

# *Growing tomorrow's economy*

## Tax policy & administration

*National Budget 2012/2013*

## ***Tax Measures***

Changes to streamline tax administration but no significant amendments

### ***Hardly any Income Tax measures***

There are minimal changes to the *Income Tax Act*, possibly in light of the impending overhaul of the *Income Tax Act* and the *Customs and Excise Act* by the end of the 2012/13 fiscal year. The intention is to simplify and modernise the legislation and stakeholders should take this opportunity to share their views and frustrations with the current regime.

### ***Changes to taxation of income from transmission of messages***

The Minister has introduced withholding tax on payments made to non resident persons engaged in the business of transmitting messages.

In the past, the obligation to pay tax on income derived from transmission of messages was on the service provider. The *Finance Bill* now requires recipients of this service to withhold tax at the rate of 5% on the payments made to non resident service providers without a permanent establishment in Kenya. The Act states that the person making the

payment should withhold tax on the gains or profits from the business of transmitting messages. It is not clear how the person making the payment would determine the gains or profits. The expectation is that the tax will be on the gross amount.

It will be important for the local recipients of the services to review their contracts to determine if the payments can be made net of tax; if the burden of tax falls on the local recipient then the tax will be an extra cost of doing business.

If a service provider has a permanent establishment in Kenya, then the gains or profits from that business should now be subject to tax at the corporate tax rate of 37.5%. Previously, such service providers were subject to tax at 5% on the gross revenues.

*Effective date 15 June 2012*

### ***Tax exempt bodies under more scrutiny***

The *Finance Bill* has set the validity period of tax exemption certificates at three years with the possibility of extension subject to the Minister's approval and applications for extension to be made at least six

months before the expiry of the certificates. The power to issue tax exemption certificates is now bestowed on the Minister upon recommendation of the Commissioner.

Tax exempt bodies (e.g. charitable organisations, religious bodies, educational institutions that are currently exempt from tax) should ensure that they apply for an extension at least 6 months before the expiry of the exemption.

*Effective date 15 June 2012*

### ***Clarification on commercial buildings***

The *Finance Bill* has clarified the meaning of a "commercial building" for purposes of claiming capital allowances.

A commercial building has been defined to include building in use as an office, shop or showroom.

An important condition to qualify for this tax incentive at 25% is that the investor must provide roads, power, water, sewers and other social infrastructure. This condition could potentially restrict this incentive to large scale real estate developments where the investor provides social amenities within the development.

This clarification is a welcome change for those who intend to invest in commercial buildings on or after 1 January 2013.

*Effective date 1 January 2013*

### ***Tax Agents to be licensed***

The Minister has published regulations that will govern the registration and licensing of tax agents. The intention is to instil professionalism in the conduct of tax agents.

*Effective date 1 January 2013*

### ***Appellate bodies***

The *Finance Bill 2012* has prescribed the qualifications, appointment, conduct and dismissal of the members of the appellate bodies such as the Local Committee and various

Tribunals under the VAT, ITA and *Customs & Excise Act*.

The KRA will also be required to file responses to appeals lodged by taxpayers within 30 days.

This is expected to enhance efficiency in dispute resolution and speed up tax collection.

*Effective date 1 January 2013*

### ***Offenses by corporate bodies***

Directors and other senior officers of companies convicted of an offence under the ITA are currently liable to penalties prescribed under the ITA.

The *Finance Bill 2012* now makes them potentially liable for unpaid taxes as a result of offenses by the corporate bodies if ordered by a court of law.

This is intended to address challenges faced in revenue collection by the KRA.

*Effective date 1 January 2013*

### ***Payment of advance tax streamlined***

Owners of commercial vehicles (vans, pick-ups, lorries, trucks and matatus) are required to pay advance tax based on tonnage or passenger capacity.

The Advance tax on commercial vehicles is now payable by the twentieth of the first month of the year of income or prior to transfer of ownership of the vehicle.

Penalties and interest are applicable for late payment of the tax.

*Effective date 14 June 2012*

### ***Transfer Pricing***

The *Finance Bill 2012* introduces a change in the tax regulations which allow the Commissioner to issue guidelines on the application of transfer pricing methods. Previously, only the Minister could prescribe rules under the *Income Tax Act*.

The change could have far-reaching implications for taxpayers. Nonetheless, this change does not provide the Commissioner with a blank cheque to issue biased

guidelines. Ideally, any new rules from the Commissioner should involve some level of consultation with stakeholders and be in line with international best practice.

It is expected that guidelines would cover areas such as the definition of the arm's length range and the restriction of methods to specific type of transactions. But will the Commissioner's changes make compliance easier for taxpayers or make the waters murkier?

## **Personal Tax**

### *KRA to prey on landlords*

The KRA intends to aggressively pursue rental income by mapping out residential and commercial areas as part of a strategy to bring all landlords into the tax net. The intention is to ensure that property-owning citizens are doing their bit to fill the national coffers. Rental profits are considered taxable income according to the tax rules but many landlords have proved to be an elusive target.

### *State officers finally snared!*

In an effort to implement the constitutional principle that state officers are not to be exempted from tax, the tax exemption enjoyed by the President on his salary and allowances has been removed with immediate effect. Interestingly, the tax exemption on allowances enjoyed by the Speaker, Deputy Speaker, Vice President, Ministers, Assistant Ministers, and all other Members of Parliament that was initially deleted in 2008 has now been zealously deleted a second time. Since there is now a corresponding deletion of the tax exemption clause within the *National Assembly Remuneration Act* hopefully this matter has been legally sealed for the time being.