

In this edition

The Kenya Revenue Authority, under the direction of the Cabinet Secretary, National Treasury and Economic Planning, has drafted new rules to implement provisions of the Income Tax Act (ITA). These rules aim to update existing regulations and align them with recent amendments to the ITA and Tax Procedures Act. The public is invited to provide feedback on these draft rules by November 22, 2024.

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Draft Statutory Instruments

The Commissioner General, on behalf of the Cabinet Secretary, the National Treasury and Economic planning has developed draft rules in compliance with the Statutory Instruments Act. The draft rules provide guidance on the implementation of various provisions under the Income Tax Act, CAP 470 (ITA).

The draft rules are intended to update the current rules guiding the application of the provisions of the ITA. The proposed amendments also seek to clean up the existing rules through a raft of amendments to align with the latest provisions of the Income Tax Act as well as the Tax Procedures Act, CAP 469B (TPA).

The Kenya Revenue Authority invites members of the public, professionals and stake holders to submit their comments on the draft rules for consideration to the Commissioner General on or before 22nd November 2024.

In this document, we outline the key amendments in the proposed draft rules and their implications.

1. Draft Income Tax (P.A.Y.E) Rules, 2024

| Citation | Current Tax Rules Provisions | Proposed Amendment |
|---------------------------|---|--|
| Definition of emoluments | Value of benefit or facility provided by employer exceeding Kshs 3,000 per month | <p>The value of benefit or facility provided by employer defined as emoluments will be as per the prescribed rate in the ITA.</p> <p>No specific threshold is provided for in the proposed rules consequently aligning the definition to the provisions of the Act.</p> |
| | Gains and profit, which in the opinion of the Commissioner, are in respect of casual employment only are excluded from the definition | The proposed amendment seeks to revoke this provision and consequently include earnings from casual employment. |
| Exemptions to the Rules | Employers whose employees earn less than Kshs 3,600 per annum or any greater sum as Commissioner may specify are exempted from the application of the rules | This Provision is to be revoked with the implication that all employers must comply with the Income Tax (P.A.Y.E) Rules, 2024 |
| Maintenance of records | Employer is required to recover tax payable from employees in the last month or subsequent payments where tax chargeable exceeds personal relief and to further maintain records | <p>Application of the same provision in recovery of tax payable with a requirement for the employer to remit the full amount of tax payable for the month for each employee and to further maintain records.</p> <p>The requirement is to ensure cashflow to KRA even as employer recovers the tax.</p> |
| Dispute in tax deductions | <p>No specific timeline is provided for the Commissioner to issue a written decision to an employee's objection on tax deductions;</p> <p>Excess tax deducted is to be refunded to the employee</p> | <p>The Commissioner is required to issue a written decision within sixty days to employee's objections. This is meant to align with the provisions of TPA</p> <p>In case of excess tax deducted, the employer shall amend the return or the employee shall lodge for a refund upon making their self-assessment.</p> |

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| <p>Returns & payment of tax</p> | <p>PAYE deductions to be remitted by the 9th of each month.</p> <p>Employers who have deducted tax that is lower than Kshs 100 are not required to remit PAYE, they are however required to consolidate the amounts and remit when it exceeds Kshs 100 or by December of each year regardless of the amount.</p> | <p>All employers are required to submit PAYE returns on or before the 9th of the following month for all employees even if no tax was deducted during the period</p> <p>PAYE deductions are to be remitted on or before the 9th of each month.</p> |
| <p>Failure to Remit a Return</p> | <p>The Commissioner is required to request the employer to render him a return where no tax has been paid and required certificate not provided to ascertain if the employer is liable to pay any tax</p> | <p>The Commissioner may issue a default assessment if employer fails to submit a return and further issue a demand notice where the tax is unpaid. Additional assessments shall also be issued where the Commissioner is unsatisfied with the amount of tax paid as per the Rules</p> |
| <p>Recovery of Tax</p> | <p>Application of the provisions of the Income Tax Act, Section 96 (Deleted)</p> | <p>Application of the provisions of the Tax Procedures Act, Cap 469B; This includes distress orders</p> |
| <p>Change of Employer – Same Employment</p> | <p>The new employer is required to fulfil the old employer’s obligation but will not be liable for any obligations in the prior periods before the change.</p> | <p>Similar requirement for new employer to fulfil the old employer’s obligations, however, the new employer will be required to notify the Commissioner of such change in accordance with provisions of the Tax Procedures Act, Cap 469B</p> |
| <p>Penalties and Interest</p> | <p>Offences under these rules attracts a fine not exceeding ten thousand shillings, or to imprisonment for a term not exceeding six months, or to both</p> | <p>Non-compliance penalties will be as per the provisions of the Tax Procedures Act (CAP 469B); Late filing of return attracts a penalty of 25% of tax due or Kshs 10,000 whichever is higher, and late payment attracts a penalty of 5% of tax due</p> |

2. Draft Income Tax (Withholding Tax) Rules, 2024

| Citation | Current Tax Rules Provisions | Proposed Amendment |
|-----------------------------|---|---|
| Dispute in WHT Calculations | There is no timeline provided for the Commissioner to issue his objection decision to the Payee's objection | The Commissioner is required to issue his objection decision in writing within sixty days. This aligns with the provisions of the TPA. |
| Payment of WHT | Tax deducted is to be remitted on or before the 20th day of the following month | Tax deducted is to be remitted within five working days after the deduction is made. This is an update of the rules as per the current provisions |
| Failure to declare/pay | The Commissioner is required to request a person to render him a return and certificate applicable where no tax has been paid to ascertain if a person is liable to pay any tax | The Commissioner shall issue an assessment if tax has not been withheld by a person liable and a demand notice on unpaid amounts. Additional assessments shall also be issued if the Commissioner is not satisfied with the amount of tax paid as per the rules |
| Recovery of Tax | Application of the Income Tax Act, Section 96(Deleted) where the person liable to withhold is deemed as an agent of the Payee | Application of Section 39A of the Tax Procedures Act, where the tax is recovered from the person liable to withhold as if it was tax due and payable by that person |
| Change in Payer | The new payers are required to fulfil obligations of the old payers for any payments made by them after the change | Additional requirement for the new payer to notify the Commissioner of the change in accordance with the TPA provisions |
| Non-compliance penalties | <p>Failure to deduct WHT attracts a penalty equal to ten percent of the amount involved subject to a maximum penalty of Kshs. 1Million.</p> <p>General penalty - A fine not exceeding one hundred thousand shillings, or to imprisonment for a term not exceeding six months, or to both.</p> | <p>Failure to deduct and remit WHT as well as other non-compliance offenses attract penalties as per the Tax Procedures Act;</p> <p>This includes 5% late payment penalty and interest of 1% per month on unpaid amount. Various penalties apply on different offences as outlined in the TPA</p> |

3. Draft Income Tax (Allowability Bad Debts Guidelines), 2024

| Citation | Current Tax Rules Provisions | Proposed Amendment |
|-----------|---|--|
| Bad debts | Guidelines to the application of Section 15(2)(a) of the ITA on deductibility of bad debt | <p>There are no changes in the proposed draft rules.</p> <p>Changes might however be introduced following the public participation</p> |

4. Draft Income Tax (Prescribed Limit of Medical Benefit)

| Citation | Current Tax Rules Provisions | Proposed Amendment |
|-----------------|--|--|
| Medical Benefit | <p>The tax-exempt threshold for medical benefits provided by an employer to a non-whole time service director has been set at a sum of one million shillings.</p> <p>This threshold guides the application of Section 5(4)(b) of the ITA on tax free benefits.</p> | <p>There are no changes in the proposed draft rules to this threshold.</p> <p>Changes might however be introduced following the public participation</p> |

5. Draft Income Tax (Advance Tax) Rules, 2024

| Citation | Current Tax Rules Provisions | Proposed Amendment |
|------------|-----------------------------------|--|
| Definition | Commercial vehicle is not defined | Definition of commercial vehicle is as defined in the Income Tax Act; Alignment of definition with provisions of the Act |
| | Government agency is not defined | <p>Government agency means an agency, body or entity of government responsible for motor vehicles registration, transport licensing, and motor vehicles inspection;</p> <p>Clarity on definition and scope provided.</p> |

| Citation | Current Tax Rules Provisions | Proposed Amendment |
|--------------------------|--|---|
| Disputes in calculations | Provides for disputes to be handled as per Section 84 of the ITA (Deleted) | Disputes relating to the assessment to tax shall be dealt with in accordance with section 51 of the Tax Procedures Act, Cap 469B, which provides for objection to tax decisions |
| Maintenance of Records | Persons liable to pay advance tax are required to keep record necessary for the determining and ascertaining advance tax or such records as the Commissioner may require | Persons liable to pay advance tax are required to keep necessary documents for determining and ascertaining advance tax as per the Tax Procedures Act, CAP 469B |
| Inspection of Records | The commercial vehicle or vehicle inspection report requested by the Commissioner for inspection may be prepared by a recognized government agency or agent | The commercial vehicle or vehicle inspection report is to be prepared by the government agency. Government agency defined in proposed rules. |
| Penalties & Interest | Provided penalties as per repealed section 72D of the ITA (Repealed) and Section 94 of the Act (Deleted) | Penalties and interest for failure to pay advance tax as well as collection and recovery to be as per the TPA |

6. Draft Income Tax (Leasing) Rules, 2024

| Citation | Current Tax Rules Provisions | Proposed Amendment |
|-----------------------|---|--|
| Lease Duration | Contracts whose term is less than six months or a hire purchase are not considered a lease | <p>The proposed amendment seeks to revoke the lease duration requirement of six month and consequently contracts with shorter terms or a hire purchase will be considered a lease.</p> <p>The rules will therefore be applicable to these contracts</p> |
| Deductions Lessor | Reference to Paragraph 9 of the Second Schedule of the ITA for wear and tear of leased assets for the lessor to claim a deduction. | <p>Reference to Paragraph 1 of the Second Schedule of the ITA for capital expenditure of leased assets for the lessor to claim a deduction.</p> <p>Update as per the current tax provisions</p> |
| Inspection of Records | The commercial vehicle or vehicle inspection report requested by the Commissioner for inspection may be prepared by a recognized government agency or agent | <p>The commercial vehicle or vehicle inspection report is to be prepared by the government agency.</p> <p>Government agency defined in proposed rules.</p> |
| Deductions Lessee | The lessee shall take as a deduction the full payment to the lessor where the sole consideration is the use of, or the right to use an asset | <p>In addition to the sole consideration being the use of or the right to use an asset, the expenditure in respect of which the lessee is seeking the deduction should be incurred by the lessee wholly and exclusively in the production of income chargeable to tax.</p> |

7. Draft Income Tax (National Social Security Fund)(Exemption) Rules, 2024

| Citation | Current Tax Rules Provisions | Proposed Amendment |
|--------------------------|---|---|
| Conditions for exemption | NSSF Board is required to publish the audit report in the Gazette and in at least two newspapers of national circulation within nine months of the end of accounting period of the fund | The proposed draft rules seek to revoke this provision and consequently the board will no longer be required to publish the audit report in the Gazette or newspapers |
| | The Board is required to submit annual audit report to the Commissioner within nine months of the end of the accounting period | Proposed change in timeline of submission of audit report to the Commissioner to be within six months of the end of the accounting period to which the audit report relates |
| Penalty | Failure of the Board to comply with the conditions of exemptions will attract a penalty not exceeding ten thousand shilling for every such failure | Amendment seeks to increase the penalty to an amount not exceeding twenty thousand shillings for every such failure |

8. Income Tax (Retirement Benefit) Rules, 2024

| Citation | Current Tax Rules Provisions | Proposed Amendment |
|---|---|--|
| Definition | "Scheme regulations" means the regulations specifically governing the constitution and administration of a particular scheme | A new definition of "scheme rules" to replace "scheme regulations" introduced. "Scheme rules" means the rules specifically governing the constitution and administration of a particular scheme |
| | "scheme" means a pension fund, a pension scheme, an individual retirement fund, a provident fund or trust fund. | Scheme" means a retirement benefit scheme as defined in the Retirement benefit Scheme (CAP 197) |
| Registration of pension & provident funds | The funds are required to provide audited accounts or actuarial report to the Commissioner of Income Tax and Insurance and notify members of the fund within thirty days from the date of completion of the audit or report | The funds are to provide audited accounts or the actuarial report as the case may be, required to be availed to the Commissioner upon request. |

| Citation | Current Tax Rules Provisions | Proposed Amendment |
|--|--|--|
| Registration of individual retirement fund | Requirement that the fund shall provide loans and other benefits out of the fund at arm's length to the beneficiary and any person dealing with the beneficiary | The amendment seeks to revoke this provision requiring that loans and benefits out of the fund to the beneficiary be at arm's length |
| Registration Procedure | No timeline is provided for the Commissioner to notify the trustee in writing after application for registration on whether the scheme is acceptable | The Commissioner is required to notify the scheme in writing within sixty days of its registration and the year of income in respect of which the registration takes effect. |
| Alteration of Schemes | Trustees required to immediately inform the Commissioner in writing where an alteration is made to the scheme regulations and the alteration will only be effective upon receipt of a written approval from the Commissioner | The scheme is required to notify the Commissioner in writing within thirty days of occurrence of the alteration which shall take effect upon approval by the Commissioner |
| Transitional Provision | Reference to schemes registered under these rules | Provision that any scheme registered under The Income Tax (Retirement Benefit) Rules, 1994 shall be deemed to have been registered under the proposed rules |

9. Tax Procedures (Distraint) Rules, 2024

| Citation | Current Tax Rules Provisions | Proposed Amendment |
|--------------------------------------|---|---|
| Citation | The Rules are under the Income Tax Act | The amendment seeks to have these rules under the TPA |
| Definition | The term "sale" is not defined | "sale" refers to sale by way of public auction or private treaty. |
| Distraint Agents | Required to be qualified under the law relating thereto to levy distress by way of attachment of movable property in execution of a decree of a court | Required to be a licensed auctioneer under the Auctioneers Act (Cap. 526) |
| Security | Distraint agents required to provide a security to the Commissioner in the sum of ten thousand shillings | Distraint agents required to provide security in such sum as the Commissioner may require |
| Service of orders | The orders are to be served to the distrainee, if not available, their agent or any adult member of their family residing with them | Every order issued shall be in accordance with section 74 of the TPA |
| Return on completion of sale | The distrainor shall make a return to the Commissioner immediately after the completion of a sale specifying details of the sale | The distraint agent shall make a return to the Commissioner within 48 hours after the completion of a sale specifying details of the sale |
| Fees of distraint agent / distrainor | Fees specified in the Schedule of the Rules | The fees shall be guided by the provisions of the Auctioneers Act, Cap. 526. |

10. Income Tax (Registered Collective Investment Schemes) Rules, 2024

| Citation | Current Tax Rules Provisions | Proposed Amendment |
|------------------------------|---|---|
| Conditions for Registration | The rules do not expressly state that the Collective Investment Scheme be registered under the Capital Markets Act, (Cap. 485A) | The scheme is required to be registered under the Capital Markets Act, (Cap. 485A) |
| | There is no time limit for operation of the scheme for it to be registered and no requirement for submission of audited financial statements. | <p>The scheme is required to have been in operation for at least twelve months and to further submit the audited financial statements for a period of at least one year immediately preceding the application.</p> <p>Enhance compliance measures proposed.</p> |
| Application for Registration | There is no timeline for the Commissioner to consider the application and notify the manager or trustee in respect of when the registration is to take effect | The Commissioner shall notify, in writing, the collective investment scheme, within sixty days, of its registration and the year of income in respect of which the registration takes effect |
| Withdrawal of Registration | No provision on withdrawal of registration | The Commissioner may at any time, by notice in writing to the scheme, withdraw the registration where scheme no longer fulfils the conditions for registration under these Rules |
| Transitional Provision | Reference to schemes registered under these rules | Any collective investment scheme registered under The Income Tax (Registered Unit Trusts/Collective investment schemes) Rules, 2003 shall be deemed to have been registered under the proposed rules |

11. Draft Income Tax – Declaration of Crops

| Citation | Current Tax Rules Provisions | Proposed Amendment |
|---|--|---|
| Permanent/ Semi- Permanent Crops | List of crops declared as permanent/semi-permanent | Additional crops; Miraa (Khat), Pawpaw, Guava, Tree Tomato Implication; Owner/tenant of any agricultural land will enjoy deduction of capital expenditure incurred in clearing the agricultural land (or on clearing) and planting of these crops. |

CONCLUSION

The draft rules are a welcome move to ensure that the various rules align with the Income Tax Act which is the primary legislation as well as the Tax Procedures Act. All stakeholders have been invited to submit comments to the Commissioner General by the 22nd November 2024 for the finalization of the rules before gazettelement.

LET'S TALK

For more information or professional advisory on any other tax matter kindly contact your regular Taxwise Africa Analyst or the contacts below:

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