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High Court declares Minimum Tax Unconstitutional

Tax Due Dates .5



Newsletter

MBAYA AND ASSOCIATES

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Introduction

We are pleased to release the tenth edition of our tax newsletter. The main focus of this issue is the VAT Electronic Tax Register (ETR) regulations. We hope this insight will encourage you, taxpayers to comply before the due dates. This issue also highlights the recent ruling on minimum tax.

On the right column of the Newsletter you will find contact details for key members of our team who can help answer any questions you may have about the issues highlighted in this newsletter or any other matter.

We are interested in your feedback on the items covered and any topics you would like to see featured in upcoming issues of the newsletter.

Please provide any feedback at tax@mbaya.co.ke

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» From the **TaxDesk** »

The Kenya Revenue Authority launched the Annual Tax Payers' Month which is held every year in October.

The taxman launched the event to celebrate compliant taxpayers for their patriotic act of dutifully remitting their taxes. The event was significant to KRA for having managed to meet and surpass the Financial Year 2020/21 revenue target after eight years wait.

This year's Taxpayers Month is driven by the theme '**Pamoja Twaweza**', which highlights the collective role and contribution of both taxpayers and KRA towards the current socio-economic environment.

During this month of October 2021, KRA will engage in various activities which include, taxpayer appreciation visits, taxpayer education, annual tax summit and Corporate Social Responsibility (CSR) activities.

VAT (Electronic Tax Invoice) Regulations 2020

Kenya Revenue Authority (KRA) wished to inform the public that the roll out of the Electronic Tax Invoice pursuant to the provisions of the Value Added Tax (Electronic Tax Invoice) Regulations, 2020.

The Value Added Tax (Electronic Tax Invoice) Regulations, 2020 were signed by the Cabinet Secretary for the National Treasury and Planning on 10th September 2020 and gazetted on 25th September 2020 vide Legal Notice No. 189 of 2020. The regulations are aimed at facilitating administration of VAT through Electronic Tax Invoice Management.

All VAT registered taxpayers shall thereafter be required to comply with the requirements of the regulations on implementation of the Electronic Tax Invoice within a period of twelve (12) months from the date of the roll out.

The Regulations, took effect from 1st August 2021 and all VAT registered taxpayers are required to comply within a period of twelve (12) months from the date of the roll out; that is, by 31st July 2022.

Where a person is unable to comply within the timelines, they shall apply to the Commissioner for extension of time to comply, which shall not exceed six months, as provided for in the Regulations. The application for extension shall be made thirty (30) days before the expiry of the twelve-month period specified.

Guidelines for VAT Registered Taxpayers

All VAT registered persons are required to comply with the requirements of the Value Added Tax (Electronic Tax Invoice) Regulations, 2020 on implementation of the electronic tax invoice within a period of twelve (12) months from the date of the roll out.

The following Guidelines provide the broad basis for VAT registered taxpayers to comply with the electronic tax invoice requirements:

1. In compliance with the requirements of the Electronic Tax invoice, all VAT registered taxpayers should use a compliant tax register with the following functionalities:

- Check of the invoice details (tax rate, taxable value, total tax and total gross amount) before issuance of the tax invoice to the customer.
 - Transmission of the validated tax invoices to KRA over the internet on a real time or near real time basis.
2. The list of the approved Electronic Tax Register suppliers and their manufacturers from whom VAT registered taxpayers can obtain the required registers. The list has been published at the KRA website and you can access the list this link: <https://www.kra.go.ke/en/component/search/?searchword=approved%20ETR%20suppliers&searchphrase=all&Itemid>
 3. The key features of a valid Electronic Tax Invoice include:
 - Buyer PIN: Refers to the PIN of the purchaser. The capture of the buyer's PIN is optional when generating an invoice and is only applicable where the purchaser intends to claim input tax for the VAT paid.

NOTE: It is the responsibility of the buyer to provide their PIN details to be captured in the invoice where they intend to claim input tax.

- Control Unit Serial Number: A unique number issued by KRA to identify each tax register.
- Control Unit Invoice Number: A unique number generated by the tax register upon issuance of each tax invoice.
- Quick Response (QR) Code: To confirm the validity of the tax invoice

Compliant tax registers will have the capability of generating the credit and debit notes referencing the original tax invoice.

Revised Electronic Tax Register Specifications

No	Component	Minimum Specifications
1	Central Processing Unit (CPU)	CPU Type: Open CPU Cores: Open
2	Memory	Any combination of RAM/Flash memory Any storage media. Minimum Memory Size: 8 GB.
3	Crypto Memory	RSA key and serial number issued by TIMS should be stored in secure memory location with manufacturer providing technical details on sufficient measures of security. The crypto chip should be FIPS Certified.
4	Display	Able to display clear messages
5	Networking	To have transmission capability to both the trader system and to TIMS Application. The following are the standards to follow; Internet (At least two options with GSM as Mandatory for all Types) GSM (3G or 4G) - Mandatory (Removable SIM Card) Ethernet -- Compliance with the IEEE 802.3 standards. Minimum speed – 10 MBs Wireless -- Compliance with IEEE 802.11 standards Local Connection -- Any industry standard connection is acceptable (USB, serial, Ethernet, Bluetooth, SD cards, etc.)
6	Clock	RTC (Internal Clock) -- Mandatory
7	OS & Fiscal Database	OS -- Any Database -- Encrypted/Protected and documented by Manufacturer

8	Power Supply	Appropriate for Kenya's Mains power
9	UPS	Internal rechargeable battery of sufficient capacity to protect data from power interruptions
10	Environmental Specifications	Commercial temperature: 0 to 70° Extended temperature: 20 to 70° Industrial temperature: 40 to 85°
11	Cabinet / Case	Case should be protected by a visible seal that should prevent opening the case without visibly destroying the seal
12	OS Update	Operating System Updates: Optional Over the Air PKI Certificate, Key Pairs & Security Updates: Over the Air HS Code Table: Over the Air from Manufacturer System VAT Table: Over the Air from Manufacturer System SSL update: Manufacturer responsible for updates
13	Technical Intervention	Only by Authorized Technicians by breaking the SEAL and documenting service in Dedicated Service Booklet.
14	User API	API documentation should be made available to KRA in all cases where control unit is an external device to trader's system. In embedded cases, no API exists.
15	PKI (Public Key Infrastructure) integration	Control unit should be PKI enabled/ready. RSA encryption should be performed in such a way as to meet encryption/decryption algorithms used in TIMS server side.

High Court Declares Minimum Tax Unconstitutional

On 20th September 2021, the High Court of Kenya delivered a judgement in the case of Stanley Waweru- Chairman & 3 others (Suing as Officials of Kitengela Bar Owners Association) v National Assembly & 2 others, Constitutional Petition Nos. E005 of 2021 (Consolidated with petition No 1. of 2021).

In this judgement, the High Court declared that the 'minimum tax' provisions in the Kenya Income Tax Act to be unconstitutional. This Petitioners in the case had sought a declaration that Sec (12D) of the Income Tax Act which imposed a 'minimum tax' was unconstitutional for the following reasons:

- Minimum tax does not fall within the category of taxes that can be imposed by the National Government as per the Constitution;
- Minimum tax contravenes the principle of fairness and just sharing of the burden of taxation as embraced by the Constitution;
- Minimum tax is discriminatory in nature;
- Minimum tax is riddled with ambiguity, uncertainty and contradictions contrary to principles of taxation;
- Minimum tax infringes on the right to property and economic and social rights provided for in the Constitution; and,
- The same being a money bill, the senate ought to have been involved in its enactment.

The Petitioners also sought a declaration that the minimum tax 'guidelines' issued by the KRA were null and void for failure to comply with the Statutory Instruments Act.

The Court made a finding that minimum tax did lend itself to a possibility of double taxation.

Further, it also noted that people who genuinely make losses will be forced to fall back on their capital in order to pay minimum tax while those who make profits will be paying income tax from their profits.

Such a system cannot be said to be fair and equitable as envisaged by the Article 201(b)(i) and (ii) of the Constitution. The Court was also of the view that taxpayers genuinely in a loss-making position run the risk of being sacrificed at the altar of taxpayers who dishonestly conceal their profits. It took issue with the National Assembly and Kenya Revenue Authority's ("KRA") approach of subjecting everyone with the exceptions of a few to minimum tax instead of putting systems to detect the dishonest entities.

This was found to be a contravention of the right to dignity as enshrined in Article 28 of the Constitution as it fails to take into consideration the circumstances under which taxpayers find themselves in a loss-making position.

In so far as the issue on minimum tax not qualifying as an income tax as envisaged by Sec (3) and (15) of the Income Tax Act given that it is a tax on the gross turnover and not on gains or profits, the Court held that Sec (12D) which provided for minimum tax is a *non obstante* provision (provision commencing with "Notwithstanding any other provision of this Act...") and as such, in cases of conflict with other provisions of the Income Tax Act, it takes precedent.

The Court also took the view that Sec (12D) of the Income Tax Act is not unlawful merely because of it being an alternative to corporate tax as long as the same is in accordance to the Constitution. More so, given that the Legislature has the power to legislate based on the policies of the day.

The Court also disagreed with the petitioners on the issue of Minimum tax being discriminatory as well as the assertion that Senate should have been involved by dint of it being a money bill.

In regards to the minimum tax guidelines, the Court also held that they were non-compliant with the Statutory Instruments Act which requires public participation and tabling of the Guidelines before the National Assembly.

What the Ruling means for taxpayers

The decision by the Court means that the minimum tax provisions in the Income Tax Act are no longer enforceable.

KRA had intentions to appeal the case but in the absence of the Court of Appeal providing a stay of the judgement, taxpayers will not be required to pay any 'minimum tax'.

This is a welcome reprieve to the business community more so to taxpayers in a loss-making position who otherwise would have had to pay from their capital or reserves (or borrow) to meet their minimum tax obligations.

What happens if minimum tax instalments have been paid?

This ruling follows a court injunction issued on April 2021. The injunction barred the KRA from implementing the minimum tax.

As a result of the injunction, the KRA issued a notice indicating that taxpayers that will have paid the tax will have the amount available as a credit should the minimum tax provisions and related guidelines be declared null and void. As a result:

- Taxpayers in a tax paying position for 2021, can utilize the minimum tax paid to offset the corporate income tax for the year.

- The taxpayers in a tax loss position, may consider applying for a refund of the minimum tax paid.

Please note that this is subject to the outcome of any appeals against this ruling.

Tax Due Dates

Withholding Tax | 20th Day of the following month
Pay as You Earn | 9th Day of the following month
VAT | 20th Day of the following month
Balance of Tax on Self-Assessment | 4th Month after year end
Monthly Rental Income | 20th Day of the following month



Instalment Tax

1st Instalment | 20th day of the 4th month after year end
2nd Instalment | 20th day of the 6th month after year end
3rd Instalment | 20th day of the 9th month after year end
4th Instalment | 20th day of the 12th month after year end
Kindly note that all the returns must be filed on I tax while the payments e-slips must be generated from the I-Tax platform.

Disclosure of Company Beneficial Ownership

Earliest date to be entered in the register of BOs | 21st day of February 2020
Deadline date for disclosure of company beneficial ownership | 31st day of July 2021

Digital Service Tax (DST)

20th day of the following month

Minimum Tax

Applicable where minimum tax is higher than instalment tax payable

1st Instalment | 20th day of the 4th month after year end
2nd Instalment | 20th day of the 6th month after year end
3rd Instalment | 20th day of the 9th month after year end
4th Instalment | 20th day of the 12th month after year end

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