



Ministry of Foreign Affairs of the  
Netherlands

# Seminar on The Finance Act 2018



October 12, 2018



## Facilitators:



**Samuel Njoroge**  
*Manager – Taxwise Africa  
Consulting LLP*

### **Career Summary**

January 2016 – Present : Manager, Taxwise Africa Consulting LLP  
January 2013 – December 2015 : Tax Consultant, Taxwise Consulting Limited  
January 2012 – December 2012 : Tax Analyst, PKF Taxation Services.



## Facilitators:



### Experience and Career Path

January 2018 – Present : Senior Tax Analyst- Taxwise Africa Consulting LLP  
June 2014 – December 2017 : Tax Analyst, Taxwise Africa Consulting LLP

**Lynnet Mwithi**  
*Senior Tax Analyst– Taxwise  
Africa Consulting LLP*



## Facilitators:



### **Bosire Nyamori**

Partner- Ogetto, Otachi &  
Company Advocates

**Partner** at **Ogetto, Otachi & Company Advocates** handling corporate, commercial and tax law.

Worked as **tax specialist** in **Deloitte** and **PricewaterhouseCoopers** and as tax law and commercial law attorney at Iseme, Kamau and Maema Advocates.

Has **taught tax law** at two Kenyan universities and, a New Zealand University.

Holds a **Bachelor of Law** degree from the University of Nairobi and a **Master of Law** degree from the University of Auckland.

# Programme



## 2018 Finance Act Briefing for Netherlands Business Network Kenya

Nairobi, 12 October 2018

### Programme:

Time	Activity	Facilitator
07:15-07:45	Registration, Breakfast & Networking	Netherlands Embassy
07:45 – 08:00	Opening Remarks	<ul style="list-style-type: none"><li>• Martine van Hoogstraten – Head of Trade &amp; Development, Netherlands Embassy</li><li>• Martin Kisuu – Partner, <u>Taxwise Africa</u></li></ul>
08:00 – 08:20	Direct Taxes	Samuel Njoroge - <u>Taxwise Africa</u>
08:20 - 08:30	Q/A	
08:30 – 08:50	Indirect Taxes	Lynnet Mwithi - <u>Taxwise Africa</u>
08:50 - 09:00	Q/A	
09:00 – 09:25	Constitutional and Administrative Dimensions	Bosire Nyamori- <u>Ogetto, Otachi &amp; Company Advocates</u>
09:25 – 09:35	Q/A	
09:35 – 09:45	Miscellaneous amendments	Bosire Nyamori- <u>Ogetto, Otachi &amp; Company Advocates</u>
09:45 – 10:00	Q/A	
10:00	<u>Closing Remarks</u>	Anja Roymans – Netherlands Embassy

### Venue

Fairview Hotel, Upper Hill Nairobi



# Opening Remarks

- Martine van Hoogstraaten- Deputy Head of Mission, Netherlands Embassy
- Martin Kisuu- Partner, Taxwise Africa



# Finance Act, Tax Laws Amendment Act and EAC Gazette Notice 2018 Changes.

**Presentation by:** Taxwise Africa Consulting  
LLP



# Introduction

- The Finance Act 2018 was assented into law on 21st September, 2018 and the Tax Laws Amendment Act was assented into law 18<sup>th</sup> July 2018 bringing together a myriad of changes affecting various tax heads.
- We proceed to outline the changes and how they will affect you.

# DIRECT TAXES

# INCOME TAX

## Withholding tax on Demurrage charges

- The Act has introduced withholding tax on payments for demurrage charges paid to non-residents at a rate of **20%**.
- The Act defines demurrage charges as “the penalty paid for exceeding the period allowed for taking delivery of goods, or returning of any equipment used for transportation of goods.”
- Effective date: **1st July 2018**

# Definition of winnings for Lottery, Gaming & Betting

- The Act has redefined winnings as “*winnings of any kind and a reference to the amount or the payment of winnings shall be construed accordingly*”.
- Initially winnings had been limited to punters only but is now broadened to include winnings of all kinds.
- Winnings will be subjected to withholding tax at a rate of **20%**.
- 15% of this which will be paid to the Sports, Arts and Social Development Fund by the Commissioner.

***Effective date: 1<sup>st</sup> July 2018***

## WHT on Insurance Premium to Non- Residents

- All insurance premiums paid to non- residents will be taxed at a withholding tax rate of **5%**.
- This however excludes premiums paid for insurance of aircrafts.
- This is aimed at protecting local insurance companies.

***Effective date: 1<sup>st</sup> July 2018***

# Taxation of Deemed Dividends

The Act has widened the scope to include taxation of deemed dividends under the following circumstances:

- Cash or asset distributed for the benefit of the shareholder;
- Quantifiable obligation discharged or used by the company for the benefit of the shareholder or a person related to the shareholder;
- Third party debt owed by the shareholder or a person related to the shareholder which is settled by the company;
- Any transactions with the shareholder or a person related to the shareholder that results to a foregone taxable income by the company.

***Effective date: on 1<sup>st</sup> July 2018.***

## Taxation of Dividends from Untaxed Profits - Compensating Tax

- Dividends distributed out of profits on which no tax has been paid will be taxed at the corporation tax rate of **30%**.
- This is aimed to eliminate instances where dividends are taxed only on the balance of the dividend tax account or taxed at a lower preferential rate.
- The move is expected to bring to tax instances of non-taxation of profits which are later distributed as dividends tax free through elaborate tax evasion schemes.

***Effective date: 1<sup>st</sup> January 2019***



# Presumptive Tax

- The Act has introduced a presumptive tax at the rate of **15%** of business permit fee or trade license issued County governments, to replace turnover tax.
- It will be applicable on an annual turnover not exceeding **Kshs 5,000,000**.
- Tax will be due at the time of acquisition or renewal of business permit or license.
- The tax will not apply to Management & professional fees, rental income or incorporated companies.
- A taxpayer can opt out of this tax regime by application to the Commissioner in writing.

***Effective Date: 1st January 2019***

# Capital Gains Tax (CGT) on Insurance

- The Act has introduced a capital gains tax at the rate of **5%** on the transfer of property by general insurance companies.
- This does not include transfer of property related to life insurance business.

***Effective date: 1<sup>st</sup> July 2018***

## Fiscal incentive for Special Operating Framework arrangements

- The Act has introduced a preferential tax rate where any company engaged in business under a special operating framework arrangement with the Government, will be taxed to the extent provided for in the arrangement.
- This is aimed at boosting targeted investment projects by the government.

***Effective date: 1<sup>st</sup> January 2019***

## Fiscal incentive for Special Operating Framework arrangements

Firms operating under the Special Operating Framework arrangements will benefit from the following tax incentives:

- VAT – exemption of goods/services used in projects under this framework;
- Excise duty- exemption of goods used in projects under this framework; and
- Miscellaneous Fees and levies Act – goods used in projects under this framework are exempted from Import Declaration Fee (IDF) and Railway Development Levy (RDL).

***Effective date: 1<sup>st</sup> July 2018***

# Allowable Deduction on Electricity Bills

- The act allows an additional deduction of **30%** on the total electricity costs, over and above the normal costs incurred by the manufactures.
- Further guidance on this provision will be issued by the Ministry of Energy.
- This is an incentive aimed at promoting manufacturing which is one of the big 4 agenda in Kenya.

***Effective date: 1<sup>st</sup> January 2019***

# Employment Act

## National Housing Development Fund

- The Act amends Section 31 of the Employment Act by introducing the National Housing Development Fund.
- This will require both the employer and employee to contribute **1.5%** of the employee's gross monthly earnings each subject to a maximum contribution of KES 5,000 to the fund.
- The contributions should be remitted before the **9<sup>th</sup>** of the following month failure to which a **penalty of 5%** of the contributions will accrue.

# Employment Act

## **National Housing Development Fund**

- Qualifying employees will use their accrued contribution to finance the purchase of a home.
- Ineligible employees will get a refund of their contributions at the earlier of 15 years from the date of commencement of the contributions or attainment of the retirement age through either a
  - transfer to registered pension scheme,
  - to another person who is eligible, to a spouse or dependent children and
  - can as well be refunded as a cash receipt.
- This will become effective upon gazettelement of regulations by the CS responsible for housing in consultation with CS for the National Treasury.

# Home Ownership Savings Plan (HOSP)

- Home ownership savings plan has been increased to Ksh 96,000 from Ksh 48,000 annually translating to a monthly limit of Ksh 8,000.
- This is a 50% increase in the allowable deduction for employees saving towards owning a home. This is a boost towards ensuring that employees can now own their own homes.

***Effective date: 1st July 2018.***



# Housing Relief

- The ITA has been amended to include a housing relief. This relief will be at 15% of the gross emoluments and shall not exceed Ksh 108,000 p.a accorded to resident individuals who;
  - A. Are eligible to make an application under an affordable housing scheme (“scheme”);
  - B. Have applied and are pending allocation of a house under the scheme; and
  - C. Are saving for a purchase under the scheme approved by the Housing Cabinet Secretary.

Details of the “affordable housing scheme” are yet to be enacted into law and more guidance is expected under this

***Effective date: 1st July 2018.***

# Housing Relief

- It is envisioned that there will be two tiers of affordable houses. The first tier that the government will engage in, itself, through construction of affordable houses in which individuals will need to fulfill conditions A and B above to be entitled to the relief.
- The second tier is expected to be a public private partnership in liaison with approved financial institutions for social housing with which individuals will need to fulfill condition C above to obtain the relief.
- However, this relief is applicable only once per person regardless of the number of applications similar to how personal relief currently operates.

# Power Purchasing Agreement

- The ITA is amended to exempt from income accruing to a power producer under a Power Purchase Agreement (PPA) from compensating tax provisions.
- The move is targeted at championing the big four agenda of an enabling manufacturing sector. This will be realized by investors in the energy sector who will be more incentivized and is hoped will generate cheaper power to plug into the national grid.
- This goes hand in hand with Withholding tax exemptions granted on payments made to non-residents for services rendered under a PPA.

***Effective date: 1st July 2018***

# INDIRECT TAXES

# VALUE ADDED TAX (VAT)

# Petroleum and petroleum products

- Effective 21st September 2018, petroleum and petroleum products will be taxable at the rate of **8%**.
- However, the 16% VAT imposed between 1st September to 20th September 2018 will remain due and payable to KRA.
- The taxable value in respect of these products shall exclude excise duty, fees and other charges.

## Transportation of Cargo to destinations outside Kenya

- Transportation of cargo to destinations outside Kenya has now been removed from the exemption regime.
- This had been erroneously included in the Finance Act 2017 under exempt goods.
- It is still a zero rated supply as it relates to supplies in relation to goods in transit.

## Maize (corn) seed of tariff no. 1005.10.00

- Maize (corn) seed of tariff no. 1005.10.00 has been removed from the first schedule as a standalone exemption since it is already exempt under paragraph 25 of the first schedule of the VAT Act.



# Change in VAT Status of Various Items

Item	Previous status	New status	Rationale
Hearing aids, excluding parts and accessories, of Tariff No.9021.40.00	Standard rated	Exempt	This was done in an effort to make the hearing aids more affordable to people with hearing impairment.
One personal motor vehicle each for a returning public officer and his spouse returning from a foreign mission.	Standard rated	Exempt	It is an incentive to public officers relocating to Kenya.

# Change in VAT Status of Various Items

Item	Previous status	New status	Rationale
Alcoholic or non-alcoholic beverages supplied to the Kenya Defense Forces Canteen Organization	Standard rated	Exempt	This is a special incentive to the KDF aimed at making these beverages more affordable to them.
Parts imported or purchased locally for assembly of computers	Standard rated	Exempt	Previously, the exemption was only limited to primary school laptops. This exemption is aimed at promoting the local manufacturing industry based on approvals by Treasury CS.

# Change in VAT Status of Various Items

Item	Previous status	New status	Rationale
Asset transfers under REITS and asset backed securities	Exempt	Exempt	This was incorrectly classified under exempt financial services.
Garments and leather footwear manufactured in EPZ at the point of importation.	Exempt	Standard rated	This change will safeguard the local producers from unfair competition from EPZ manufacturers who already enjoy incentives and are meant to manufacture for export.

## Change in VAT Status of Various Items

Item	Previous status	New status	Rationale
Postal services provided through the supply of postage stamps, including rental of post boxes or mail bags and any subsidiary services thereto.	Standard rated	Exempt	This is in an effort to enable the postal corporation to offer globally competitive services and enable the corporation to thrive in the current digital economy.

## Change in VAT Status of Various Items

Item	Previous status	New status	Rationale
Equipment used in the construction of grain storage facilities	Standard rated	Exempt	This is an aim to ensure food security is maintained. The exemption was previously limited to the materials used in the construction of the storage facilities.

## Change in VAT Status of Various Items

Item	Previous status	New status	Rationale
Specialized equipment for the development and generation of solar and wind energy.	Exempt	Exempt	<p>The exemption has been modified to limit the exemption to specialized equipment for the development and generation of solar and wind energy.</p> <p>This excludes equipment and accessories which exclusively use or store solar power previously exempted..</p> <p>This move may discourage the use of solar energy as an alternative energy source.</p>

## Change in VAT Status of Various Items

Item	Previous status	New status	Rationale
Maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour by more than ten percent in weight.	Exempt	Zero rated	The Tax Law Amendment Act, 2018, which came into effect on 25 <sup>th</sup> July 2018, had exempted these items making them more expensive compared to if they were zero-rated.

## Change in VAT Status of Various Items

Item	Previous status	New status	Rationale
Wheat and meslin cereals of tariff heading 1001 and Barley cereals of tariff heading 1003.	Standard rated	Exempt	This is to ensure a similar treatment of the cereals classified under the same heading.



## Change in VAT Status of Various Items

Item	Previous status	New status	Rationale
Apparatus for direct and exclusive use for equipping specialized hospitals with a minimum bed capacity of 50.	Exempt	Standard Rated	This is to clarify applicable exemptions on goods used in the construction of these specialized hospitals.

# Change in VAT Status of Various Items

Item	Previous status	New status	Rationale
1213.00.00 - Cereal straw and husks, unprepared, whether or not chopped, ground, pressed or in the form of pellets.	Standard rated	Exempt	This is a welcome move to reduce the cost of producing animal fodder. However this exemption is limited to the provided tariff numbers. It would be beneficial to include other similar products used to prepare animal fodder.
1214.10.00 - Lucerne (alfalfa) meal and pellets.			
2303.20.00-Beet-pulp, bagasse and other waste of sugar manufacture			

# Change in VAT Status of Various Items

Item	Status
Plant and machinery under Chapter 84 and 85.	<p>Previously exempted all machinery under this classification.</p> <p>Exemption is now restricted to plant and machinery used for manufacturing only</p>

# Change in VAT Status of Various Items

Item	Previous VAT status	Current VAT status	Conditions	Comment
Transfer of business under going concern	Zero rated	Exempt	The main condition is that the transferor and transferee should be registered for VAT.	<ul style="list-style-type: none"> <li>VAT incurred on costs in transferring the business will not be recoverable such as legal fees.</li> <li>The condition that both transferor and transferee must be registered for VAT creates an implication that if the transferee is not registered then the supply would be standard rated.</li> </ul>
Supply of natural water for domestic purpose or industrial use	Zero rated	Exempt	Applies to supplies made by National Government, County Government or person approved by Cabinet Secretary (CS) in charge of water development matter	<ul style="list-style-type: none"> <li>Any input VAT incurred in supplying the water will not be recoverable by the suppliers of water.</li> <li>Any person supplying water that is not approved or any of the parties outlined above will have to charge VAT on water supplied.</li> </ul>

# Change in VAT Status of Various Items

Item	Previous VAT status	Current VAT status	Conditions	Comment
Articles of clothing, accessories/apparels for use in firefighting, safety and protective purposes.	Zero rated	Exempt	<ul style="list-style-type: none"> <li>Used by county government and local authorities in firefighting</li> <li>Used in registered hospitals or clinics</li> </ul>	<ul style="list-style-type: none"> <li>This may create a preference for importing the finished product and reselling as opposed to manufacturing locally. This is as the input VAT shall not be claimable against the exempt supply.</li> </ul>
Taxable goods provided to marine fisheries and fish processors	Zero rated	Exempt	Based on approval by relevant state department	Any input VAT incurred in supplying these items will not be claimable thus will be passed on to the consumer of these items.

# Change in VAT Status of Various Items

Item	Previous VAT status	Current VAT status	Conditions	Comment
Articles of clothing, accessories/apparels for use in firefighting, safety and protective purposes.	Zero rated	Exempt	<ul style="list-style-type: none"> <li>Used by county government and local authorities in firefighting</li> <li>Used in registered hospitals or clinics</li> </ul>	<ul style="list-style-type: none"> <li>This may create a preference for importing the finished product and reselling as opposed to manufacturing locally. This is as the input VAT shall not be claimable against the exempt supply.</li> </ul>
Taxable goods provided to marine fisheries and fish processors	Zero rated	Exempt	Based on approval by relevant state department	Any input VAT incurred in supplying these items will not be claimable thus will be passed on to the consumer of these items.

# Change in VAT Status of Various Items

Item	Previous VAT status	Current VAT status	Conditions	Comment
Goods used for emergency relief to be used in a specific area and period supplied by Government, Approved agent, NGO or relief agency authorized by CS responsible for disaster relief	Zero rated	Exempt	<ul style="list-style-type: none"> <li>• Specific place- area where a natural disaster or calamity has happened</li> <li>• Specific time- within 6 to 12 months of natural disaster occurring as permitted by Commissioner</li> <li>• Used in officially recognized refugee camps</li> <li>• Includes goods such as household utensils, food stuffs, materials for provision of shelter or materials and equipment to be used for health, sanitary and educational purposes.</li> </ul>	This move was aimed at ensuring there was no VAT on the supply as was the case when the goods were Vatable at 0%. However again this will affect the manufacturer/supplier of these goods as the input VAT cannot be claimed.

# Change in VAT Status of Various Items

Item	Previous VAT status	Current VAT status	Conditions	Comment
Supply of ordinary bread	Exempt	Zero rated	No specific conditions outlined	The input VAT claimed in supplying ordinary bread will be claimable and will ease the cost to the consumers.
Agricultural pest control products	Zero rated	Standard rated	<ul style="list-style-type: none"> <li>No specific conditions outlined</li> </ul>	<ul style="list-style-type: none"> <li>This will make the cost of these pest control products to go up which will affect farmers and other users of these products. However given the inputs used are zero rated then the effect may not be as hefty.</li> </ul>



# Change in VAT Status of Various Items

Item	Previous VAT status	Current VAT status	Conditions	Comment
Inputs or raw materials used by manufacturers of automotive and solar batteries in Kenya.	Standard rated	Zero rated	<ul style="list-style-type: none"> <li>Applies to electric accumulators and separators including lead battery separators.</li> </ul>	<ul style="list-style-type: none"> <li>This could be aimed at encouraging the manufacturing of solar batteries and essentially making them more affordable thus encouraging the use of these batteries.</li> </ul>
Passengers baggage and personal effects arriving from places outside Kenya	Zero rated	Exempt	<ul style="list-style-type: none"> <li>Various conditions outlined are similar to those when goods were zero rated.</li> </ul>	<ul style="list-style-type: none"> <li>This may not have a huge impact as the effect in terms of VAT borne by the passenger will be the same as it were when the items were zero rated.</li> </ul>

# Change in VAT Status of Various Items

- All these changes are effective 1<sup>st</sup> July 2018.

# Excise Duty

# Exemptions from Excise duty

The application of the exemptions will only apply where the commissioner is satisfied that:

- Exempt goods purchased before clearance through Customs or removal from excise control have been received and consumed by the exempt persons; and
- Excisable goods/services exported under customs control have not been, and shall not be consumed in Kenya.

***Effective date: 1<sup>st</sup> July 2018***

# Inflation Rate Adjustment

- The specific rate of excise duty shall be adjusted for inflation **annually** as opposed to every two years.
- This will be adjusted on the first day of the government's financial year (1st July) every year.

**Effective date: 1st July 2018**

## Suspension of Excise License

The Act allows the commissioner to suspend a license without notifying a taxpayer in case of:

- tax fraud;
- Possession/using, counterfeit stamps on excisable goods;
- possession of goods bearing counterfeit stamps; or
- violation of any regulations relating to health & safety standards or packaging of goods.

# Changes to Excise Duty Rates

- In other cases however, the commissioner is required to give a 21 days' notice prior to the suspension, giving grounds on which the suspension shall be done.
- The commissioner is however prevented from canceling the license of a person on rejection of an appeal for suspension.
- This measure will ensure fair treatment of taxpayers by ensuring they are notified and given grounds for suspension and a window to remedy any wrongdoing.

***Effective date: 1<sup>st</sup> July 2018***

## Allocation and utilization of Excise Duty

- To support social development and universal health care, the Commissioner will pay **16%** of the excise duty from transfer of money by cellular phone service providers into the Sports, Arts and Social Development Fund established under the Public Finance Management Act, 2012.

***Effective date: 1<sup>st</sup> July 2018***



# Offences and Penalties

- Penalties for carrying out excisable activities without a license and for importation of excisable goods requiring an excise stamp will now be **double the excise duty payable** if the person were licensed or **Kshs 5,000,000**, whichever is higher.
- Any excisable goods that have been manufactured without a license or removed without payment of excise duty can be forfeited by the commissioner in addition to other penalties.

***Effective date: 1<sup>st</sup> July 2018***

## Change in Excise Duty Rates

Item	Old rate	New rate	Rationale
Private passenger motor Vehicles			To ensure that high engine rating private motor vehicles make larger contributions compared to low engine rating. Currently both low and high engine are taxed at the same rate.
Above 2500cc(diesel)	20%	30%	
Above 3000cc (Petrol)	20%	30%	

## Change in Excise Duty Rates

Item	Old rate	New rate	Rationale
Illuminating kerosene	Kshs 7,205 per 1000l @ 20 degC	Kshs 10,305 per 1000l @ 20 degC	The rate on both products has been harmonized to ensure that quality of fuel products is not compromised through adulteration, and no excise duty revenue is lost.
Gas oil	Kshs. 10,305 per 1,000 liters	Kshs. 10,305 per 1,000 liters	

## Change in Excise Duty Rates

Item	Old rate	New rate	Rationale
Sugar confectionery, including white chocolate	-	Kshs. 20 per Kg.	Increase tax revenues in what is now being considered a sin tax for having a “sweet tooth”

## Change in Excise Duty Rates

Item	Old rate	New rate	Rationale
Alcoholic or non-alcoholic beverages supplied to the Kenya Defense Forces Canteen Organization.	Ranging from Kshs 5- shs175 depending on the beverage	Exempt	Incentive to KDF.
Bottled or similarly packaged water and other non-alcoholic beverages	Kshs 5 per litre	Kshs 5.20 per litre	To increase tax revenues

## Change in Excise Duty Rates

Item	Old rate	New rate	Rationale
Money transfer services by banks, money transfer agencies and other financial services providers or institutions	10%	20%	To enable the government get additional revenue from the well-established and growing financial sector for funding critical government activities
Money transfer by cellular phone service providers	10%	12%	

## Change in Excise Duty Rates

Item	Old rate	New rate	Rationale
Telephone services	10%	15%	To increase the tax base in this booming sector
Internet data services	0%	15%	
One personal motor vehicle each for a returning public officer and his spouse returning from a foreign mission.	20%	Exempt	Incentive for public officers looking to relocate back to Kenya.

# Change in Excise Duty Rates

All these changes will be effective 1<sup>st</sup> July 2018



# Customs Duty

## Change in Duty Rates

Item	Old rate	New rate	Rationale
Iron and steel products and alloys of various tariffs	Higher of 25% or \$ 200 per metric tonne	Higher of 25% or \$ 200 per metric tonne	To protect local industries and promote uptake of local iron and steel products
Pre-fabricated buildings	25%	Higher of 35% or \$250 for one year.  Listed as sensitive items	To protect local industries and promote uptake of local products
LPG cylinders	0%	25% applicable per year	To promote use of clean energy and environmental conservation.
Non-electric stoves and similar appliances	10%	Higher of 35%	

## Remission on goods for manufacture

Item	Old rate	New rate	Comment
Inputs for manufacture of pesticides	10%	25% applicable for one year	Cost of these products will go up as these goods are now standard rated.
Plywood, fibre board, particle board and oriented boards	25%	Higher of 35% or \$110-230 per MT for one year	Cost of the building materials will go up.
Wheat Grain	35%	10% for one year	The cost of importation will go down.

# Duty remissions

- Inputs and raw materials for manufacture of energy savings stoves.
- Inputs for manufacture of pesticides, fungicides, insecticides and acarides as approved by Ministry of Agriculture.
- Inputs used for the manufacture of roofing tiles coated.
- All these changes will be effective 1<sup>st</sup> July 2018 and are applicable for one year.

# Duty remissions

- Motor vehicles for transportation of tourists, sightseeing buses, overland trucks and tourism boats imported by licensed tour operator.- exempt from duty.
- Sugar for industrial use- scrapped provisions of reducing 90% remission on 100% duty charged.
- Completely knocked down kits- stay of application of duty remission for one year.

***All these changes will be effective 1<sup>st</sup> July 2018***

# Questions





# CONSTITUTIONAL AND ADMINISTRATIVE ASPECTS

Bosire Nyamori  
Fairview Hotel  
12<sup>th</sup> October 2018



# Brief background

- Government's powers to impose taxes limited by constitutional and democratic norms
- Articles have a bearing on tax policy and administration: Art 1 (sovereignty); Art 10 (principles and values of good governance), Art. (31-Right to privacy), Art. 35 (-access to information), Art. 40 (protection of right to property), Art. 47 (fair administration; investigations; unexpected raids), Art. 50-fair hearing

# CONSTITUTION AND THE FINANCE ACT 2018

- *In Okiya Omtatah Okoiti-V-The Cabinet Secretary, National Treasury & 3 Others*, Petition No. 253 of 2018, the High Court declared the Provisional Collection of Taxes and Duties Act (PCTDA) unconstitutional. Law changes in section 1 of the Finance Act, which came into force on 1<sup>st</sup> July 2018, are ineffective.
- **Examples**
  - The Miscellaneous Fees and Levies Act exempts from Import Declaration Fee and Railway Development Levy goods imported for implementation of projects under special operating framework arrangements with the Government. The commencement date for this amendment is 1 July 2018.

# CONSTITUTION AND THE FINANCE ACT 2018

- *Law Society of Kenya –v- The Hon A-G & 2 Others*, Constitutional Petition No. 334 of 2018
  - Seeks to declare key provisions of the Finance Act 2018 unconstitutional
  - Grounds include retroactivity and lack of public participation
- *Okiya Omtatah Okoiti-v-The Cabinet Secretary, National Treasury & 3 Others*, Petition No. 321 of 2018
  - Seeks to declare key law changes-such as housing development fund and 8% VAT on petroleum products-unconstitutional

# CONSTITUTION AND THE FINANCE ACT 2018

- **Earlier**

- *Titus Alila & Others v Energy Regulatory Commission & Others-V-The Cabinet Secretary, National Treasury*, Petition No. 19 of 2018 (Filed in Kisumu)
- *Okiya Omtatah Okoiti & 2 Others-V-The Cabinet Secretary, National Treasury & 3 Others*, Petition No. 253 of 2018

- TAX PROCEDURE ACT

# BRIEF BACKGROUND

- The Act came into force on 9th January, 2016
- TPA legislates for a broad spectrum of issues that taxpayers will encounter when dealing with KRA
- The Commissioner General has immense powers including search and seizure, collecting taxes from third parties, and forcing taxpayers and third parties to disclose information which in other cases could be protected under professional privilege.
- Section 44 (seizure and forfeiture), 60 (powers of search and seize) and section 59(4) (lawyer-client privilege) declared unconstitutional in *Robert K. Ayisi v Kenya Revenue Authority and Another, Petition No. 412 of 2016*

# TAX PROCEDURE ACT AND FINANCE ACT 2018

- **Foreign Income Tax Amnesty**

- The Finance Act extends the deadline of filling for amnesty on foreign income and assets to 30 June 2019.
- Repatriated funds exempted from the Proceeds of Crime and Anti- Money Laundering Act, 2009

- **Extension of Time to File Returns**

- Act clarifies procedures for applying for extension to file tax returns
  - taxpayer can request for extension of time to file a return at least fifteen days before the due date for monthly returns and at least thirty days for annual returns.

- Commissioner is required to respond at least five days before the due date lest the request is deemed accepted
  - penalty for late submission of returns is not applicable where an extension of time to file a return is granted
- **Penalty and Interest for Late Payment**
  - Introduced a late payment penalty of 5% of the tax due and retains the 1% interest on late payments.
  - Late filling penalty for individual taxpayers who are individuals reduced from KES 20,000 to to the higher of 5% of the tax payable or two thousand shillings.



- **Liabilities and Obligations of Tax Representatives**
  - Each tax representative responsible for tax obligations for which appointed
- **General Provisions Relating to Penalty**
  - Commission may either on application or of own motion “remit in whole or in part, any penalty or interest” on grounds of hardship or equity or undue difficult in recovery
  - CS for National Treasury required where interest or penalty exceeds KES 1.5 million
  - Previously remission would be granted on uncertainty of law or fact but this has been removed
  - Hardship, inequity and undue difficulty not defined

- Creates an offence of unauthorized access or improper use of computerized tax system
  - Individual- imprisonment of two years or a fine not exceeding KES 400,000 or both
  - Body corporate-a fine not exceeding KES 1 million.



- **MISCELLANEOUS LAWS**

# THE MISCELLANEOUS LEVIES AND FEES ACT

- **Introduction of anti-adulteration levy**
  - Introduces a levy of KES 18 per litre of the customs value of illuminating kerosene imported into the country
- **Exemptions to projects under special operating framework arrangement with the Government**
  - The Act exempts from Import Declaration Fee and Railway Development Levy goods imported for implementation of projects under special operating framework arrangements with the Government
  - The commencement date for this amendment is 1 July 2018.

# Stamp Duty Act

- **life insurance and insurance against accident**
  - Provides for monthly payment of stamp duty for policies of life insurance and insurance against accident issued.
- **Instruments Exempted from stamp duty**
  - Instruments relating to the business activities of Licensed Special Economic Zone enterprises, developers and operators from stamp duty
  - Instruments executed for the purposes of collection and recovery of taxes from stamp duty

# Betting Lotteries and Gaming Act

- **The Finance Act**
- Reduces the rate of tax for betting, gaming, prize competition and lotteries operators from 35% of their revenue to 15% of their revenue. Note: They still corporation tax at 30% and are required to dedicate 25% of their sales to social causes
- Requires the taxes be paid into the Sports, Arts and Social Development Fund.
- Introduces a late payment penalty of 5% of the tax payable and late payment interest at the rate of 1% per month

# Employment Act

- Amended to deal with the National Housing Development Fund
- Employers and employees will each contribute 1.5% of the employee's monthly basic salary to the fund but the combined contribution is capped at KES 5,000 per month
- These to come into force after the Cabinet Secretary for Housing in consultation with the Cabinet Secretary of the National Treasury) prepared and gazettes regulations setting how the Fund is to operate



## Retirement Benefits Act, 1997

- Gives the Retirement Benefits Authority (RBA) powers to compel non-compliant employers to pay the outstanding contributions and interest with a penalty of five percent of the unremitted contributions or a minimum of twenty thousand shilling

# Air Passenger Service Act

- Proceeds of passenger service charge
  - These are to be shared among Kenya Airports Authority, Kenya Civil Aviation Authority and Tourism Promotion Fund.
  - Previously shared between Kenya Airports Authority and Kenya Civil Aviation Authority