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FINANCE ACT 2022

- The Finance Act, 2022.
- This alert contains a summary of key provisions made in the Finance Act, 2022 and their potential effect on taxpayers.

- **INCOME TAX**
- **VALUE ADDED TAX**
- **EXCISE DUTY**
- **TAX PROCEDURES**

Effective dates:

- **sections 3, 6, 10, 15, 16, 22(b)(ii) and 32, on the 1st January, 2023**
- **All other sections, on the 1st July, 2022**.

INCOME TAX

Employment Income

“Permanent home” means a place where an individual resides or which is available to that individual for residential purposes in Kenya, or where in the opinion of the Commissioner the individual’s personal or economic interests are closest.

Sec 5(5)&(6) Employee share ownership plan-ESOP

The value of the benefit under ESOP shall be the difference between the offer price, per share, at the date the option is granted by the employer and the market value, per share on the date when the employee exercises the option

Implication: Employees will be taxed at the point when they exercise the option as opposed to the current practice where the benefit vest at the end of the period.

The benefits chargeable shall be deemed to have accrued on the date the employee exercises the opinion

Section 3- Charge to Tax

Gain from financial derivatives

“financial derivative”

means a financial instrument the value of which is linked to the value of another instrument underlying the transaction which is to be settled at a future date;

Gain from financial derivatives, excluding financial derivatives traded at the Nairobi Securities Exchange is now incomes chargeable to tax under the Income Tax Act.

Incomes of gains from financial derivatives accruing to non-resident deemed to be income derived from Kenya

- Where a resident person enters into a financial derivatives contract with a non-resident person, any gain accruing to the non-resident person from that arrangement shall be subject to tax.
- Gains from financial derivatives to non residents shall be subject to 15% withholding tax
- Payments to a non-resident person not having a permanent establishment in Kenya on gains from financial derivatives. Shall be subject to withholding tax

This expands the tax base and promotes fairness on tax charge on incomes accruing from Kenya for both residents and non-residents

Sec 4A ; Foreign exchange loss

Initial provision-

where the foreign exchange loss is realized by a company with respect to a loan from a person who, alone or together with four or fewer other persons, is in control of that company and the highest amount of all loans by that company outstanding at any time during the year of income is more than three times the sum of revenue reserves and the issued and paid up capital of all classes of shares of the company

substituted by-

where a foreign exchange loss is realized by a company whose gross interest paid or payable to related persons and third parties exceeds thirty per cent of the company’s earnings before interest, taxes, depreciation and amortization in any financial year;

Implication;

This aligns with the thin capitalization rules introduced in the Finance Act, 2021

Sec 4A- EBITDA interest restriction rule ;

Exemption from EBITDA extended to the following financial entities,

- Microfinance institutions licensed and non deposit taking microfinance businesses under the Microfinance Act, 2006;
- Entities licensed under the Hire Purchase Act;
- Non-deposit taking institutions involved in lending and leasing business;
- Companies undertaking the manufacture of human vaccines; No. 19 of 2006. Cap 507 Finance 2022 4 No.
- Companies engaged in manufacturing whose cumulative investment in the preceding five years from the commencement of this provision is at least five billion shillings;
- Companies engaged in manufacturing whose cumulative investment is at least five billion shillings: Provided that the investment shall have been made outside Nairobi City County and Mombasa County; and
- Holding companies that are regulated under the Capital Markets Act.

Sec 12E; Non- Residents with PE exempted from DST

Non-resident person with a permanent establishment in Kenya exempted from Digital service tax.

Sec 15(2)(w); Donations to charitable Organizations

Any donation to a charitable organization whose income is exempt from tax under paragraph 10 of the First Schedule or

to any project approved by the Cabinet Secretary responsible for matters relating to finance is an allowable deduction where previously only cash donations were allowable.

Sec 15(2)(y); Investment Allowance on Indefeasible right to use a fibre optic cable.

The provision to allow 5% of purchase cost of the Indefeasible right to use a fibre optic cable was deleted. This has been deleted because defeasible Right of Use allowance is provided under second schedule at 10% of the cost

Sec 15(4A); Carry forward of losses

This provision where losses would be carried forward for 10 year was deleted to align with the removal of time limit for carry forward as per he Finance Act 2021

Sec 34 ; Capital Gains Tax

The CGT **r**ate has increased from 5% to 15%. However, for firms certified by the Nairobi International Financial Centre Authority that invests five billion shillings in Kenya; and the transfer of such investment is made after five years, the applicable rate shall be the rate that was prevailing at the time that the investment was made.

Introduction of tax rates for Special Operating Framework Arrangement

28A. A company which –

(a) is engaged in business under a special operating framework arrangement with the Government;

(b) incorporated for purposes of undertaking the manufacturer of human vaccines;

(c) whose capital investment is at least ten billion shillings,

shall be subject to the rate of tax specified in the special operating framework arrangement with the Government

First schedule Amendment;

The following incomes to be exempt from tax:

- Deemed interest in respect of an interest free loan advanced to a company undertaking the manufacture of human vaccines.
- Payments made to non-resident service providers not having a permanent establishment in Kenya in respect of services provided to a company undertaking the manufacture of human vaccines.
- Compensating tax accruing to a company undertaking the manufacture of human vaccines.
- Dividends paid by a company undertaking the manufacture of human vaccines to any nonresident person.
- Income of a company undertaking the manufacture of human vaccines.
- Dividends paid by Special Economic Zone enterprises, developers and operators licensed under the Special Economic Zones Act.
- Dividends paid by Special Economic Zone enterprises, developers and operators to any nonresident person.

This is aimed at promoting manufacturing of human vaccines

Third schedule: Tax rates

- A company operating a carbon market exchange or emission trading system that is certified by the Nairobi International Financial Centre Authority, will be taxed at 15% for the first ten years from the year of commencement of its operations.
- A company operating a shipping business in Kenya, will be taxed at 15% for the first ten years from the year of commencement of its operations.
- Interest and deemed interest arising from a bearer bond issued outside Kenya of at least two years duration and interest, discount or original issue discount, to be taxed at 7.5% of the gross sum payable.
- Gains arising from financial derivatives for non-residents will be taxed at 15%.

Sec 18 A; Ascertainment of gains and profits of business in a preferential tax regime

Section 18A was repealed and replaced with the provision that takes into account the foreign jurisdictions preferential tax regimes

"preferential tax regime" means

(a) any Kenyan legislation, regulation or administrative practice which provides a preferential rate of tax to such income or profit, including reductions in the tax rate or the tax base; or

(b) a foreign jurisdiction which—

1) does not tax income;
2) taxes income at a rate that is less than twenty per cent;
3) does not have a framework for the exchange of information;
4) does not allow access to banking information; or
5) lacks transparency on corporate structure, ownership of legal entities located therein, beneficial owners of income or capital, financial disclosure, or regulatory supervision.

This amendment widens the scope of Transfer pricing framework to include transactions in foreign jurisdictions with preferential tax regimes.

Section 18C to 18F ; Country-by country reporting (CbCR)

New provisions have been made to give a framework under which large Multi-nationals will be required to prepare Country by Country (CbCR) report.

To be included in the report will be ; the group's aggregate information including information relating to the amount of revenue, profit or loss before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees and tangible assets other than cash or cash equivalents with regard to each jurisdiction where the group has taxable presence

***The provisions of sections, 18C, 18D, 18E, and 18F shall apply to returns for the year of income 2022 and subsequent years of income*.**

VALUE ADDED TAX

Section 5 (2) ; Charge to tax

Supply of liquefied petroleum gas including propane, to be charged VAT at 8%.

Section 5 (9) ; VAT on Digital supplies

Amendment of "digital marketplace" (previously defined as an online platform which enables users to sell or provide services, goods or other property to other users.)

to;

"digital marketplace" to mean an online platform which enables users to sell goods or provide services to other users.

- Supplies made over the internet or an electronic network or through a digital marketplace are excluded from the treatment of imported services under the reverse VAT

Section 17(3); Claim of Input VAT

- Input VAT is only claimable by a registered person if the input VAT was declared in a return for the tax period in which the taxable supply occurred
- Documentation for the purposes of deducting input tax for oil marketers.

In the case of a participant in the Open Tender System for the importation of petroleum products that have been cleared through a non-bonded facility, the custom entry showing the name and PIN of the winner of the tender and the name of the other oil marketing company participating in the tender:

- Provided that the input tax that may have been incurred by an oil marketing company participating in the Open Tender System before the coming into force of this provision shall be claimed within twelve months after this provision comes into force

Sec 17(5)(e); Refund claim on Input tax by manufacturers for supplies made to an official aid funded project

Additional provision for an input tax refund claim where excess input tax arise from taxable supplies made to an official aid funded project

The Commissioner of Customs can impose interest and penalties within the confines of Tax Procedures Act, 2015 and in cases where interest becomes payable it shall not, in aggregate, exceed the principal tax.

Section 34; Persons supplying imported digital services over the internet or an electronic network or through a digital marketplace are exempted from VAT registration in respect to a turnover threshold of five million shillings.

First Schedule; exempt supplies deleted

- Fertilizers of chapter 31 (***previously exempt supplies***) are now zero rated under the second schedule
- Taxable goods for the direct and exclusive use in the construction and equipping of specialized hospitals with a minimum bed capacity of fifty, approved by the Cabinet Secretary upon recommendation by the Cabinet Secretary responsible for health who may issue guidelines for determining eligibility for the exemption.

First schedule: Part I:-additions on the exempts supplies:

- Plant and machinery of chapter 84 and 85 imported by manufacturers of pharmaceutical products or investors in the manufacture of pharmaceutical products upon the recommendation of the Cabinet Secretary responsible for matters relating health.
- Medical oxygen supplied to registered hospitals.
- Urine bags, adult diapers, artificial breasts, colostomy or ileostomy bags for medical use.
- Inputs and raw materials used in the manufacture of passenger motor vehicles.
- Locally Manufactured passenger motor vehicles:
- Taxable goods, inputs and raw materials imported or locally purchased by a company which is-

(a) engaged in business under a special operating framework arrangement with the Government; and

(b) incorporated for purposes of undertaking the manufacture of human vaccines; and whose capital investment is at least ten billion shillings, subject to approval of the Cabinet Secretary for the National Treasury, on recommendation of the Cabinet Secretary for health.

- Such capital goods the exemption of which the Cabinet Secretary may determine to promote investment in the manufacturing sector: Provided that the value of such investment is not less than two billion shillings.

First schedule: Part II

- The exportation of taxable services ***deleted from the exempt services.***

Introduction to the exempt supplies list.

- Taxable goods, inputs and raw materials imported or locally purchased by a company which-

  (a) is engaged in business a special operating framework arrangement with the Government; and

  (b) is incorporated for purposes of undertaking the manufacture of human vaccines; and whose capital investment is at least ten billion shillings,

  subject to approval of the Cabinet Secretary for the National Treasury, on recommendation of the Cabinet Secretary for health are exempt

Second Schedule Part A –Additions to the Zero rated supplies

- The exportation of taxable services in respect of business process outsourcing.
- Fertilizers of chapter 31.
- Inputs or raw materials locally purchased or imported by manufacturers of fertilizer as approved from time to time by the Cabinet Secretary responsible for Agriculture

Second Schedule: Part B- Paragraph 9 deleted

Supply of protective apparel, clothing accessories and equipment specially designed for safety or protective purposes for use in registered hospitals and clinics or by county government or local authorities in firefighting has been deleted from the second schedule part B on zero rated supplies to public bodies, privileged persons and institutions

EXCISE DUTY

Inclusion to excisable goods and services

- Excise duty on Imported furniture of any kind used in offices, kitchen, bedroom and other furniture which was formally 25% has been repealed.
- Electronic cigarettes and other nicotine delivery devices to attract 40% excise duty
- Liquid nicotine for electronic cigarettes to be charged excise duty of Ksh. 70 per milliliter
- Imported ready-to-use SIM cards to be charged excise duty at Shs. 50 per SIM card
- Excise duty on betting shall be 7.5% of the amount wagered or staked with the exemption of betting on horse racing.
- Excise duty on fees charged by digital lenders at a rate of 20%.
- Excise duty on importation of cellular phones, shall be at 10% of the excisable value.

Adjustment of the specific rate of excise duty by the commissioner;

The Commissioner may, by notice in the Gazette and with the approval of the Cabinet Secretary, exempt specified products from inflation adjustment after considering the circumstances prevailing in the economy in that year in respect of such products

Imposition of interest and penalties;

Section 36 of the Excise Duty Act, 2015 is amended to include the provision that-

(a) the Tax Procedures Act, 2015 shall apply with regard to the imposition of interest and penalties;

(b) in cases where interest becomes payable it shall not, in aggregate, exceed the principal tax

Exempt excisable goods

- Neutral spirit imported or purchased locally by registered pharmaceutical manufacturers upon approval by the Commissioner.
- Locally manufactured passenger motor vehicles: Provided that in this paragraph,

"locally manufactured passenger motor vehicle" means a motor vehicle for the transportation of passengers which is manufactured in Kenya and whose ex-factory value comprises at least thirty percent of local content;

"local content" means parts designed and manufactured in Kenya by an original equipment manufacturer operating in Kenya.

Changes on excise rate

Description	Old Rate of Excise Duty	New Rate of Excise Duty
Fruit juices (including grape must), and vegetable juices, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter	Shs. 12.17 per litre	Shs. 13.30 per litre";
Cosmetics and Beauty products of tariff heading No. 3303, 3304, 3305 and 3307	10%	15%
Beer, cider, perry, mead, opaque beer and mixtures of fermented beverages with nonalcoholic beverages and spirituous beverages of alcoholic strength not exceeding 6%	Shs. 121.85 per litre	KSh. 134 per litre
Wines including fortified wines, and other alcoholic beverages obtained by fermentation of fruits	shs. 208.20 per litre	Shs. 229 per litre
Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 6%	KSh. 278.70 per liter	KSh. 335.30 per liter
Cigars, cheroots, cigarillos, containing tobacco or tobacco substitutes	KSh. 13,906.04 per Kg	Sh s. 1 5,296.6 per kg
Cigarette with filters (hinge lid and soft cap)	KSh. 3,447.61 per mille	KSh. 3,825.99 per mille
Cigarettes without filters (plain cigarettes)	KSh. 2,502.74 per mille	KSh. 2,752.97 per mille
Other manufactured tobacco and manufactured tobacco substitutes; "homogenous" and "reconstituted tobacco"; tobacco extracts and essences"	Shs. 9,734.45 per kg	Shs. 10,707.88 per kg";

Changes on excise rate

Description	Old Rate of Excise Duty	New Rate of Excise Duty
Imported sugar confectionery of tariff heading 17.04	shs. 36.74 per kg	"Shs. 40.37 per kg"
Jewelry of tariff heading 7113 and imported jewelry of tariff heading 7117	10%	15%
Products containing nicotine or nicotine substitutes intended for inhalation without combustion or oral application but excluding medicinal products approved by the Cabinet Secretary responsible for matters relating to health and other manufactured tobacco and manufactured tobacco substitutes that have been homogenized and reconstituted tobacco, tobacco extracts and essences	KSh.1,259 per Kg	KSh. 1,500 per Kg
3907.91.00 Imported Unsaturated polyster(amended to apply to imported)	10%	10%
3907.50.00 Imported Alkyd (amended to apply to imported)	10%	10%
3905.91.00 Imported Emulsion VAM (amended to apply to imported)	10%	10%
3903.20.00 Imported Emulsion - styrene Acrylic (amended to apply to imported)	10%	10%
3905.19.00 Imported Homopolymers (amended to apply to imported)	10%	10%
3906.90.00 Imported Emulsion B.A.M (amended to apply to imported)	10%	10%

TAX PROCEDURES

Change of particulars of a Trust; Sec 9 of TPA

A trust is required to notify the commissioner on changes made on Trust particulars whether the entity is carrying out business or not.

Claim on input VAT; sec 31 of TPA

According to section 31 of Tax Procedures Act, the commissioner may amend an original assessment in the case of an excess amount of input tax under the Value Added Tax Act, 2013, to ensure that the taxpayer is assessed in respect of the correct amount of the excess input tax carried forward for the reporting period

The finance Act 2022 provides that for purposes of VAT, claim for input tax shall be within 6 months as provided for in section 17(1) of the VAT Act, 2013.

Sec 40 ; Security on property for unpaid tax

The new provision gives the commissioner a wider scope of assets to secure unpaid taxes. This will include aircraft, ships, motor vehicles, and any other property. Where the tax payer fails to pay within two months, the commissioner can dispose the assets at the cost of the taxpayer.

Sec 42 ; Power to collect tax from person owing money to a taxpayer

42(6) Notice period for notification to the commissioner by an agent from 7 days to 14 days

42(9) The Commissioner shall serve the taxpayer with a copy of a notice under this subsection when serving the agent.

42(14) No notice shall be issued under this section unless the Commissioner has either confirmed its assessment through an Objection Decision and the taxpayer has defaulted to appeal to the Tax Appeals Tribunal within the prescribed timelines.

Sec 47 ; Refund or setoff of overpaid tax

47. (1) Where a taxpayer has overpaid a tax under any tax law, the taxpayer may apply to the Commissioner, in the prescribed form—

(a) to offset the overpaid tax against the taxpayer's future tax liabilities; or

b) for a refund of the overpaid tax within five years, or six months in the case of value added tax, after the date on which the tax was overpaid.

(2) The Commissioner shall ascertain and determine an application under subsection (1) within ninety days

(3) Where the Commissioner fails to ascertain and determine an application under subsection (1) within ninety days, the same shall be deemed ascertained and approved.

Sec 47A- Refund of Tax paid in error

47A. (1) Where tax has been paid in error, the Commissioner shall, except as otherwise provided in this Act or the relevant tax law, refund such tax. A tax paid in error means any tax paid which the Commissioner is satisfied ought not to have been paid.

Sec 47B- Refund of Tax paid on exempted or Zero rated supply

The Commissioner may, upon approval by the Cabinet Secretary, refund a tax paid in error in any case where the supply is exempt or zero-rated under the Act but such exemption or the zero rating was not processed within the specified period due to circumstances beyond the control of the taxpayer.

Sec 51 (4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall within a period of fourteen days notify the taxpayer in writing that the objection has not been validly lodged.

Initially the notice was to be immediately

Sec 51(11) Deleted and substituted with:-

Sec 51 (11)The Commissioner shall make the objection decision within sixty days from the date of receipt of a valid notice of objection failure to which the objection shall be deemed to be allowed.

Sec (12)A person who is dissatisfied with the decision of the Commissioner under subsection (11) may appeal to the Tribunal within thirty days after being notified of the decision.

First Schedule

Amended by adding PIN requirement for registration of a trust

Thank You

Please note that the contents of this newsletter are intended to provide a general guide to the subject matter. Where the content is inconsistent with the tax statutes, the tax statutes prevail and as such it should not be relied upon without legal advice.

Should you require further information or legal assistance on Compliance or any other legal issue, kindly feel free to contact us at contactus@crowe.co.ke

Cephas Osoro MSc, ACA, CPA (K)
Managing Partner,
Crowe COR LLP
2nd floor, Symbion House
Africa Reit Lane-Off Dagoretti Road
Karen
P.O Box 583 - 00502 Nairobi
Main phone: +254 (0)20 382 2073
Direct phone: +254 (0)722 342 259
cephas.osoro@crowe.co.ke

Rosemary Mwebia
Tax Manager,
Crowe COR LLP
2nd floor, Symbion House
Africa Reit Lane-Off Dagoretti Road
Karen
P.O Box 583 - 00502 Nairobi
Main phone: +254 (0)20 382 2073
Direct phone: +254 (0)721 476 331
rosemary.mwebia@crowe.co.ke