TAX LAWS (AMENDMENT BILL) 2020

(LAWYERS HUB COMMENTS)

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Submissions on the Tax Laws (Amendment Bill), 2020

The Kenyan Government confirmed its first Covid-19 case on Friday the 13th March 2020, with 110 cases confirmed by the 2nd April. The government has banned all public gatherings, shut down schools and imposed a curfew. It has also called on citizens in non-essential services to implement self-quarantine and where possible, work from home. The adverse impact on the economy is already being felt in all sectors of the economy.

In an attempt to mitigate the spread of the virus, citizens across the country have adopted measures in line with the WHO directives. However, with a considerable population working in the informal sector and living under 1 dollar a day, such standards have been met with significant backlash and non-enforcement. To deal with this challenge, President Uhuru Kenyatta last week announced economic stimulus intervention in response to the coronavirus pandemic.

We welcome the additional proposed amendments to the various tax laws in Kenya made by the Tax Laws (Amendment Bill) 2020. We appreciate the effort made by parliament and other entities involved in the development of the Bill. In particular we welcome measures geared to reduce tax liabilities of individuals and corporates and other measures of relief provided. We further appreciate the effort taken to balance between the need for reliefs for individuals and corporates and revenue collection by the Government.

We are however concerned with some of the provisions which we highlight and make further recommendation as follows:

1. THE INCOME TAX ACT (Cap. 470)

The Suggested Amendments made to the Income Tax seek to reduce the individual top tax rate and resident corporate tax rate, The Amendments are analyzed below:

a.) Widen of the Individual income tax bracket and increase of personal relief from Ksh. 16896 to Ksh. 28, 800 by amending the Third Schedule of the Income Tax Act.

The effect of such an amendment is that it will increase disposable income for individuals and companies. However, alive to the fact that this does not include reliefs for all low-income households' earners, since only the first KSh. 24,000 to exempt from income tax. Furthermore, It is imperative to note that most Kenyans who get paid less than Ksh. 24,000 belong to the largely Informal sector, hence mainly do not contribute to the Income Tax. We submit that ensuring that the first Ksh. 30,000 becoming exempt from Tax will be more effective to the formal sector those earning less than 24,000 highly. Furthermore, it is likely that those working in the formal sector and in non-essential services are likely to lose their jobs and other non-tax, sound fiscal measures should also be considered to protect them during this pandemic. Although not a tax relief, we recommend lifting the requirement to make statutory contributions on Pensions for certain industries such as tourism for the duration of the pandemic. Instead, this can be directed to salaries.

b) Turnover Tax (TOT)

Increase of businesses liable to pay Turnover Tax (TOT) from between Ksh. 500,000 - 5million to between Ksh.500,000 - Ksh. 50 million. Similarly, Income from incorporated companies falling within this bracket is now subject to TOT. There is no longer an obligation to pay Presumptive tax that was previously an allowable deduction against TOT. We recognize these measures are a great move in protecting SMEs at this time.

We are however concerned with the implementation of this taxation on companies which were previously subject to a different tax regime. Noteworthy that some corporates also have outstanding obligations to pay their balance of Tax by 30th April. Moreover, to facilitate business continuity, companies may have had to make additional capital investments and increase in payment of internet and airtime which are now taxable. They will have to file TOT within the calendar period which in this case may be by April 20th.

We therefore recommend:

1. Clarity on the application of the new TOT regime vis a vis existing taxation regime.
2. Extension of filing returns. To ease compliance, it's advisable that the period within which to pay the balance of tax payment be extended. Extension of time in

filing return has been done in multiple jurisdictions including India, Nigeria and Mauritius[1].

3. Application for a tax payment plan. This tax payment plan may be helpful for the young SMEs and Small-scale traders who still have to pay tax, but are prioritizing salaries and other measures to stay afloat during this COVID-19 pandemic. This payment plan may entail payments done in instalments, and where penalties do accrue due to late filing, taxpayers can apply for waivers of the same.

c) Capital Tax Allowance on capital investment that ranges from 10-50% for companies putting up Buildings, Machinery and Right to use fiber optics cable for the first year of operations.

This move is welcome since there is a need to invest in Technology and Health related infrastructure. This is important since the government has shut down schools and all learning facilities to curb the spread of COVID-19. With schools trying to implement online learning, this amendment will reduce the cost that trickles down to the final consumers, students.

d) Resident corporation tax rates will be reduced from 30% to 25%.

Following the presidential Directive, the Bill fails to mention the reduction of resident corporate tax rates from 30% to 25% as directed.

However, Reducing resident corporate tax and will increase the distributable profits to shareholders or ensure retained earnings available for re-investment. However, Clarity is needed on whether the rate will be applicable on the entire income accrued in the year of income 2020 or only on income accrued from 26 March 2020. Given the lack of certainty brought by COVID-19 time, most companies that are in non-essential will be affected, and thus need for mitigating measures to curb the potential unemployment

e) Pension Liability

We welcome amendments to the third Schedule of the ITA to reduce taxation of payments on pensions above Ksh. 1.2Million by 5%. We are however alive to the fact

1. https://home.kpmg/xx/en/home/insights/2020/03/jurisdictional-tax-measures-in-response-to-novel-coronavirus-covid-19.html

that older persons between the age of 50 -65 are extremely vulnerable during this tragic period of the pandemic. Pre-existing medical conditions further increase their vulnerability. Article 57 of the constitution places an obligation on the state to ensure older members of the society receive reasonable care and assistance. At this time, we note that decreased mobility to comply with WHO and ministerial directives increases costs where particular items of older persons are required. They may need to send for medication or cater for special dietary needs and other measures to keep them safe during this period. We further recognize that pensioners only receive and survive on a portion of what used to be their salary.

It is therefore our recommendation that tax on gratuity payment for persons above 60 years be exempt from tax.

f) Deductible expenses

Donations

Section 15 of the ITA only exempts donations on expenditure incurred in that year of income on donations to the Kenya Red Cross, county governments or any other institution responsible for the management of national disasters to alleviate the effects of a national disaster declared by the President.

To increase direct donations made by corporates either directly or indirectly to the public or entities such as hospitals, we reiterate submissions by the Law Society of Kenya in proposing that any expenditure incurred by corporate entities for these donations for disaster management towards the effort to combat the COVID-19 pandemic, be deductible in computing the taxable income of the relevant taxpayer in the year of income.

2. VALUE ADDED TAX ACT (No. 35 of 2013)

The Bill seeks to amend the Value Added Tax Act to align with incentives contained in the Bill with best practice. The Amendments are analysed below:

a.) Reduction in VAT tax from 16% to 14% for registered persons for goods and services from 1st April 2020

A reduction in VAT is a welcome measure to reduce the cost of goods and services, hence an overall cost of living. The decrease in VAT ensures that not only is the cost of business lowers for many businesses, but vulnerable Kenyans are able to purchase basic commodities at a lower price. especially for the most vulnerable, and will also lower the cost of business for many entities. It will also improve the cash flow of businesses due to reduced outflow and reduced credits/refunds.

b.) Release of VAT refunds held by the Kenya Revenue Authority

In times where Liquidity is needed, expedited payment of VAT refunds will provide much needed cash to businesses. However, the true effect of this amendment may not be realized immediately due to the laid down procedures by the Kenya Revenue Authority. We note the period for claim has been reduced to four years from five years. This needs to be properly communicated to ensure claims aren't statutory barred.

c.) Goods no longer exempt from tax

Commodities such as bread, wheat flour, raw materials for making agricultural fertilizers and pest control products are no longer exempt from tax, hence are subject to VAT. This move is not welcome as prices of food commodities during a pandemic should not get expensive.

Most Citizens are being encouraged to stay home and with the current state of the economy, it will prove to be an additional tax burden to low income earners, and other marginalized groups. Furthermore, Kenya is an Agricultural country and the rainy season is set to start soon, with the increased price of pest control products and fertilizers, the final consumer will have an added tax burden to bear.

We submit that these commodities should be tax exempt. Alternatively, we recommend that the government should Consider charging VAT on final consumption goods only and eliminate VAT on inputs which increases the cost of production and the ultimate purchase price to consumers who feel the incidence.

RECOMMENDATIONS

We therefore recommend the following:

1.) Reduction of resident corporation tax rate from 30% to 25 % inline with the presidential directive.
2.) Period of filing returns to be extended. Incorporated companies with turnover of up to 50 million are now liable to pay TOT, and may still need to pay the balance of tax by 30th April. The current work from home and curfew situation has put a strain on working hours and is likely to affect compliance. Further, curfew currently enforced has reduced working hours of Kenya Revenue Authority workers who help in filing or settling disputes related to filing.
3.) We recommend that the first Ksh. 30,000 becoming exempt from Tax will create more impact.
4.) Clarity on whether the current corporate tax rate of 25% applies to income accrued before 25th of March 2020.
5.) 100% tax relief for monthly gratuity for pensioners above the age of 60 years.
6.) Exempting Bread, wheat, flour and agricultural products from VAT or alternatively charging VAT on final consumption goods only and eliminating VAT on inputs which increases the cost of production and the ultimate purchase price to consumers who feel the incidence.
7.) Application for a tax payment plan for SMEs, and Small-Scale Traders. This payment plan may entail payments done in instalments, and where penalties do accrue due to late filing, taxpayers can apply for waivers of the same.

CONCLUSION.

We welcome the move to urgently create the Tax Laws Amendment bill 2020, but we submit that Public participation is still paramount, and thus key stakeholders should be given more time to go through the long amendment. Furthermore, we submit that the circulated advert on National Dailies was not detailed enough to explain the salient changes in the new amendments to the common ***mwananchi.*** This can thus be misconstrued to entail some legislative mischief.