ALN ANJARWALLA & KHANNA

Legal Alert |

Highlights of the Covid-19 Tax Measures

President Uhuru Kenyatta on 25 March 2020 delivered a number of measures designed at cushioning Kenyans from the impact of **COVID-19**.

The President acknowledged that following the declaration by the World Health Organization (**WHO**) categorising COVID-19 as a pandemic, it was necessary for the government to make targeted state interventions to mitigate shocks arising from the impact of the pandemic and to empower the public as well as the private sector to work together to support the Kenyan economy during these tough times.

Consequently, the President has directed the National Treasury to implement a number of immediate relief measures geared at individual taxpayers, businesses, investments and with a view to increasing disposable income for the people of Kenya in general.

The measures appear to go beyond those which have, to date, been introduced by other East African governments. The Ugandan and Rwandan Governments have so far announced various tax measures to combat COVID-19.

Our Firm had earlier sent proposals to the National Treasury, some of which have been adopted. Click here for a copy of these proposals. A&K also contributed to the Law Society of Kenya's proposals which can be found here.

Statutory changes required to implement these changes

In order to implement the measures declared by the President, we expect that the Government will issue a special Tax amendment statute which will introduce these measures.

The changes will necessitate an amendment of the provisions of the Income Tax Act and the Value Added Tax Act. We expect that the Government will shortly issue a Tax Amendment Bill which will set out these changes. It is unclear what the enactment process will be, noting the fact that Parliament is in recess at the moment as a result of the COVID-19 pandemic.

Additionally, it will be noted that the High Court in the case of **Okiya Omtatah Okoiti v Cabinet Secretary, National Treasury & 3 others Petition No. 253 of 2018** declared that the Provisional Collection of Taxes and Duties Act (the **PCTDA**) (which allowed for tax measures to be introduced through a Bill prior to its enactment into an Act) to be null and void. The High Court in addition stated that *"…the Finance Bill 2018, or any parts or provisions thereof, including on taxation, cannot be implemented before the Bill becomes the Finance Act after it goes through the parliamentary legislative process laid out in the Constitution for approval and adoption by Parliament, and assent by the President."* Based on this decision, and except as set out below, it would appear that the measures can only enter into force once the Tax Amendment Bill has been enacted into law by Parliament once it is convened and on such terms as the prevailing pandemic situation may allow. Had the PCTDA still been in force, it would have provided a mechanism for the Government to implement all the tax measures immediately and without the need for parliamentary intervention (prior to the enactment of the statute into law).

As will be noted below, the President has directed that the National Treasury reduce the rate of VAT from 16 percent to 14 percent, with effect from 1 April 2020. Section 6(1) of the Value Added Tax Act specifically empowers the Cabinet Secretary by an order published in the Kenya Gazette, to amend the rate of tax by increasing or decreasing any of the rates of tax by an amount not exceeding twenty-five percent of the prevailing rate. The proposal to reduce the VAT rate to 14 percent is therefore well within the power of the Cabinet Secretary to amend, and we would expect that a Gazette Notice to this effect will be published imminently.

Additionally, it will be noted that the off-setting of VAT refund claims against tax liabilities owed by the taxpayer under any other tax law is allowed, upon application, pursuant to section 47 of the Tax Procedures Act. The grant of approval is conditional upon the Commissioner being satisfied that the refund is due. On this basis, it would appear that the process will be expedited, provided that the VAT refunds have been verified.

Highlights

The comments highlighted in this alert are based on our preliminary views following the President's news briefing. Once the Tax amendment statute has been published, we will issue a more comprehensive alert that may include items that were not reflected in the President's address.

Tax Measures

1. **Pay As You Earn (PAYE)** – PAYE is charged on a graduated scale at the rate of between 10 percent to 30 percent. To cushion employees from the impact of COVID-19 and increase disposable income, the President has directed that income of KES 24,000 (approx. USD 225) or less be exempt from PAYE and in addition, the top PAYE rate of 30 percent be reduced to 25 percent. This is a welcome move, which will not only increase

disposable income but will also cushion employees further in the event of salary reductions.

Monthly Taxable Pay (KES)	Annual Taxable Pay (KES)	Current rate of Tax	New rate of Tax as proposed in the President's address
Up to 12,298	Up to 147,580	10%	0%
12,299 to 23,885	147,581 to 286,623	15%	0%
23,886* to 35,472	286,624 to 425,666	20%	20%
35,473 to 47,059	425,667 to 564,709	25%	25%
Above 47,059	Above 564,709	30%	25%

***Please note that those who earn up to KES 24,000 will be exempted from PAYE and therefore this band will not apply for the first KES 114 (i.e. up to KES 24,000).**

2. **Corporation tax** – The standard rate of corporation tax has been reduced from 30 percent to 25 percent. While it is not immediately clear whether companies which are yet to pay the balance of tax for the year 2019 (due at the end of April for companies with December year ends) can apply the reduced corporate tax rate of 25%, this new corporate tax rate will enhance cash flows for companies on payment of instalment taxes and balance of tax for the 2020 financial year. As noted on the **ALN Covid Hub Tax FAQ's** it would be important for companies using the instalment tax regime to consider adopting the current year basis of computing instalment taxes, should it be apparent that profitability in the current year will be significantly lower than that of prior year.
3. **Turnover tax (TOT)** – TOT at the rate of 3 percent was re-introduced by the Finance Act 2019 and is payable by any resident person whose turnover from business does not exceed or is not expected to exceed KES. 5,000,000 during any year of income. The TOT rate has been reduced from 3 percent to 1 percent.
4. **Value Added Tax (VAT)** – The following VAT measures have been introduced by the President:

- *Reduction in the VAT rate*: VAT at the rate of 16 percent is applicable on taxable goods and services provided by a registered person in Kenya. The President has directed that the standard VAT rate be reduced to 14 percent from 16 percent with effect from 1 April 2020. This is a very welcome move and will cushion taxpayers from the cash flow impacts associated with monthly VAT payments.
- *Immediate release of VAT refunds*: The President has directed the Kenya Revenue Authority to release verified VAT refunds of approximately KES 10 billion (approx. USD 95 million) within three weeks or to allow the outstanding VAT refunds to be offset against VAT withheld by appointed withholding VAT Agents. Withholding VAT agents are required to withhold VAT at the rate of 2 percent and remit the VAT withheld to the Kenya Revenue Authority on a monthly basis. This is a welcome move and will significantly enhance cash flows for businesses, especially businesses which deal in exports and which are currently facing cash flow constraints due to reduced demand for most commodities globally and as a result of disruptions in global trade.

Non-Tax Measures

The President has also directed that the following measures be implemented immediately to enhance healthcare services, cushion the vulnerable in society and improve liquidity:

1. Appropriation of KES 1 billion (approx. USD 9.5 million) from the Universal Health Coverage kitty, towards the recruitment of additional health workers to support in the management of the spread of COVID-19.
2. Voluntary reduction of salaries of top Government officials by between 80 percent and 20 percent.
3. Directing all Government Ministries and Departments to release pending payments of at least KES 13 billion (approx. USD 122 million) to suppliers within the next three weeks.
4. Temporary suspension of negative listings with the Credit Reference Bureau effective 1 April 2020 for borrowers whose loans fall overdue or are in arrears.
5. Appropriation of an additional KES 10 billion (approx. USD 9.5 million) to the elderly, orphans and other vulnerable members of our society through cash-transfers by the Ministry of Labour and Social Protection.
6. Directing Government employees aged 58 years and above serving in Job Group S and below or their equivalents to be allowed to take leave or work from home.

The measures set out above are in addition to the following emergency measures introduced by the Central Bank of Kenya on 24 March 2020:

1. lowering of the Central Bank Rate to 7.25 percent from 8.25 percent which is expected to enable commercial banks to lower the interest rates to borrowers on new and existing facilities;

2. reduction of the Cash Reserve Ratio to 4.25 percent from 5.25 percent which is expected to provide additional liquidity of KES 35 billion to commercial banks to directly support borrowers that are distressed as a result of the economic effects of COVID-19; and
3. flexibility to banks in relation to statutory requirements for loan classification and provisioning for loans classified as performing as at 2 March 2020 and whose repayment period is extended or restructured as a result of COVID-19.

We will keep you updated on developments and issue a comprehensive analysis of the changes once the Tax Amendment statute has been published.

Should you require more information, please do not hesitate to contact Daniel Ngumy or Kenneth Njuguna.

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.