Tax Alert
Tax Procedures Act 2015

Unified tax procedures will ease compliance burden

The President assented to the Tax Procedures Bill on 15 December 2015. The Cabinet Secretary for the National Treasury, via a notice in the Kenya Gazette, appointed 19th January, 2016 as the date which the Tax Procedure Act ("TPA") came into operation. The TPA seeks to harmonize and consolidate the procedures for administration of taxes.

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The TPA aims to provide uniform procedures for consistency and efficiency in the administration of tax laws, facilitate tax compliance by tax payers and promote the effective and efficient collection of tax. It also places strict timelines on the Commissioner to respond to taxpayer issues. TPA covers procedures for Income Tax (personal taxes, withholding tax and corporate tax), Value Added Tax and Excise Duty.

Some of the salient features of the TPA include:

- Interest on late payment of tax has been changed from 2% per month to 1% per month;
- Penalties have been changed with a number of penalties enhanced as detailed in the table below;
- Public and private rulings are now obtainable for all taxes;
- The Kenya Revenue Authority ("KRA") is now required to respond within 60 days in respect to an objection to a tax assessment;
- No tax in dispute is payable on appeal to the Tax Appeal Tribunal or from the Tax Appeal Tribunal to the High Court;
- The time requirement to maintain records for tax purposes has been harmonized to 5 years (previously 7 years for Income Tax and Excise Duty); and
- Interest on assessed tax or late payments can no longer be waived.

The TPA does not apply to assessments that have been appealed to before 19 January 2016.

In the table below, we highlight some of the important changes contained in the TPA and compare them with the former tax procedures.

Issue	Old Tax Procedures	New Tax procedures	PwC Comment
Penalty for failure to register or deregister as a taxpayer	The penalty for failure to obtain a PIN is currently KES 2,000 while the penalty for dealing with excisable goods and services without a license is KES 500,000. The penalty for failing to register or apply for deregistration for VAT is KES. 200,000 or imprisonment for a term not exceeding 2 years or both.	The penalty for failure to register or deregister for taxes including licenses will be KES 100,000 per month up to a limit of KES 1,000,000.	All entities and persons subject to tax obligations would be required to register for tax failing which there would be a significant penalty.
Record keeping	Records have to be maintained in official languages (English or Swahili) and preserved for 10 years in respect of income tax. However, the Commissioner can only request records going back 7 years unless there is a fraud. Records for VAT and Excise are required to be maintained for five and seven years respectively.	Records to be maintained in official languages (English or Swahili) and the period for which the records must be preserved has been harmonized to a period of five years.	The TPA does not appear to delete the provision in the current Income Tax Act that requires preservation of books for 10 years. There now appear to be two conflicting provisions – one in the Income Tax Act that requires preservation for 10 years and one under the TPA that requires preservation for 5 years.
Extension of time to file tax return	In the previous legislation, there are no provisions on extension of time to file a tax return.	There is an option to apply for extension of time to submit a tax return. However, such extension shall not alter the due date for payment of tax due and late payment interest shall still be applicable from the original due date.	There will be no penalties where an extension to file a tax return has been sought. However interest on late payments will still be applicable.
Late submission penalty	Currently, the penalty for late submission of a tax return is the higher of; • 25% of tax not paid or KES 10,000 for PAYE; • 5% of tax not paid or KES 10,000 for corporate tax; • 5% of tax not paid or KES 5,000 for individual tax returns; • 5% of tax not paid or KES 10,000 for VAT; and • Forfeiture of the excisable goods which are the subject of the return for Excise Duty.	The proposed penalty under the TPA for late submission of return shall be the higher of: • 25% of tax not paid or KES 10,000 PAYE; • KES 5,000 for turnover tax; and • 5% of tax not paid or KES 20,000 in all other cases.	Late submission penalties have largely remained the same.

Issue	Old Tax Procedures	New Tax procedures	PwC Comment
Tax shortfall penalty	The penalty for a fraudulent declaration are as follows: • Income tax - KES 10,000 or double the amount of tax involved, whichever is the greater, or to imprisonment for a term not exceeding two years or to both. • VAT – KES 1,000,000 or imprisonment for 3 years or both	Under the TPA, the penalty for knowingly making a false declaration leading to a tax short fall is 75% of the tax shortfall where the statement or omission was done deliberately or 20% of the tax shortfall in any other case. The penalty will be enhanced by 10% if it is a second time and 25% in case it is a third or subsequent time. The penalty will be reduced by 10% in cases where taxpayers have voluntarily disclosed the short fall.	The tax shortfall penalty is punitive and is geared towards discouraging tax evasion. It however introduces an element of subjectivity given that it is unclear whether errors would be considered to be "false declarations" and the standards to be used to determine whether an act was "deliberate".
Failure to comply with the electronic tax system penalty	Currently there are no penalties for failure to file returns electronically or make payments electronically.	Under the TPA, the penalty for failing to comply with the electronic tax system shall be KES 100,000.	The penalty is punitive and is geared towards encouraging tax payers to file returns and make payments electronically.
Tax avoidance penalty	Currently, there are no specific penalties for tax avoidance schemes but the Commissioner is empowered to re-characterize the transaction and reverse the tax benefit. Late payment penalty and late payment interest will apply.	Under the TPA, a tax avoidance penalty will be set at double the amount of tax that would have been avoided.	It is unclear whether the 200% penalty will be over and above the tax shortfall penalty or whether it will be the only penalty applicable in tax avoidance cases. While it is clear that Section 23 of the Income Tax Act on transactions designed to avoid tax will be captured under this provision, it is less clear which other sections of the tax law will be interpreted as tax avoidance.
Amendment of self-assessment	A taxpayer who has made a mistake or error in a return or assessment may apply for relief within 7 years (income tax) and 5 years (VAT).	Under the Act, relief for error or mistake may be sought within 5 years and the Commissioner is required to respond within 30 days.	This proposal has harmonized the period for applying for relief under the various legislations and provided a time limit within which the Commissioner should respond. The Act should also include consequences should the Commissioner not respond in time, such as the Commissioner being deemed to have accepted the amendment.

Issue	Old Tax Procedures	New Tax procedures	PwC Comment
Tax assessments	Under the current legislation, types of assessments include: • Self-assessment; • Amended assessment; • Additional assessment; and • Assessments in cases of risk of non-payment of tax.	Current type of assessments have largely been retained under the Act but will be categorized into three as follows: • **Self assessment or original assessments** which is the assessment made by a taxpayer and submitted to the KRA; • **Default assessment** in cases where a taxpayer has failed to submit a tax return; • **Advance assessment** in specified instances where the Commissioner has reason to believe the taxpayer will cease carrying on business in Kenya or is about to leave Kenya permanently; and • Amended assessment in cases where the Commissioner has reason to believe that a taxpayer has understated or underpaid taxes in a self-assessment or original assessment.	The changes make it clear and simple to understand the different types of assessments.
Extension of time to pay tax	No provisions on extension of time to pay tax but there has been the practice of taxpayers negotiating to pay in installments.	A taxpayer may apply for extension of time to pay a tax due in which case a non-payment penalty will not be applicable but interest on late payment will be applicable from the original date the tax was due for payment.	Taxpayers experiencing cash flow challenges and business pressures can take advantage of this avenue to manage their exposure to penalties. An extension of time to pay tax would also prevent attachment of a taxpayers assets during the extended time period without seeking an injunction.
Order of settlement of tax liability	No provisions on order of settlement of tax liability but generally principal tax would be paid first and an application for waiver of penalties and interest made.	Where a tax payer pays less than the total amount of tax, penalty and interest due, the amount paid shall be applied to settle the tax liability first, then the penalty and finally the interest. If the taxpayer faces more than one tax liability at the time payment is made, the payment shall be applied in the order in which the tax liabilities arose.	This clarifies the order of settlement of tax liabilities and grounds it in law.

Issue	Old Tax Procedures	New Tax procedures	PwC Comment
Late payment interest	Late payment interest is currently 2% (simple interest for income tax and compounded for VAT and excise taxes).	Interest on late payment of tax will now be 1% per month simple interest for all taxes.	This effectively reduces the interest burden in cases of tax arrears.
Transferred tax liabilities	There are no provisions on transfer of tax liabilities but generally tax liability cannot be transferred under the current tax regimes.	Where a tax payer (the transferor) has a tax liability in relation to a business and transfers all or some of the assets of the business to a related person (the transferee), the transferee shall be liable for the tax liability of the transferor.	This provision is primarily designed to ensure that assets are available to the KRA as security for non-payment of taxes.
Refund of overpaid tax	Currently, claim for overpaid tax in respect of income taxes should be made within seven years while claims for VAT paid in error should be made within twelve months.	Applications for a refund of tax should now be lodged within one year of payment of the tax.	It is unclear whether this applies to overpaid income taxes (including withholding tax) where no formal refund application is required and an overpayment can only be determined after the financial year end.
Service of notices by the Commissioner	Currently, there are no clear guidelines on what constitutes notice of service but under civil procedure rules, service has to be either personal on principal officers or by post. Electronic service is not recognized.	In addition, to personal service and service by post the TPA has recognized service by electronic format. Admissibility of documents produced electronically as evidence in a court of law has also been recognized.	This provision is in line with increased use of technology in tax compliance.
Objection to tax decision	Objection to a tax decision is currently done within 30 days after date of service of the notice of assessment and there is no time limit for the Commissioner to respond on the objection under income tax. For VAT, the Commissioner should respond within 60 days.	30 days objection period has been retained under the Act and the Commissioner is now required to respond within 60 days from receipt of objection.	This provision provides certainty and finality on issues under dispute.
Appeals	Appeals to the High Court can be made only on a question of law or of mixed law and fact while appeals to Court of Appeal are restricted to matters of law and procedure.	Under the TPA, appeals to the High Court and Court of Appeal have now been restricted to points of law only.	Taxpayers will now have to ensure that facts have been thoroughly examined by the Tax Appeals Tribunal as there will be no opportunity to litigate on the facts at the High Court. The Tax Appeals Tribunal will also now be required to provide thorough decisions that detail their positions on the facts submitted.

Issue	Old Tax Procedures	New Tax procedures	PwC Comment
Payment of Tax on Appeal	Under the previous law, a party seeking to appeal an assessment by the KRA was required to pay the tax not in dispute as well as 30% of the tax in dispute.	Under the TPA, no taxes are payable on appeal other than taxes not in dispute.	
Out of court settlement	No provisions on time limit for out of court settlement but the option to settle out of court is available under civil procedure rules.	The TPA now provides out of court or out of Tax Appeals Tribunal settlement to be settled within 90 days where leave for such settlement has been granted by a court or the Tax Appeals Tribunal. On expiry of the 90 days, the matter shall revert back to court.	The provision of timelines within which out of court settlements are to be finalized will promote the expeditious settlement of tax disputes.
Public and private rulings	Public and private ruling provided for under the VAT Act, but no similar provisions for income tax and excise duty.	The TPA introduces public and private rulings on interpretation of tax laws for all taxes. The Commissioner may issue public rulings on his own volition while private rulings will be issued upon application by a taxpayer. Public and private ruling shall be binding on the Commissioner and not on the taxpayer and such rulings may be withdrawn or superseded by subsequent public rulings or new law. The Commissioner should issue private rulings within 45 days from application.	Public and private rulings provides an opportunity for certainty in transactions. To enforce compliance with the timelines provided for, the Commissioner should be deemed to have accepted the taxpayer's interpretation if he fails to respond in time.
Penalties and prosecution	Currently, a person may be subject to either a penalty or prosecution or both for a tax offence. This works as a deterrence measure.	Under the TPA, a person shall not be subject to both the imposition of a penalty and the prosecution of an offence in respect to the same act or omission under a tax law. If a person is liable to both under a tax law, the Commissioner shall decide which of the two shall apply.	This will ensure that a taxpayer is not penalized the same offence twice. The exercise of the Commissioner's discretion in determining which option to pursue should however be exercised judiciously to ensure fair treatment of taxpayers.

Conclusion

The Tax Procedures Act 2015 introduces new rules in respect of procedures, assessments, appeals, interest and penalties.

It is therefore important that a tax payer evaluates their tax strategy in the context of the new Tax Procedures Act.

For further information on this issue, please contact any of the people below or your usual PwC contact.

Steve Okello
Partner
steve.x.okello@ke.pwc.com
+254 20 285 5000

Rajesh Shah
Partner
rajesh.k.shah@ke.pwc.com
020 285 5000

Job Kabochi
Partner
job.kabochi@ke.pwc.com
020 285 5653

Titus Mukora
Partner
titus.mukora@ke.pwc.com
+254 20 285 5000

James Mwangi
Senior Associate
james.mwangi@ke.pwc.com
+254 20 285 5702