
ANALYSIS OF THE STATUTE LAW (MISCELLANEOUS) AMENDMENTS ACT, 2019 IN RELATION TO TAX LAWS

The Statute Law Miscellaneous Amendment Act is an Act of Parliament to make various amendments to statute law. As noted in **Law Society of Kenya v Attorney General & Another [2016] eKLR, Constitutional Petition No. 3 of 2016**, it is confined to minor non – controversial and generally housekeeping amendments.

As at now, there exists the Statute Law Miscellaneous Amendments Act 2019 (Hereinafter “The Amendment Act”) which has made some amendments to some tax laws in Kenya. The amendments we shall review in this alert are in respect of:-

VALUE ADDED TAX, NO. 35 OF 2013

The Act amends the VAT Act 2013 by providing that a taxpayer can utilise any excess withholding VAT as a credit to offset any other VAT liability due from the taxpayer. It thus proposes further grounds under Section 17 (5) (c) and (d) of the VAT Act upon which the amount of the excess input tax for the previous period is carried forward as input tax deductible in the next tax period where such excess arises from VAT withheld.

These introduced grounds are where:

- (c) the Commissioner is satisfied that such excess arises from tax withheld by appointed tax withholding agents;
- (d) the Commissioner is satisfied that such excess arising out of tax withheld by appointed tax withholding agents may be applied against any tax payable under this Act.

Overview of Withholding VAT regime

It should be observed that the Withholding VAT (WHVAT) was first introduced in Kenya in 2003 but suspended in 2011. It was however reintroduced by the Finance Act 2014 as a measure to increase compliance and collect VAT revenue in advance.

Section 26 of Finance Act 2014 amended the VAT Act 2013 by introducing a new Section 25A. This new provision obligated government ministries, departments and agencies to withhold 6% of the tax payable thereon effective 19th September 2014 when making payments to suppliers for taxable supplies, with the exemption of payments made on supplies to official aid funded projects.

The Finance Act 2015 extended the scope of the entities obligated to withhold the VAT by empowering the Commissioner to appoint any other persons as Withholding Tax Agents.

The Finance Act 2016 amended the Tax Procedures Act, by inserting Section 42A which reinstated the powers to allow the Commissioner to appoint any other person as a withholding VAT Agent.

Challenges faced with Withholding VAT

One of the key challenges that has been faced in regard to the remission of the Withholding Tax has been instances where the VAT was withheld but the taxpayer was in a credit position. In such a case the tax would have been paid “in error” given that the taxpayer would be in a credit position as such not expected to pay any VAT.

This stemmed from the treatment of WHVAT, where the tax was deducted in advance at the time of payment and the final VAT position accounted for later when filing the VAT return by the 20th day of the following month. This was the case especially where the taxpayer would be supplying both standard rated and zero rated supplies and would consistently end up in a credit position.

Previously, before the introduction of Section 17(5) (c) and (d) of the VAT Act on transfer of excess amounts, the Taxpayers who had credits relating to WHVAT could not receive a refund of the said amounts or have the same transferred to cover for other tax obligations. This in so many ways crippled business as the Taxpayer's cash flows was curtailed and yet they had tax credits with Kenya Revenue Authority (KRA) in form of WHVAT which could not be refunded to them.

Further before the amendments set out in the Amendment Act, there was no legal provision allowing for refund of the excess VAT withheld. This meant that the taxpayer could not apply for the refund.

The Finance Act 2017 proposed the exemption of taxpayers from the provisions of WHVAT where they could demonstrate that they would be in a continuous in a credit position for a period of not less than twenty four months. Although this provided reprieve for such cases it did not fully resolve the problem for taxpayers who had mixed supplies and would be in a credit position.

Even with the provision for VAT Tax refunds under the Tax Procedures Act 2015, there has been a lot of difficulty in the issuance of the said refunds occasioned by the slow pace in the processing and the release of the refunds by KRA.





The additional amendments under Section 17(5) of the Amendment Act allowing for transfer of any excess amounts to offset for other tax liability due from the taxpayer has come in handy taking into account that the taxpayers are now able to request to have the excess tax transferred to offset any VAT tax liability without having to necessarily wait for long periods before they can receive their VAT Refunds.

Although various measures have been introduced to clear refund backlogs, we are yet to see the streamlining of the refund processing and payments. The introduction of penalties on refund payments which would be borne by KRA is yet to take effect. There are various measures to move zero rated items from zero rated regime to exempt regime to also reduce the VAT refund headache faced by KRA. Further the finance bill 2019 proposes the reduction of withholding VAT rate from 6% to 2% perhaps easing the burden for taxpayers in terms of cash flows.

It would be interesting to see how the refund of excess WHVAT payments will be implemented and essentially if the VAT refund process will be fully realized and effectively implemented as provided for under VAT Act 2013 and the Tax procedures Act.

Let's talk

For further information on how the tax provisions will affect your business or assistance on any other matter kindly contact your regular Taxwise Africa Analyst or the contacts below.

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