KENYA

The key changes in Kenya came about from the Finance Act, 2019 which was assented into law on 7 November 2019. We highlight below some of the key changes introduced by the Finance Act, 2019:

Amendments to the Income Tax Act, Cap 470 of the Laws of Kenya

1. Taxation of income from digital marketplace

The Finance Act, 2019 (the Finance Act) introduced tax on income accruing through a digital marketplace by introducing a new charging section. While the Finance Act has introduced tax on income earned on a digital marketplace, it is still not clear how international companies operating on digital platforms with no physical presence in Kenya will be taxed since the tax laws in Kenya, as currently drafted, only cater for businesses that have a physical presence (either through a local entity or through a permanent establishment). Further, it is also unclear as to why there is a need for a new charging section for buyers and sellers in the digital marketplace as their income has always been subject to income tax under the Income Tax Act, Cap 470 of the Laws of Kenya (the **Income Tax Act**). The Finance Act requires the Cabinet Secretary to come up with regulations to provide for the mechanism and implementation of digital tax. It is expected that the regulations may soon be formulated detailing the operational mechanics of how taxation of the digital economy will be undertaken.

2. Clarity on dividends distributed out of untaxed gains

In 2018, the Finance Act, 2018 had amended the Income Tax Act by introducing a new compensating tax regime which provided that dividends distributed out of untaxed profits shall be subject to compensating tax at 30% with effect from 1 January 2019. However, the amendment caused great uncertainty as it was not clear whether exempt dividends received by Kenyan holding companies and gains that had been subject to capital gains tax could be distributed without triggering compensating tax. The 2019 changes contained in the Finance Act excluded application of the compensating tax provisions to income that is exempt from tax under the Income Tax Act such as dividends paid to a Kenyan HoldCo with a more than 12.5% stake.

3. Thin capitalisation for projects under the affordable housing scheme

In order to promote the government's Big Four Agenda pledge for affordable housing, the Finance Act amended the thin capitalisation provisions to exclude from thin capitalisation, companies implementing a project under the affordable housing scheme upon recommendation by the Cabinet Secretary responsible for housing. This is critical for most developers since they heavily rely on the debt for project financing.

4. Provision on demurrage charges and income from non-resident shipping line

The amendment brings demurrage payments charged by shipping lines to their customers under the ambit of freight tax. In 2018, there was an attempt to introduce withholding tax on demurrage but this will now be replaced by freight tax due to the administrative challenges faced for WHT.

5. Additional tax incentive to Real Estate Investment Trust (REIT)

A REIT is exempt from tax under the Income Tax Act (including capital gains tax and compensating tax) save for withholding tax on interest and dividends. In addition, all distributions of income and payments for redemption or sale of units received by unit holders are deemed to be already tax paid and therefore not subject to further tax in the hands of the unit holders. The Finance Act extends the exemption from tax to an investee company of a REIT which holds the investment property. This incentive will assist in structuring by REITS as their SPVs set up to invest in specific project will also benefit from the REIT exemption.

6. Withholding tax on re-insurance premiums paid to non-residents

The Finance Act, 2018 introduced withholding tax at the rate of 5% on insurance premiums paid to non-residents. It was however not clear whether this amendment also included re-insurance payments. The Finance Act provided clarity to the insurance industry that re-insurance premiums paid to non-residents are also subject to withholding tax, except insurance or re-insurance premium paid in respect of aircraft.

7. Green Bonds

The Finance Act exempts interest income accruing from all listed bonds, notes or other similar securities used to raise funds for infrastructure, projects and assets defined under Green Bonds Standards and Guidelines, and other social services provided that such bonds, notes or securities have a maturity of at least three years. Green Bond as provided by the Standards and Guideline refer to a fixed income instrument, either unlisted or listed on a securities exchange, approved by the Capital Market Authority, whose proceeds are used to finance or refinance new or existing projects that generate climate or other environmental benefits that conform to green guidelines and standard.

8. **Capital Gains Tax (CGT) exemption**

The Finance Act introduces an exemption on the transfers of property in internal corporate restructuring from CGT. Restructuring transactions include incorporation, recapitalization, acquisition, amalgamation, separation and dissolution. The exemption will cover transactions where the transfer of property is as a result of:

a. a legal or regulatory requirement;
b. a directive or compulsory acquisition by the government;
c. as internal restructuring within a group which does not involve transfer of property to a third party; or
d. in the public interest and approved by the Cabinet Secretary.

CGT exemption on restructuring will provide for transfer of assets within group companies without incurring additional tax costs where there is no change in beneficial ownership of the assets transferred.

AMENDMENTS TO THE VALUE ADDED TAX, 2013

9. Expansion of imported services scope

Previously, import VAT on services was only applicable to a VAT registered person. However, the Finance Act extended the definition of *"supply of imported services"* to include supplies made to any person and not just registered persons. Further, the Finance Act has amended the VAT Act in relation to the treatment of imported services to now apply to "any person" and not "registered person" as was the case before. This means that going forward, both registered and unregistered persons are required to account for reverse VAT on imported services. It is however not clear how the reverse-charge VAT will be accounted for by non-registered persons and we therefore expect administrative mechanisms to be introduced to allow for this.

10. Aid funded projects

Taxable goods, imported or purchased for direct and exclusive use in the implementation of official aid funded projects are exempt from VAT. While concessional loans are typically extended on terms substantially more generous than market loans, the Act has further narrowed the definition of "concessional loans", which may be used to fund such projects, to mean a loan with *"at least 25% grant element".* The definition of concessional loan brings clarity as to the nature of official aid funded projects that qualify for VAT exemption.

11. Taxation of income from the digital marketplace

The Finance Act provides for imposition of VAT on supplies made through a digital marketplace. A digital marketplace is defined to mean "*a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means*." The Finance Act requires the Cabinet Secretary to make regulations to provide for the mechanism for implementation of VAT on supplies made through a digital marketplace. It is not clear to us whether this provision is necessary given the fact that sales in the digital marketplace are either subject to VAT at 16% (standard rate), 8% (for petroleum fuels), 0% (zero rated sales) or exempt supplies and are therefore not unique to sales made in a more traditional marketplace. It is also not yet clear when the regulations will be drafted and how the VAT will be charged on the digital marketplace.

12. Time of supply of goods and services

With the introduction of the Special Economic Zones (SEZ) regime, the Act amends the VAT Act to include that the time of supply of imported goods in the case of goods removed from an SEZ shall be at the time of removal for home use. This is a similar position to export processing zones.

13. Going green

The Finance Act 2018 introduced a VAT exemption on specialised equipment for the development and generation of both solar and wind energy, including deep cycle batteries which use or store solar power. The Finance Act clarified that this exemption shall only be available upon recommendation of the Cabinet Secretary responsible for matters related to energy.

AMENDMENTS TO THE EXCISE DUTY, 2015

14. Excise Duty on amount staked

The betting and gaming industry has been under significant scrutiny from both from the National Government and regulatory agencies such as the KRA. The Finance Act has introduced an amendment to the Excise Duty Act, 2015 to charge an additional 20% excise duty on the amount "wagered" or "staked". The amount "wagered" or "staked" is defined to mean "*the amount of money placed by a person for an outcome in a betting transaction*". The Finance Act also clarifies that in relation to a betting transaction, the "*time of supply"* shall be the time a person wagers or stakes money on a platform or other medium provided by a bookmaker. The definition indicates that the excise tax does not apply when a punter transfers money to a mobile wallet held with a betting company, but instead only when the punter actually places a bet "*…for an outcome in a betting transaction*."

We expect further developments in the gaming industry including the Gaming Bill, 2019 and the Betting, Lotteries and Gaming (Online Gaming) Regulations, 2019 which are currently subject to public participation.

15. Aid Funded Projects

Excisable goods imported or purchased locally for direct and exclusive use in the implementation of an Official Aid-Funded Project, to the extent provided for under the financing agreement, are exempt from excise duty. The Finance Act introduces a definition of official aid-funded projects to mirror the definition in the VAT Act. The Finance Act has also defined *"concessional loans",* which may be used to fund such projects, to mean a loan with *"at least 25% grant element".* This is also similar to the definition introduced under the VAT Act and provides clarity on the nature of official aid funded projects that will enjoy excise duty exemption.

16. Clarity on other fees

The definition of "other fees" has been amended to exclude fees or commissions earned in respect of a loan or any share of profit or an insurance premium or premium based or related commissions specified in the Insurance Act or Regulations. This provides clarity that fees or commissions from loans and insurance related payments are not subject to excise duty at the rate of 20%.

<u>Notable tax decisions</u>

17. Creation legitimate expectation (*The Commissioner of Domestic Taxes v Lewa Wildlife Conservancy Limited, High Court Income Tax Appeal No. 17 of 2017*[1])

In this case, the KRA issued a written private ruling to the taxpayer to the effect that park entry fees were exempt from VAT. The taxpayer did not charge VAT and the KRA did not demand for VAT on the fees for 12 years and then purported to reverse the decision and demand for VAT on the understanding that the VAT legislation did not expressly exempt the park entry fees.

The key points in issue were whether the ruling and the passage of time would entitle the taxpayer to a legitimate expectation that the fees were VAT exempt. On the ruling, the court held that it amounted to an express and unambiguous interpretation of the law and the commissioner could not purport to review its position after the taxpayer had relied on it for years. On the issue of passage of time, the court observed that each case ought to be considered on the basis of its peculiar circumstances and there cannot be a blanket application.

18. Rules of interpretation of tax law (*Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 others [2019] Civil Appeal No. 164 of 2013*[2])

The case involved the determination of what constitutes excisable value for locally manufactured goods under Section 127C of the now repealed Customs and Excise Act. Before 2004, the Customs & Excise Act provided that the cost of returnable bottles is excluded from the excisable value. However, the Finance Act, 2004 amended Section 127C to provide that the excisable value for locally manufactured goods shall be the ex-factory selling price which shall not include VAT and the cost of excise stamps. The cost of returnable containers was therefore deleted from the provision and the Customs and Excise Act was now silent on whether ex-factory selling price excluded the cost of returnable containers as was the case before the amendment for purposes of computing excise duty.

The key point in issue in this case was therefore whether the deletion automatically meant that the cost of returnable containers was now to be included as part of the excisable value. The Court of Appeal observed that a person is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him. The court also observed that a taxing legislation must be construed with perfect strictness whether or not such construction is against the State or against the person sought to be taxed and that any ambiguity must be interpreted in favour of the taxpayer.

The Court allowed the appeal holding that since there was no express inclusion of returnable containers as part of the excisable value of goods in the Customs and Excise Act, the KRA did not have any legal right to include the returnable containers in its assessment of the excisable value.

[1] http://kenyalaw.org/caselaw/cases/view/181041/
[2] http://kenyalaw.org/caselaw/cases/view/178273/

UGANDA

The Tax Amendment Act, 2019 was introduced through the Budget Statement of the Financial Year 2019/20 which was read on 13th June 2019 by the Minister of Finance, Planning and Economic Development. The Act sets out amendments to tax laws in Uganda that became effective on 1st July 2019 unless otherwise noted.

INCOME TAX (AMENDMENT) ACT, 2019

1. Definition of Citizen and Beneficial Owner

The key highlights are the newly introduced definitions of the terms ''citizen'' and ''beneficial owner'' in the Income Tax Act (ITA).

A ''citizen'' is defined as a natural person who is a citizen of a Partner State of the East African Community (EAC) or a company or body of persons incorporated under the laws of a partner state of the EAC in which at least 51% of the shares are held by a person who is a citizen of a partner state of the EAC. This is going to encourage investing in Uganda since individuals and companies that are majority controlled by EAC citizens and are incorporated in the EAC will enjoy the same tax benefits as Ugandan nationals

A "beneficial owner" is defined to mean a natural person who owns or has a controlling interest over a legal person other than an individual and who exercises control over the management and policies of a legal person or legal arrangement, directly or indirectly whether through ownership or voting securities, by contract or otherwise. The benefits of reduced tax rates or exemptions under Double Taxation Agreements with Uganda have been restricted to individuals who qualify as Beneficial Owners under the Act therefore, only individuals can enjoy these benefits.

2. Deductibility of interest expenses

The thin capitalization rules were deleted and replaced with a cap on deductible interest in respect of debts owed by taxpayers who are a member of a group at 30% of the earnings before interest, depreciation and amortization.

3. Withholding tax on purchase of a business or business asset

A 6% withholding tax has been introduced on purchases of a business or business assets by a resident person. Currently, withholding tax is only levied on purchases of an asset. The amendment seeks to broaden the tax base by including trading stock.

4. Tax incentives for investing in Uganda

Income derived from leasing or letting facilities in industrial parks and free zones or conducting business outside these areas, provided the minimum investment capital requirements are satisfied, has been exempted from income tax for 10 years compared to the 5 years in the 2018 amendment. The minimum investment capital requirements to qualify for the income tax exemption have also been significantly reduced for both foreigners and citizens. The above tax incentives are aimed at enhancing competitiveness in the region by attracting investors to Uganda.

Interest paid on infrastructure bonds has also been exempted from income tax. Infrastructure bonds include listed bonds, notes or similar securities used to raise funds for public infrastructure and other social services with a maturity period of at least 10 years.

5. **Withholding tax on payments of Government securities**

Withholding tax on long term bonds with a maturity period of at least 10 years has been reduced from 20% to 10% to encourage investment in long term Government securities and also to reduce financing costs to Government.

6. **Prohibition of issuance of licenses to persons without a Tax Identification Number ("TIN")**

Local authorities, Government institutions or regulatory bodies are now prohibited from issuing licenses or authorizations necessary to conduct business to persons without a TIN. This amendment aims to expand the tax net to include persons conducting business in Uganda who are not tax registered yet they should be.

Other adjustments made through the Income Tax Amendment Act 2019 include, ring-fencing of rental income made by a taxpayer that owns more than one rental property to ensure that they do not offset tax losses in one building from the other buildings.

<u>THE VALUE ADDED TAX (AMENDMENT) ACT, 2019</u>

7. Return of Withholding Valued Added Tax ("WHVAT")

WHVAT which had been suspended in 2018 has been reintroduced. The VAT to be withheld is 6% as opposed to the previous 18%. In order to encourage tax payers to be complaint, taxpayers who are compliant will be exempted from withholding VAT.

8. Restriction of zero-rate to Ugandan manufacturers of drugs

The supply of drugs, medicines and medical sundries manufactured in Uganda is now zero-rated under the 3rd schedule of the VAT Act. This amendment favours Ugandan manufacturers who are still able to claim credit on input VAT as opposed to their counterparts who have now been excluded from the zero-rated regime.

9. Expansion of exempted supplies

The list of exempt supplies has been amended to include aircraft insurance services, rice mills, agricultural sprayers, imported drugs, medicines and medical sundries, imported mathematical sets and geometrical sets used from in educational services, woodworking machines, welding machines and sewing machines, and imported crayons, colored pencils, lead pencils, rulers, erasers, stencils, technical drawing sets, educational computer tablets, educational computer applications or laboratory chemicals for teaching science subjects used in educational services.

<u>THE EXCISE DUTY (AMENDMENT) ACT, 2019</u>

1. Registration of manufacturers, importers and providers of excisable goods and services

All manufacturers, importers or providers of excisable goods and services (except retailers) are required to register with the Uganda Revenue Authority and also register their premises. A penalty of UGX 400,000 applies for each day a person operates without a certificate of registration. The certificate of registration is renewable annually.

2. Widening penalty on unpaid excise duty

Previously interest has been levied only on the non-payment of excise duty in respect of the manufacture or importation of excisable goods however services have now been included in the ambit of the penal tax. This amendment will reduce revenue leakage from previously not penalizing non-payment of excise duty on services.

3. Promotion of development of industrial parks and free zones

The minimum investment capital requirements for developers of industrial parks or free zones has been reduced from USD 100 million to USD 50 million to widen the scope of investors who can qualify for nil excise duty on construction materials for developing industrial parks or free zones. The same applies for operators within industrial parks, free zones, single factories or businesses outside the aforementioned whereby the minimum investment capital for foreigners has been reduced from USD 15 million to USD 10 million and USD 1 million for citizens.

THE TAX PROCEDURES CODE (AMENDMENT), ACT 2019

1. **Payment to informers**

The amount paid to informers has been reduced from 10% to 5% of the principal tax or duty recovered.

2. **Waiver of tax due and payable by Government**

The Minister of Finance is responsible for paying any tax due and payable by Government which arose from a commitment made by Government to pay the tax on behalf of a person or which the Government owes as counterpart funding for aid funded projects. All unpaid taxes by Government as at 31 June 2019 will be written off and a list of all taxes waived will be published in a gazette.

3. **Compounding of offences**

The Uganda Revenue Authority is now empowered to compound offences where a taxpayer voluntarily discloses the commission of a tax offence at any time prior to commencement of court proceedings, and the offender agrees to pay the outstanding unpaid tax. The offender will not be required to pay any interest or fine due. This amendment is aimed at encouraging early settlement of tax matters.

TANZANIA

The provisions of the Finance Act, 2019 became effective on 1 July 2019 and amended various tax legislations as set out below.

Amendments to the Income Tax Act, 2004

1. Increase in threshold for presumptive tax

The threshold for presumptive tax was increased from TZS 20m to TZS 100m.

2. Reduction in the corporate income tax rate

The corporate income tax rate for new investors producing sanitary pads has been reduced from 30% to 25% for two years starting from year 2019/20 to 2020/21 subject to the investor signing a performance agreement with the government.

3. Exemption from Withholding Tax

Interest, fees and other financing charges paid by the Tanzanian Government to a non-resident bank, financial institution, other government or representative of other government arising from a loan agreement that entitles such a non-resident entity to a tax exemption for purposes of financing Government projects are exempt from withholding tax. This provision has retrospective effect and applies from 1 June 2017.

Amendments to the Value Added Tax Act

1. Supply of electricity by a supplier in Mainland Tanzania Mainland to a supplier of electricity in Tanzania Zanzibar is now zero-rated.
2. Supply of the following items is exempt from VAT:
   (a) supply of aircraft lubricants to a local operator of air transportation;
   (b) importation of refrigerated containers of Harmonized Schedule (HS) code 8418.69.90 by a person involved in horticulture for exclusive use in Mainland Tanzania;
   (c) importation of grain drying equipment of HS code 8419.31.00 for exclusive use in agriculture in Mainland Tanzania;
   (d) importation of aircraft lubricants, airline tickets, brochures, leaflets, calendars, diaries, headed papers and airline uniforms imported by designated airlines under a Bilateral Air Service Agreement between the Government of United Republic of Tanzania and a foreign government.

Amendments to the Excise (Management and Tariff) Act

1. Importation and supply of aircraft lubricants to a local operator of air transportation or designated airline under Bilateral Air Service Agreement with the Government is exempt from excise duty.
2. Amendment of the Fourth Schedule to introduce new excise rates to various items including human hair, tobacco,, tubes, pipes and fittings of plastic.

Amendments to the Tax Administration Act (TAA), 2015

The Finance Act, 2019 amended section 22 of TAA to allow deferment of the requirement to pay instalment tax under the Income Tax Act for a period of six months by a person registered and issued with the Taxpayers Identification Number (TIN) for the first time. The amount of tax deferred is payable in three equal instalments in the remaining period. The deferment granted is optional and a taxpayer can opt to pay the tax during the deferment period.