note that in light of the COVID-19 pandemic, the Finance Act has exempted ambulance services from VAT. This is a welcome move as it should result in a reduction in the cost of these services in the wake of the COVID-19 pandemic.

In rejecting the Finance Bill proposal to tax materials used in the construction of a plastics recycling plant, Parliament’s Finance Committee noted that the exemption was introduced by the Finance Act, 2019 and the law should therefore be given an opportunity to be fully operationalised and its impact assessed before it is amended. The plant, machinery and equipment used in the construction of a plastics recycling plant therefore remain VAT exempt.
Amendments to the Excise Duty Act, 2015 (No. 23 of 2015)

1. Gazettement requirements

Effective Date: 1 January 2021

The Finance Act amends the Excise Duty Act to limit the powers of the Commissioner to unilaterally adjust the annual excise duty rates for purposes of taking inflation into account. The amendment provides that the Commissioner must first obtain the approval of the Cabinet Secretary in order to adjust the rates of excise duty in the Gazette once every year. Further, the Gazette notice shall be laid before the National Assembly within seven (7) days of publication and the National Assembly shall consider the notice within twenty eight (28) days to either approve or reject the notice.

We note that this amendment was not contained in the Finance Bill, 2020 and was introduced during deliberations on the Finance Bill. That said, we are of the view that this is a welcome amendment as it serves the purpose of checking the powers donated to the Commissioner to make inflation adjustments.

2. Excise duty on alcoholic beverages

Effective Date: 30 June 2020

Currently, Beer, Cider, Perry, Mead, Opaque beer and mixtures of fermented beverages of an alcoholic strength not exceeding 10 percent are taxable at the rate of KES 100 (approx. USD 1) per litre. On the other hand, spirits of undenatured ethyl alcohol, spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 10 percent are taxable at KES 235 (approx. USD 2) per litre.

The Finance Act restricts the alcoholic drinks subject to excise duty at the rate of KES 100 (approx. USD 1) per litre to those with an alcoholic strength of 6 percent (further down from the rate of 8 percent that was proposed in the Finance Bill, 2020). Further, the Finance Act increases the alcoholic drinks subject to excise duty at KES 253 (approx. USD 2) per litre to now include those with an alcoholic strength of 6 percent and above, (again lower than the 8 percent rate proposed in the Finance Bill, 2020).

These changes will have the impact of increasing the alcoholic drinks taxable at the rate of KES 253 (approx. USD 2) per litre while reducing those taxable at the rate of KES 100 (approx. USD 1) per litre and is likely to have the effect of increasing the amount of duty collected from alcoholic drinks.

3. Win for betting sector

Effective Date: 30 June 2020

The Finance Act removes excise duty on betting which was previously at the rate of twenty per cent (20 percent) of the amount wagered or staked and which was introduced by the Finance Act, 2019. The National Assembly’s Finance Committee noted the negative effects of this tax on the betting industry which had become burdensome as “winnings” were also subject to withholding taxes as well as betting companies being subject to an additional “betting tax”. The National Assembly’s Finance Committee proposed that excise duty be eliminated as this led to the
closure of betting companies in Kenya yet international players continue to operate and make profits in the Kenyan market.

This is a win for the betting industry which has been recently embattled with the KRA on account of taxes levied in the industry. As a result, the betting companies felt overtaxed and concluded that operations in the Kenyan market became unviable, leading to the closure of several betting businesses. We expect to see a revival of the industry in light of this amendment.

However, we note that the National Treasury has issued a notice to the effect that they will be submitting a proposal to the National Assembly to reintroduce the tax on betting within six (6) months, on the basis that betting has a negative impact on the social fabric of the Kenyan society.

**Amendments to the Tax Procedures Act, 2015 (the TPA)**

1. **Voluntary Tax Disclosure Programme**

*Effective Date: 1 January 2021*

The Finance Act has established a voluntary tax disclosure programme which shall run for three (3) years from 1 January 2021. Under the programme, taxpayers will be allowed to disclose their tax liabilities to the KRA for purposes of being granted relief of penalties and interest on disclosed tax as well as immunity from prosecution. The programme will apply to tax liabilities that accrued within five (5) years prior to 1 July 2020 meaning it will cover the period from June 2015.

Remission of interest and penalty shall be granted in the following manner:

<table>
<thead>
<tr>
<th>Remission %</th>
<th>Period when disclosure is made and tax liability is paid</th>
</tr>
</thead>
<tbody>
<tr>
<td>100%</td>
<td>First year of the programme</td>
</tr>
<tr>
<td>50%</td>
<td>Second year of the programme</td>
</tr>
<tr>
<td>25%</td>
<td>Final year of the programme</td>
</tr>
</tbody>
</table>

Taxpayers who want to benefit from this programme shall be required to make a voluntary application to the KRA in a prescribed form disclosing all material facts. Upon granting the relief, KRA shall enter into an agreement with the person setting out the terms of the payment of the tax liability and the period of payment of tax which shall be limited to one (1) year from the date of the agreement. In the instance that the taxpayer fails to pay tax liability within the year, they shall be liable to pay the full interest and penalty agreed.

Interestingly, the taxpayer that is granted the relief cannot seek any other remedy e.g. right to appeal in regard to the taxes, penalties and interest remitted to the Commissioner. Failure to disclose a material fact may result to withdrawal of the relief granted, assessment and collection of any balance of tax liability and prosecution. The taxpayer may appeal the decision to withdraw a relief.

Taxpayers under audit or who have been notified of a pending audit will not qualify for the programme.
The programme is a welcome move that will assist taxpayers in compliance without additional penalty and interest costs and it will also assist KRA in collection of outstanding taxes. Kenya may be borrowing a leaf from Tanzania which carried out a fairly successful tax amnesty programme in 2018.

Amendments to the Miscellaneous Fees and Levies Act, 2016 (the MFLA)
Effective Date: 30 June 2020

1. Import Declaration Fee on goods imported under the East African Community (EAC) Duty Remission Scheme

In the past, Import Declaration Fee (IDF) on goods imported under the Duty Remission Scheme has been charged at KES 10,000. The Finance Act has now changed this to 1.5 percent of the customs value. This will see an increase in the cost of goods imported through the Duty Remission Scheme.

2. Import duty on goods from Export Processing Zones

The Finance Act has introduced an additional duty at a rate of 2.5 percent of customs value for goods entered for home use from an Export Processing Zone (EPZ). This is in addition to the already existing import duty payable. Notably, the Government had recently allowed EPZs to supply goods to the local market given the negative effects of the COVID-19 pandemic. This may have the effect of wiping out the lower cost benefits for EPZ contracts as a result of the tax incentives enjoyed.

3. Exemptions from Import Declaration Fee

The Finance Act provides that IDF exemptions shall apply on the following:

a. aircrafts, excluding aircraft of unladen weight not exceeding 2,000kg and helicopters of heading 8802.11.00 and 8802.12.10. Currently, all aircrafts are exempt from IDF. This amendment therefore limits IDF exemptions available for helicopters and other aircraft. This read together with the VAT amendments will increase the cost of helicopters and other aircraft that do not meet the prescribed unladen weight. However, the coming into force of this change has also been postponed to 1 July 2021;

b. all goods, including materials supplies, equipment, machinery and motor vehicles for the official use by the Kenya Defence Forces and National Police Service.

The Finance Act has removed exemptions from IDF in respect of goods that the Cabinet Secretary may determine are in public interest, or to promote investments which value is not less than KES 200 million (approx. USD 2 million). The exemption for goods imported for implementation of projects under special operating
framework arrangement with the Government has also been removed. This will further serve to reduce the exemptions granted to foreign investors carrying out large infrastructure projects especially on the energy sector.

4. Exemptions from Railway Development Levy

The Finance Act has similarly removed the Railway Development Levy (RDL) exemption for goods where the Cabinet Secretary may determine they are in public interest, or to promote investments which value is not less than KES 200 million (approx. USD 2 million). As noted above this further erodes the exemptions currently granted to investors in large infrastructure projects.

The Finance Act has also amended the MFLA to exempt from RDL the following goods:

a. currency notes and coins imported by the Central Bank of Kenya; and
b. equipment, machinery and motor vehicles for the official use by the Kenya Defence Forces and National Police Service.

Amendments to the Tax Appeals Tribunal Act, 2015

Effective Date: 30 June 2020

The Finance Act limits the grounds of appeal relied on by a taxpayer before the Tax Appeals Tribunal to now cover the grounds provided for under the appeal as well as the documents to which the decision of the KRA relates to. Previously, the limit only covered the grounds of appeal relied on by the taxpayer in their response to the decision by the KRA but the amendment further limits the taxpayer to the documents presented in its response. This may have the effect of limiting the introduction of new documents at the Tax Appeals Tribunal which had not been presented to the KRA.

This is intended to limit the documents that a taxpayer can rely upon in an appeal to those which the Commissioner has had an opportunity to consider in arriving at the decision to which the appeal relates. This will therefore require taxpayers to present all the documents to support their position at the earliest stage so as to allow the Commissioner a chance to consider the documents in the process of making the decision. This may have the effect of protecting the Commissioner from being ambushed with new documentary evidence at the Tax Appeals Tribunal which had not previously been presented earlier and which could actually have influenced the Commissioner’s decision.
Miscellaneous Amendments

Amendments to the Public Roads Tolls Act, Cap 407 of The Laws Of Kenya

Effective Date: 30 June 2020

The Finance Act amends the Public Roads Tolls Act to clarify that in defining a toll collector, a toll collector can either be private or public. This means that a private entity may be designated as a toll collector.

The amendments provide clarity on what constitutes toll stations and provides for the designation of the specific stations that would be considered toll stations for public roads. The amendments provide that a toll shall be payable only as prescribed by the Cabinet Secretary for Transport.

The Cabinet Secretary for Transport will have the power to enter into alternative agreements with private parties to plan, design, construct and manage a public road or any portion thereof which has been declared to be a toll road. The amendments do away with the requirement for National Assembly approval for such agreements giving the Cabinet Secretary for Transport full discretion in that regards. Additionally, although not proposed in the Finance Bill, 2020, the Finance Act has introduced a requirement that a private toll collector shall only levy toll and collect monies payable on a public toll road constructed under an agreement.

Further, the amendments provide for the creation of a National Roads Toll Fund by the Cabinet Secretary for National Treasury and Planning under the Public Finance Management Act, 2012. All tolls collected by toll collectors will be deposited into the Fund. The Fund shall provide funds for the proper functioning of toll roads and toll stations and development, repair and maintenance of roads as the Cabinet Secretary for Transport may direct and taking into account regional balancing.

Additionally, the Finance Act has revised the penalty for driving a vehicle through a toll station except by the route designated for the passage of that vehicle, refusing to stop a vehicle at a toll station and to pay the toll and fraudulently or forcibly driving a vehicle through a toll station without paying the toll. The fine has been increased from KES 5,000 to KES 50,000 (approx. USD 47 to USD 468).

Lastly, the Finance Act provides that the person managing a toll road under an agreement with the Cabinet Secretary for Transport will have the right to collect unpaid tolls from defaulters as a civil debt recoverable summarily.

The amendments effectively set the stage for the establishment of toll roads in Kenya most of which are likely to be carried out under public-private partnership agreements.

Amendments to the Capital Markets Act, Cap 485a of The Laws Of Kenya (the CMA Act)

Regulation of private equity and venture capital companies

Effective Date: 30 June 2020

Before the assent of the Finance Act, the CMA did not exercise regulatory oversight over private equity and venture capital companies. The amendments bring private equity and venture capital companies that access public funds under the regulatory oversight of the CMA. The term ‘public funds’ has not been defined in
the amendment and it will be interesting to see how the CMA will proceed going forward.

**Clarification of the role of the Investor Compensation Fund**

*Effective Date: 30 June 2020*

The CMA Act, in establishing the Investor Compensation Fund, provides that one of its purposes would be payment to beneficiaries from collected unclaimed dividends when they resurface. This function is already undertaken by the Unclaimed Financial Assets Authority. The amendment to the CMA Act does away with this purpose to ensure there is no conflict between the Investor Compensation Fund and the Unclaimed Financial Assets Authority.

**Amendments to the Insurance Act, Cap 487 of The Laws Of Kenya (the Insurance Act)**

**Period within which an appeal may be filed at the Insurance Tribunal**

*Effective Date: 30 June 2020*

The Insurance Act provides that a party dissatisfied with the determination of a dispute by the Commissioner of Insurance may appeal the determination at the Insurance Tribunal. The Insurance Act did not specify the period within which an appeal against the decision of the Commissioner of Insurance by an aggrieved party can be filed in the Insurance Tribunal. The amendments specify that an appeal should be filed at the Insurance Tribunal within thirty (30) days of issuance of a decision by the Commissioner of Insurance.

**Amendments to the Kenya Revenue Authority Act (No. 2 of 1995)**

**Establishment of capacity building and training institution**

*Effective Date: 30 June 2020*

The amendments provide a legal framework for the establishment of an institution to provide capacity building and training on tax, customs and revenue administration. It is also required that the Board of the KRA may make regulations with respect to capacity building and training.

**Commissions earned by the KRA to form part of the Funds of the KRA**

*Effective Date: 30 June 2020*

The amendments include commissions received by the KRA for collecting any revenue on behalf of a county or government agency as forming part of the funds of the KRA. The commission is capped at 2 percent of the total revenue collected on behalf of the county government or government agency.

**Limitation of actions**

*Effective Date: 30 June 2020*

The amendments introduce a provision to the Finance Act providing for specific timelines within which the KRA can be sued to enable the KRA to effectively manage its disputes. It is provided as follows:
<table>
<thead>
<tr>
<th>Reason for dispute</th>
<th>Timeline to sue KRA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Action, neglect or default</td>
<td>within 12 months after the act, neglect or default complained of.</td>
</tr>
<tr>
<td>Continued injury or damage</td>
<td>within 6 months after the act stops.</td>
</tr>
</tbody>
</table>

In at least one (1) month, written notice must be served upon the Commissioner-General specifying the particulars of the claim and intention to commence action or legal proceedings. This is a measure to protect the KRA from a multiplicity of suits by limiting the time within which a person can sue.

Amendments to the Retirement Benefits Act (No. 3 of 1997)

**Penalties in respect to actuarial evaluations**

**Effective Date: 30 June 2020**

The amendments introduce new provisions relating to actuarial evaluations. A trustee who fails to submit a copy of the actuarial report to the Chief Executive Officer by the due date specified in the Regulations shall pay a penalty of KES 100,000 (approx. USD 935). If the report has not been submitted, the trustee shall pay an additional penalty of KES 1,000 (approx. USD 9) for each day during which the report remains unsubmitted.

The amendments enhance the supervisory role of the Retirement Benefits Authority on pension schemes by providing powers to charge a penalty for failure to submit actuarial evaluations within the period specified in the Regulations.

Amendments to the Insolvency Act (No. 18 of 2015)

**Reduction of risk exposure on tax revenues held by commercial banks**

**Effective Date: 30 June 2020**

In the context of second priority claims, unpaid amounts held on behalf of the KRA by a bank shall have second priority at the point of receivership or liquidation of the bank. This is a measure to further safeguard the amounts collected from taxpayers by banks on behalf of KRA. This follows changes introduced by the Tax Laws (Amendment) Act, 2020 which empowered the KRA to appoint banks as revenue collection agents and further introduced a two per cent (2 percent) daily penalty for late payment of the revenue collected.

Rejected Amendments to the Standards Act, Cap 496 of The Laws Of Kenya (the Standards Act)

The Finance Bill, 2020 had sought to propose a new definition for a consolidator as defined in the Finance Act although the proposal was not assented to in the Finance Act. The proposed amendment would have required consolidators to seek licensing and further to break down the consignments for purposes of customs declaration. This proposal aimed to regulate activities of consolidators to ensure that there are no tax revenue leakages as they import goods on behalf of small enterprises and individuals.
Key contacts

Should you require more information, please do not hesitate to contact:

Daniel Ngumy
Partner
ALN Kenya | Anjarwalla & Khanna
dng@africalegalnetwork.com

Kenneth Njuguna
Partner
ALN Kenya | Anjarwalla & Khanna
kkn@africalegalnetwork.com

The content of this alert is intended to be of general use only and should not be relied upon without seeking specific legal advice on any matter.