CLIENT ALERT: TAX LAWS (AMENDMENT) ACT, 2020.

INTRODUCTION

The Tax Laws (Amendment) Act, 2020 (the **Act**) was assented into law on 25th April, 2020. Noteworthy, the Act was meant to incorporate the fiscal proposals that had been outlined by the President on 25th March, 2020 to cushion the economy against the adverse effects of Covid-19 (the **Pandemic)**.

Following comments submitted by various stakeholders, certain proposals that were contained in the Tax Laws (Amendment) Bill, 2020 (the **Bill**) were dropped (Our previous alert on the Bill can be accessed here). However, the Act retained other legislative proposals which were contained in the Bill.

The provisions of the Act shall come into effect immediately (i.e. from the date of assent) save for amendments in respect of the taxable value of petroleum products under the Value Added Tax Act (the **VATA**) which will take effect on 15th May, 2020.

In this alert, we highlight the key legislative amendments introduced by the Act:

INCOME TAX ACT

a. Corporation tax

The **corporation tax rate for resident companies** has been decreased from 30% to 25%. A company is considered resident in Kenya for tax purposes if it is incorporated under Kenyan law; the management and control of its affairs are exercised in Kenya for any given year of income; or the Cabinet Secretary in charge of the National Treasury (the **CS**) declares the company to be tax resident for a particular year of income in a notice published in the Kenya Gazette.

The corporation tax rate for non-resident companies remains at 37.5%.

The reduction in the tax rate will cushion resident companies from the effects of the Pandemic by providing a relief of 5%.

The following **special tax rates enjoyed by specified companies have been repealed**. These companies shall henceforth be subject to corporation tax at a rate of 25%:

i. A company newly listed on the Nairobi Securities Exchange (the **NSE**) with at least twenty percent of its issued share capital listed - Such companies were previously subject to a corporation tax rate of 27% for the first three years after the year of income following the date of listing.

ii. A company newly listed on the NSE with at least thirty percent of its issued share capital listed - These companies were previously subject to 25% corporation tax for the first five years from the year of income following the date of listing. The impact of the repeal of this provision will therefore not be felt as the rate remains the same.

iii. A company newly listed on the NSE which has at least forty percent of its issued share capital listed - These companies were previously subjected to payment of corporation tax at the rate of 20% for five years following the year on income in which the companies were listed.

iv. A company introducing its shares through listing on any securities exchange via introduction - These companies were previously subjected to payment of corporation tax at the rate of 25% for the first five years following the year of listing hence the new rate will have no effect on them.

The above amendments will increase the corporation rate for companies which had a preferential rate of less than 25% (i.e. companies newly listed on the NSE which has at least forty percent of its issued share capital listed) while at the same time providing a relief for companies whose rate was more than 25% (i.e. companies introducing its shares through listing on any securities exchange via introduction.)

v. A company engaged in business under a special operating framework arrangement (**SOFA**) with the Government - These companies were previously subjected to tax at the rate provided for in the SOFA. The agreed upon tax rates will prevail for the unexpired contract period.

vi. The Act has done away with the corporation tax rate of 15% for the first five years for companies operating plastic recycling plants. This amendment shall translate into an increase in taxes payable by the current operators of plastic recycling plants hence withdrawing the incentive to engage in the environmentally friendly operations to the potential detriment of the environment.

All companies should take note of the new corporation tax rates and make the necessary amendments to their budgets as these rates shall be applicable from the year of income 2020.

b. Turnover Tax and Presumptive Tax

The Act has altered the scope of persons liable to payment of **turnover tax** at a reduced rate of 1% to any resident person whose business turnover exceeds Kenya Shillings One Million (Kshs. 1,000,000/=) but does not exceed or is not expected to exceed Kenya Shillings Fifty Million (Kshs. 50,000,000/=). This is a deviation from the previous position which provided for payment of turnover tax by resident persons whose annual turnover did not exceed Kenya Shillings Five Million (Kshs. 5,000,000/=). The reduction in the rate (from 3% to 1%) shall offer relief to all persons who are liable to pay this tax especially in the current year where businesses are likely to lose revenue due to the Pandemic.

Further, the previous position was that turnover tax did not apply to rental income, management or professional fees, the income of incorporated companies or the income that is subject to a final withholding tax (**WHT**). These provisions have however been deleted and it should be clarified whether these incomes would be subject to turnover tax if they fall within the scope of this provision.

Small business owners with annual turnovers that do not exceed Kenya Shillings One Million (Kshs. 1,000,000/=) will benefit the most as they shall not be required to remit this tax.

Lastly, the Act has done away with payment of **presumptive tax** which was previously payable by persons liable to payment of turnover tax at the rate of 15% of the amount payable for a business licence or trading licence and could be offset against turnover tax. This amendment shall bring great relief to business owners who were previously liable to payment of presumptive tax.

c. Pay as You Earn (PAYE) and personal relief

The Act has amended the annual personal relief claimable by an individual from Kshs. 16,896 to Kshs. 28,800. This amendment shall bring about a reduction in tax payable by an individual with the effect of increasing individuals disposable income and is therefore highly welcome.

The new individual tax rates under the Act are as follows:

	Annual income	New rates
On the first	KES 288,000	10%
On the next	KES 200,000	15%
On the next	KES 200,000	20%
On all income over	KES 688,000	25%

Employers should take these new rates into consideration when remitting taxes on behalf of their employees in respect of the April payroll for employers who have not yet disbursed the salaries. The PAYE for the month of April should be remitted by the 9th of May. For employers who had already disbursed the April salaries using the old PAYE rates, a refund of the differential PAYE should be made to the affected employees assuming that the PAYE has not yet been remitted to the KRA. Having said that, it is possible to claim a refund of the overpaid PAYE from the KRA for employers who have already remitted the PAYE.

d. Withdrawals from pensions

i) The previous preferential tax treatment for resident members who leave a registered pension fund, registered provident fund or a registered individual retirement fund, after fifteen (15) years of service or those who retire after the age of fifty (50) years or those who retire at any time on grounds of ill health is such that the lesser of the first KES 60,000 for every year of membership or the first KES

600,000 of lump sum payment is tax free. In addition, the first KES 300,000 of the total pensions and retirement annuities received by a resident individual from a registered fund in a year of income is tax free (together the **Tax Free Amounts**). Any amount above the Tax Free Amounts will now be subject to WHT being a final tax) at wider bands as follows:

	Annual income	New rates
On the first	KES 400,000	10%
On the next	KES 400,000	15%
On the next	KES 400,000	20%
On all income over KES 1.2M of the amount in excess of the tax free amount	KES 1,200,000	25%

ii) Where a resident individual withdraws before the expiry of fifteen (15) years from the date of joining a registered pension fund, registered provident fund or a registered individual retirement fund, any withdrawal in excess of the Tax Free Amounts and the statutory limits (the Income Tax Act provides that tax deductible contributions for an employee should be limited to the lesser of: 30% of an employee's pensionable income; or KES 240,000 per annum on aggregate; or the actual contributions made by an employee) in any one year are subject to WHT (not being a final tax) at the rates set out below:

	Annual income	New rates
On the first	KES 288,000	10%
On the next	KES 200,000	15%
On the next	KES 200,000	20%
On all income over	KES 688,000	25%

iii) Further, the Act has reduced the tax rate on surplus funds withdrawn by or refunded to an employer in respect of registered pension or registered provident funds from 30% to 25%.

Registered pension funds, provident funds and individual retirement funds providers should take note of the new WHT rates with respect to withdrawals for the purpose of informing their clients and amending their trust deeds where need be.

e. *Withholding Tax (WHT)*

The Act has introduced the following amendments on non–residents WHT for the following incomes:

Dividends

The Act has increased the WHT on dividends to non – residents (where no double taxation agreement exists) from 10% to 15% of the amount payable. This amendment will slightly reduce the effective tax rate for foreign owned companies and/or subsidiaries to 36.25% (as compared to the previous 37%). On the other hand, it may have the negative effect of discouraging non-residents from investing in Kenya.

Reinsurance premiums

Reinsurance premiums payable to non – residents shall attract WHT at the rate of 5% of the gross amount payable. This amendment shall widen the tax base as well as give effect to the amendments that were brought about by the Finance Act, 2019.

Sales, promotion, transportation of goods

Sales promotion, marketing, advertising services, and transportation of goods excluding transportation by air and shipping will be subject to WHT at a rate of 20% of the gross amount.

Allowable deductions

Thirty percent of electricity cost incurred by manufacturers in addition to the normal electricity expense will no longer be an allowable deduction. This amendment has the effect of translating into a significant increase in tax payable by manufacturers given the fact that manufacturers consume a lot of electricity which contributes largely to high manufacturing costs. In light of the Pandemic, this is likely to cause a strain on manufacturers.

f. *Previously exempt income currently taxable*

The following incomes accrued in, derived from or received in Kenya shall no longer be exempted from tax. These include the income of:

i. The Tea Board of Kenya,
ii. The Pyrethrum Board of Kenya,
iii. The Sisal Board of Kenya,
iv. The Kenya Dairy Board,

v. The Canning Crops Board,
vi. The Central Agricultural Board,
vii. The Pig Industry Board,
viii. The Pineapple Development Authority,
ix. The Horticultural Crops Development Authority,
x. The National Irrigation Board,
xi. The Mombasa Pipeline Board,
xii. The Settlement Fund Trustees,
xiii. The Kenya Post Office Savings Bank,
xiv. The Cotton Board of Kenya.

Most of these bodies are no longer in existence hence the effect of this deletion shall be barely felt.

Other incomes that shall be subjected to taxation include:

i. Income from stock or shares of the government, shares of local authority.
ii. Dividends paid by Special Economic Zone Enterprise, developers or operators to any non-resident person.
iii. Compensating tax accruing to a power producer under a power purchase agreement.

g. Capital allowances

The Act has brought about the following amendments to the items subject to capital allowance as follows:

Investment Deduction (ID)

Item	Previous rate	New rate
Buildings used for manufacture	100%	50% for the first year and 25% on a reducing balance for each subsequent year
Machinery used for manufacture	100%	50% for the first year and 25% on a reducing balance for each subsequent year

The decrease in ID rates will have a negative impact on manufacturers as they shall be only allowed to deduct lower rates than are currently provided. This may have the effect of discouraging a rise in the manufacturing industry as the incentives have been decreased.

Industrial Building Deduction Allowance (IBD)

Item	Previous rate	New rate
Hotel Buildings	10%	50% for the first year and 25% on a reducing balance for each subsequent year

Hospital Buildings	Nil	50% for the first year and 25% on a reducing balance for each subsequent year
Petroleum and Gas storage facilities	Nil	50% for the first year and 25% on a reducing balance for each subsequent year
Buildings used for educational purposes e.g. student hostels	60%	10% on a reducing balance
Commercial buildings	25%	10% on a reducing balance

While determining capital expenditure on construction of a building, the value of acquisition of or rights over land shall not be considered.

Wear and Tear Allowance (WTA)

Item	Previous rate	New rate
Hospital Equipment	12.5%	50% for the first year and 25% on a reducing balance for each subsequent year
Ships and aircrafts	100% & 25% respectively	50% for the first year and 25% on a reducing balance for each subsequent year.
Motor Vehicles and other heavy earth moving machinery	25 & 37.5 respectively	25% on a reducing balance
Computers, peripheral hardware equipment, copiers, calculators	30%	25% on a reducing balance
Computer software	20%	25 on a reducing balance
Furniture and fittings	12.5%	10% on a reducing balance
Telecommunication equipment	20%	10% on a reducing balance
Filming equipment by local producer	100%	25% on a reducing balance

Machinery used to undertake operations under a prospecting Right	37.5% or 12.5%	50% for the first year and 25% on a reducing balance for each subsequent year
Machinery used to undertake Exploration operations under a mining right	37.5% or 12.5%	50% for the first year and 25% on a reducing balance for each following year
Other machinery	12.5%	10%

It is important to note that the qualifying amount for non- commercial vehicles has been set at Kenya Shillings Three Million (Kshs. 3,000,000/=). This is a shift from the previous qualifying amount of Kenya Shillings Two Million (Kshs. 2,000,000/=).

Other Deductions

Item	Previous rate	New rate
Purchase or an acquisition of an indefeasible right to use fibre optic cable by a telecommunication operator	20%	10% on a reducing balance

Farm works deductions (FWDs)

The former rate for FWD was 100%. The Act has amended this rate to 50% for the first year and 25% per year for each following year on a reducing balance.

NB: expenditure spent on behalf of another person shall not qualify for any deduction.

Persons who qualify for any of the above capital allowance deductions ought to take note of the new rates and apply them when calculating payable tax.

h. Qualifying interest

The Act has altered the definition of qualifying interest to '*aggregate interest, discount or original issue discount receivable by a resident individual in any year of income*'. Previously, qualifying interest was restricted to interest earned by a resident individual from registered financial institutions, the Central Bank of Kenya and registered building societies.

This amendment shall have the positive effect of encouraging individuals to invest in a wider range of debt instruments.

VALUE ADDED TAX ACT, NO. 35 OF 2013

a. *Taxable value*

With effect from 15th May, 2020, duty, fees and other charges are to be included in the computation of taxable value for products taxed at the rate of 8%. This means that the resulting cost of fuel will be higher as VAT will now be computed based on a higher taxable value. This may have the effect of causing an increase in other products that are dependent on fuel.

b. *Credit note*

Previously, the VATA provided that a credit note may only be raised six (6) months after supply. The amendment introduces a new time lime applicable where there is a commercial dispute as to the price payable. In this instance, a credit note may only be issued within thirty (30) days of the determination of the dispute. This amendment recognizes that business transactions are not without conflict and where there is such a dispute, the timelines for issuance of a credit note is pegged on the determination of the dispute as opposed to the date of supply. Business seeking to issue a credit note must thus keep a keen eye on the progress of their dispute and be sure to issue a credit note within the timelines of the VATA.

c. *VAT refund*

The time frame to make an application for refund of VAT in instances of bad and written off debts, for which VAT has been accounted and paid for, has been reduced from five (5) years to four (4) years. The impact of this amendment is that a person wishing to claim refund of VAT must do so within four (4) years. This means that taxpayers must keep proper records and claim any required refunds on time failure to which such a claim cannot be made.

d. *Record keeping*

The Act now requires all persons to keep a full and true written record of every transaction they make and the records shall be kept in Kenya for a period of five (5) years from the date of the last entry made therein. This requirement was previously imposed on persons registered for VAT but has now been extended to all persons whether they are registered for VAT or not.

e. *Re-classification of goods under the Act: Exempt, zero rated or standard*

Medicine, medicaments and vaccines which were previously zero rated are now exempt from VAT. The zero rating provision is thus repealed.

Personal protective equipment, including facemasks, for use by medical personnel in registered hospitals and clinics, or by members of the public in the case of a pandemic or a notifiable infectious disease will also be exempt from VAT.

A. The VATA is amended to impose VAT at 14% on the following items that were previously exempt:

i. Plants and machinery of chapter 84 & 85 used for manufacture of goods;
ii. Taxable supplies, excluding motor vehicles, imported or purchased for direct and exclusive use in the construction of a power generating plant, by a company, to supply electricity to the national grid approved by the CS upon recommendation by the Cabinet Secretary responsible for energy.
iii. Taxable supplies, excluding motor vehicles, imported or purchased for direct and exclusive use in geothermal, oil or mining prospecting or exploration, by a company granted prospecting or exploration license in accordance with The Geothermal Resources Act, (No. 12 of 1982), production sharing contracts in accordance with the provisions of Petroleum (Exploration and Production) Act (Cap. 308) or mining license in accordance with the Mining Act (Cap. 306), upon recommendation by the Cabinet Secretary responsible for energy or the Cabinet Secretary responsible for mining, as the case may be;
iv. Taxable supplies, procured locally or imported for the construction of liquefied petroleum gas storage facilities with a minimum capital investment of four billion shillings and a minimum storage capacity of fifteen thousand metric tonnes as approved by the CS upon recommendation by the Cabinet Secretary responsible for liquefied petroleum gas;
v. Plastic bag biogas, biogas, Leasing bio gas equipment;
vi. Parts imported or purchased locally for the assembly of computer, subject to approval by the CS, on recommendation by the Cabinet Secretary responsible for matters relating to information technology;
vii. Taxable goods purchased or imported for direct and exclusive use in the construction and infrastructural works in industrial parks of one hundred acres or more including those outside special economic zones approved by the CS;
viii. Museum and natural history exhibits and specimens and scientific equipment for public museums;
ix. Chemicals, reagents, films, film strips and visual aid equipment imported or purchased prior to clearance through the customs by the National Museums of Kenya;
x. Goods falling under tariff number 4907.00.90;
xi. Materials and equipment for the construction of grain storage, upon recommendation by the Cabinet Secretary for the time being responsible for agriculture;
xii. Taxable goods supplied to marine fisheries and fish processors upon recommendation by the relevant state department; and
xiii. Goods imported or purchased locally for direct and exclusive use in the implementation of projects under a special operating framework arrangements with the Government.

B. Impose VAT at the rate of 14% for services described in the following sectors that were previously exempt:

i. **Insurance Sector:** Insurance agency and brokering services;
ii. **Industrial Parks**: Taxable services provided for direct and exclusive use in the construction and infrastructural works in industrial parks of one hundred acres or more including those outside special economic zones approved by the CS;
iii. **Petroleum Sector:** Taxable services, procured locally or imported for the construction of liquefied petroleum gas storage facilities with a minimum capital investment of four

billion shillings and a minimum storage capacity of fifteen thousand metric tonnes as approved by the CS upon recommendation by the Cabinet Secretary responsible for liquefied petroleum gas;

iv. **Government Projects:** Services imported or purchased locally for direct and exclusive use in the implementation of projects under SOFAs with the Government;

v. **Asset Transfer**: Asset transfers and other transactions related to the transfer of assets into real estate investment trusts and asset backed securities;

vi. **Transfer of Business:** Transfers of a business as a going concern will now be subject to VAT at a rate of 14%. For such transactions, the transfer of business agreement will need to be properly drafted to include the VAT component. VAT is an indirect tax and it is mostly borne by the transferee;

The effect of these amendments is that the cost of acquisition of such products and services by the end consumer will increase as VAT is a tax passed to the final consumer of the goods, products and services.

EXCISE DUTY ACT, NO. 23 OF 2015

a. Excise duty on other fees

The amendment deletes the words "Licensed Financial Institutions" and replacing them with "Licensed Activities" in the definition of the term "Other Fees". Whereas the amendment largely corrects a drafting error, the amendment clarifies that excise duty is chargeable in relation to the licensed activities of the financial institutions. As such, financial institutions will no longer be required to charge excise duty on services that are not relating to their licensed activities. This will however require entering into clear agreements and laying out frameworks and mechanisms, both internal and external, that differentiate licensed activities and other activities offered by the licensed institutions.

b. Imposition of excise duty

Further, the Act imposes excise duty on the following items that were previously exempt:

i. Goods imported or purchased locally for direct and exclusive use in the implementation of projects under SOFAs with the Government.

ii. One personal motor vehicle, excluding buses and minibuses of seating capacity of more than eight seats, imported by a public officer returning from a posting in a Kenyan mission abroad and another motor vehicle by his or her spouse and which is not exempted from excise duty under item 6 of Part A of the Second Schedule.

TAX PROCEDURES ACT, NO. 29 OF 2015

a. Binding private ruling

The Act is amended to increase the timeline for the Commissioner to issue a binding private ruling from forty-five (45) days to sixty (60) days upon receiving an application. The Commissioner is therefore still time bound to deliver rulings timeously which is key in ensuring that taxpayers are able to understand and fulfill their tax obligations. However, the Commissioner is no longer required to publish such private rulings. This may create a vacuum as taxpayers may no longer have a reference point for their tax queries and clarifications that was derived from previously issued rulings.

b. *Late submission penalty for turnover tax*

Lastly, the Act has reduced the late submission penalty for turnover tax from Kenya Shillings Five Thousand (Kshs. 5,000/=) Kenya Shillings One Thousand (Kshs. 1,000/=).

MISCELLANEOUS FEES AND LEVIES ACT, NO 29 OF 2016

a. *Processing Fees on Duty Free Motor Vehicles*

the Act imposes a new fee known as processing fees on duty free motor vehicles, with the exception of motorcycles, purchased prior to the clearance through customs under the specified paragraphs of the fifth schedule to the East Africa Customs Management Act, 2014. This means that, all such motor vehicles will be subject to a Processing Fee of Kenya Shillings Ten Thousand.

b. *Import Declaration Fee*

Raw materials and intermediate products imported by approved manufacturers are now subject to the normal Import Declaration Fee at the rate of 3.5% up from the special 1.5% rate imposed on them. The cost of acquisition of such raw materials to is thus bound to increase.

The following items are no longer exempt from Import Declaration Fee:

i. gifts or donations, excluding motor vehicles, by foreign residents to their relatives in Kenya for their personal use;
ii. Samples which in the opinion of the Commissioner have no commercial value;
iii. raw materials for direct and exclusive use in construction by developers or investors in industrial parks of one hundred acres or more located outside the municipalities of Nairobi and Mombasa as approved by the Cabinet Secretary upon recommendation by the Cabinet Secretary responsible for matters relating to industrialization;
iv. goods imported for the construction of liquefied petroleum gas storage facilities as approved by the Cabinet Secretary responsible for liquefied petroleum gas;

c. *Railway Development Levy*

Operation of the Standard Gauge Railway is added as one of the now two purposes of the Railway Development Levy. The following previously exempt items are now subject to the Railway Development Levy:

i. raw materials for direct and exclusive use in construction by developers or investors in industrial parks of one hundred acres or more located outside the municipalities of Nairobi and Mombasa as approved by the Cabinet Secretary upon recommendation of the Cabinet Secretary responsible for matters relating to industrialization;
ii. goods imported for the construction of liquefied petroleum gas storage facilities as approved by the Cabinet Secretary responsible for liquefied petroleum gas;
iii. goods imported for implementation of projects under a SOFA with the Government

Further, the Cabinet Secretary can no longer grant an exemption from RDL goods of not less than two hundred million shillings in public interest.

KENYA REVENUE AUTHORITY ACT, NO 2 OF 1995

The amendment introduces an additional reward of Kenya Shilling Five Hundred Thousand Shillings for any other information that leads to the otherwise recovery of taxes which is neither classified as being information either lead to the identification or recovery or unassessed duties or taxes. Such persons are therefore entitled to this reward and should be keen to its recovery.

Further, the Commissioner may appoint a person registered under the Banking Act to act as agents for revenue banking services through an agreement. These agents are required to remit revenue collected to a designated Central Bank Account within two days. Further, the section imposes a compounded penalty of 2% of revenue collected, for failure to remit funds collected after remittance is due.

Although the appointment is a statutory appointment by the Commissioner, the Act prescribes such appointment to be by agreement between the Commissioner and the banks and other institutions registered under the Banking Act. It thus raises the need to draft agreements that not only ensure compliance with the Act but are compatible with the institutional operational framework and procedures. Negotiations may therefore be crucial.

RETIREMENT BENEFITS ACT, NO. 3 OF 1997

The RBA Act is amended to allow a member of pension fund to assign and utilize a portion of his or her accrued retirement benefits to purchase a residential house. As such, pension schemes need to educate their members on this new benefit as well as amend their trust deeds and rules, as may be necessary, to allow members to exercise this right.

ABOUT US

Simba & Simba Advocates is one of Kenya's leading full-service law firms, with a rich professional history built over a period of over twenty-five (25) years.

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