



FINANCE ACT 2023 Insights

Introduction

The Finance Act, 2023 was assented to by the President on 26th June 2023. The Act makes changes to a number of legislations including The Income Tax Act, Cap 470, The VAT Act, 2013, The Excise Duty Act, 2015, The Tax Procedures Act, 2015, The Tax Appeals Act, The Miscellaneous Fees and Levies Act, 2016, Employment Act, 2007 among others comprehensively discussed in our Finance Act Tax Alert.

In this alert MGI Adam & Associates is sharing key highlights of the changes adopted from the proposed Finance Bill 2023 affecting different tax streams highlighted above.

Tax heads



Effective Date: 01 July 2023

Enacted changes

- **Lottery Winnings:** The payout from betting, lottery, prize competition, gambling or other transaction under the Betting, Lotteries and Gaming Act, excluding the amount staked or wagered.
- The **20%** withholding tax will be on the net amount won thereof.





Effective Date: 01 July 2023

Digital Asset:-

- They include: -
 - a) Valuable assets that are not tangible, crypto currency, tokens , or numbers held in digital form and derived from cryptographic means , providing a digital representation of value exchanged with or without consideration and can be transferred, stored or exchanged electronically; and
 - b) A non-tangible token or any other token similar in nature.

- “Income generated from transfer or exchange of a digital asset” means the gross fair market value received or receivable at the point of transfer.
- DAT is payable by a person deriving the income. The burden to deduct and remit the tax lies with the platform’s owner.
- Nonresident owners of such a platform must register under the Simplified Tax Regime.
- Tax withheld is to be remitted within five working days.



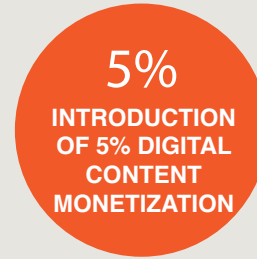
Effective Date: 01 July 2023

- In essence the definition of immovable property has been expounded to include “land, any estate, rights, interest in or any land and things attached to the earth or permanently fastened to anything attached to the earth and includes a debt secured by mortgage or charge on immovable property; mining right, an interest in petroleum agreement, mining information or petroleum information.”



Effective Date: 01 July 2023

- ‘Related Persons’ are designated as “in relation of two persons where a person participates directly or indirectly in the running, control or capital of the business of another person.”



Effective Date: 01 July 2023

Digital content monetization:

- This is construed to mean an offering for payment of entertainment, social, literal, artistic, educational or any other material electronically through any medium or channel in any of the following forms:
 - a. Running advertisement on websites, social media platforms or similar networks by partnering with brands, including endorsements from sellers of such brands;
 - b. Sponsorship, where a brand owner pays a content creator for content creation;
 - c. Affiliate marketing, where the content creator earns whenever the audience of the content creator clicks on the product displayed;
 - d. Subscription services where the audience pays a periodic fee to access the content of the content creator;
 - e. Merchandise sales where physical goods and services are sold featuring a logo, brand or catch phrase to the audience of the content creator, eBooks, courses, or software;
 - f. Membership programmer’s for exclusive content ;
 - g. Licensing the content, including photographs, music or other businesses or individuals for use in the user’s projects; and
 - h. Crowd funding for raising funds for specific goals for a content creator or other person;
- The tax is withheld and remitted by the platform owner or the person who facilitates the exchange or transfer of the digital asset.
- Non-resident persons who own platforms must register under the Simplified Tax Regime (“STR”).



FOREIGN EXCHANGE LOSS AND EBITDA

Effective Date: 01 July 2023

- Foreign exchange losses will be deferred (and not considered as a deduction) and claimed over a period of not more than five years from the date the loss was realized. By an individual whose gross interest paid or payable to a nonresident person exceeds thirty per cent of the person's earnings before interest, taxes, depreciation, and amortisation in any year of income.
- Deductions may be spread to a five-year period where the EBITDA improves.



EMPLOYEE SHARE OWNERSHIP PLANS

Effective Date: 01 July 2023

- Market value of shares offered in an ESOP arrangement is changed to be the value when the option is exercised and not at the time it is granted.
- Option for the Commissioner to set the value is removed.



GAINS AND PROFITS FROM EMPLOYMENT

Effective Date: 01 July 2023

- The travel allowance paid to employees to perform official duties shall not be subject to PAYE up to the limit prescribed by the Automobile Association of Kenya ("AA Rates"). Any other additional amounts shall be taxable.
- Club entrance and subscription fees shall be taxed on the employee. If the employer claims the deduction of such fees against their income.
- Wife's employment income will not be taxable in the hands of the husband.



EMPLOYEE PAYMENT BY SHARES OF START-UPS

Effective Date: 01 July 2023

- Payments to employees by way of shares of eligible start-ups shall be deferred for tax purposes up to the earlier of 30 days after:- (a) lapse of five years from the award of shares, (b) disposal of the shares by the employee or (c) cessation of employment with the employer.
- This doesn't apply to cash emoluments, the fair market value or the value determined by the Commissioner from the last audited financial statements will be the basis of the taxable value.



TAXATION OF PERMANENT ESTABLISHMENTS PE EXPENSES

Effective Date: 01 January 2024

- The corporation tax rate of permanent establishments (Pes) will be **30%**.
- PEs will also deduct, for tax purposes, expenses incurred outside Kenya on executive and general expenses.
- Tax will be paid on "repatriated income". Repatriated income shall be computed using the following formula:

$$R=A1 + (P - T) - A2$$

Where:

- R is the repatriated profit;
- A1 is the net assets at the beginning of the year;
- P is the net profit for the year of income calculated in accordance with generally accepted accounting principles;
- T is the tax payable on the chargeable income; and
- A2 is the net assets at the end of the year.
- "Net assets" means the total book value of assets less total liabilities for the year of income and shall not include revaluation of assets.

WITHHOLDING TAX CREDITS ON PAYMENTS TO NON – RESIDENTS

Effective Date: 01 July 2023

- The Withholding tax assessed by KRA after an audit adjustment shall not be available as a deduction or credit.

BENEFICIARY INCOME FROM TRUST

Effective Date: 01 July 2023

- Income paid to a beneficiary for education, medical treatment, housing and income which in total is below **Kes.10 million** is no longer tax-exempt.

DIMINUTION IN VALUE OF UTENSILS

Effective Date: 01 July 2023

- The deduction for diminution of the value of utensils has been removed.

TURNOVER AND PRESUMPTIVE TAX

Effective Date: 01 January 2024

- The Act reduced the turnover tax threshold from **Kes.1M to Kes.50M** to between **Kes .1M to Kes.25 million**.
- Businesses whose turnover is more than **Kes.25 million** will be taxed under the normal tax regime.

DEDUCTIBILITY OF EXPENSES

Effective Date: 01 January 2024

- Effective 01 January 2024, any expenditure or loss where the invoices of the transactions are not generated through the electronic tax invoice management system shall not be allowed for deduction against revenue unless the transactions have been exempted from tax.
- Fees such as club fees, including entrance and subscription fees are deductible expenses in the determination of taxable income of a business.

30%

INTEREST RESTRICTION UNDER EBITDA

Effective Date: 01 January 2024

- Interest restrictions under EBITDA now apply only to borrowings from non-resident persons, whether related or not. It doesn't apply to the expenses relating to resident persons hence forth.
- Exemptions of companies engaged in manufacturing with a cumulative investment of **KES 5 billion** in the same year or five preceding years have been removed.
- The **30%** of EBITDA restriction is lifted, and all interest may be carried forward for up to 3 subsequent years, provided the interest on loans from nonresident persons doesn't exceed **30%** of EBITDA.
- This doesn't apply where the interest is exempted from tax





QUALIFYING INTELLECTUAL PROPERTY INCOME

Effective Date: 01 January 2024

- Qualifying interest income that is subject to preferential tax rate will be determined as follows:

Where:

- **I** - Income receiving tax benefits;
 - **Q** - Research and development expenditures generated by the taxpayer, excluding acquisition costs and other related party out sourcing cost.
 - **T** - Research and development expenditures generated by the taxpayer, including acquisition costs and other related party outsourcing cost.
 - **P** - Intellectual property income, including royalties, capital gains and any other income from the sale of an intellectual property asset.
- Provided the intellectual property losses shall only be deducted against intellectual property income
 - This is then used to determine basis of arm's length standard.



COUNTRY BY COUNTRY REPORTING

Effective Date: 01 July 2023

- The Act has redefined the term ultimate parent entity as:
 - An entity of which is not controlled by another entity; and
 - Owns or controls, directly or indirectly, one or more constituent entities of a multinational enterprise or group.
- Ultimate parent entity that is resident in Kenya shall file a country-by-country report with the Commissioner if:
 - a) the ultimate parent entity or a constituent entity is not obligated to file a country-by-country report in its jurisdiction of tax residence;
 - b) the jurisdiction in which the ultimate parent entity is resident has a current international tax agreement to which Kenya is a party but does not have a competent authority agreement with Kenya at the time of filing the country-by-country report for the reporting financial year; or
 - c) there has been a systemic failure of the jurisdiction of the ultimate parent entity's tax residence that the Commissioner notified the constituent entity resident in Kenya.



Effective Date: 01 July 2023

- The gross revenue receipts from members' clubs or trade associations will be deemed business income apart from Joining fees, welfare contributions and subscriptions.
- Trade associations are no longer required to notify the tax authorities to be deemed to carry out business charged to tax.



Effective Date: 01 July 2023

- Other than human vaccines, companies manufacturing other vaccines will also be eligible for a particular tax rate outlined in a Special Operating Framework approved by the Government.
- Without the SOF, they will be subject to corporation tax at a **10%** rate.



Effective Date: 01 January 2024

- Contributions to a post-retirement medical fund will be eligible for a post-retirement medical.
- The relief reduces an individual's tax at a rate of **15%** of the contributions subject to a maximum of **Kes.60,000** per annum (**Kes.5,000** per month).
- Investment income from a post-retirement medical fund, whether the fund is part of a retirement benefits scheme, will be exempt from tax.





Effective Date: 01 July 2023

- Sales promotion, marketing and advertising services will attract a withholding tax of **5%**.



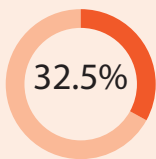
Effective Date: 01 July 2023

- KRA is empowered to appoint estate agents to deduct and remit rental income tax to the Commissioner, furnish a return of the rent received, and pay the tax within five days.

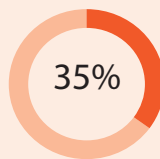


Effective Date: 01 July 2023

- There will be no increase in taxes for individuals whose earnings are below **Kes.500,000**.



- A new tax band of **32.5%** applies to those earning between **Kes.500,000** to **Kes.800,000** per month.



- **35%** for that earning above **Kes.800,000**



FIRST SCHEDULE- EXEMPT INCOMES

Effective Date: 01 July 2023

- Income of an institution, body of persons or irrevocable trust of a public character established to relieve poverty, distress of the public or advancement of education or religion may apply to the Commissioner for tax exemption.
- New requirements for tax exemptions eligibility includes;
 - An entity is operating transparently and accountable without restriction or discrimination.
 - The entity to utilise its assets or incomes exclusively for the intended benefits without conferring a private benefit to an individual.

The act has introduced new exemptions: -

- Royalties paid to a non-resident person by a company that manufactures human vaccines.
- Interest paid to a resident or non-resident person by a company that manufactures human vaccines.
- Investment income from a post-retirement medical fund and funds transfer from a post-retirement medical fund to a medical insurance cover provider.
- Non-Resident contractors, sub-contractors, consultants and employees engaged in grant-funded projects.
- Gains on the transfer of property within a special economic zone(SEZ)
- Royalties, interest, management fees, training, consultancy, agency or contractual payments paid by an SEZ or developer within 1st 10 years of establishment

SECOND SCHEDULE- INVESTMENT ALLOWANCE

Effective Date: 01 January 2024

- The repealed Second Schedule to continue in operations for those who enjoyed the relief under it up to 31 December 2024 instead of 31 December 2023.
- Industrial Buildings and Docks to enjoy a capital deduction of **10%** IBA per annum.

SECOND SCHEDULE- INVESTMENT ALLOWANCE

Effective Date: 01 January 2024

- “Civil works” is now defined to include (i) roads and parking areas; (ii) railway lines and related structures; (iii) water, industrial effluent and sewerage works;(iv) earthworks for telecommunication and construction works undertaken in connection with installation and maintenance of telecommunication equipment and related structures”.
- Refining of products is also now included in the definition of manufacture.
- “Industrial building” is used for transport, bridge, tunnel, inland navigation, water and electricity or hydraulic power undertaking”.
- “Machinery used in agriculture” is now defined to mean “machinery used directly in agricultural activities including tilling, planting, irrigation, weeding and harvesting”.
- “Telecommunications equipment” includes civil works deemed as part of the telecommunication equipment or civil works that contribute to the use of the telecommunication equipment.



**MOTOR
VEHICLE
ASSEMBLERS**

ADVANCE TAX

Effective Date: 01 July 2023

- For local assembly of motor vehicles, the extension of the **15%** corporation tax rate is given for a further 5 years. It depends on achieving a local content of **50%** of the ex-factory value of the motor vehicle, effective 01 July 2023.
- Advance tax on commercial vehicles, including pick-ups and trucks, has been set at **Kes.2,500 per tonne** of load capacity or **Kes.5000 per year**, whichever is higher. It was previously **Kes.1,500 per tonne** of load capacity per year of a maximum of **Kes.2,500**. The tax excludes tractors and trailers used for agricultural purposes.
- Advance tax on saloon cars, station wagons, minibuses and coaches has been set at **Kes.100 per passenger** per month or **Kes.5,000 per year**, whichever is higher. It was previously **Kes.60 per passenger** capacity per year per month of **Kes.2,400 per year**, whichever is higher.



**RESIDENTIAL
RENTAL INCOME
TAX**

Effective Date: 01 July 2023

- The tax rate for residential rental income shall be **7.5%** of the gross rental receipts. This is reduced from **10%**.



**TAXATION
OF CAPITAL
GAINS**

Effective Date: 01 July 2023

- Profit derived from the transfer of shares or comparable interests, including interests in a partnership or trust, if, at any time during the three hundred and sixty-five days preceding the separation, the shares or comparable gains derived more than **20%** of their value directly or indirectly assets will be deemed taxable in Kenya.
- Persons transferring ownership of the share shall notify the commissioner in writing if the change is at least 20% in the underlying ownership of the property.
- In the event the property is transferred in a transaction that is not subject to capital gains tax, and the property is subsequently transferred in a taxable transaction within a period of fewer than five years, then the adjusted cost in the subsequent transfer shall be based on the original adjusted price as determined in the first transfer.
- Due date for tax payable in respect of property alienated under this Part shall be the earlier of:
 - Receipt of the total purchase price by the vendor; or
 - Registration of the transfer.
- For Internal company restructuring shall be exempt from the capital gains tax, which does not involve a transfer of property to a third party within a group that has existed for at least twenty-four months.



**TAXATION OF OIL
AND GAS AND
MINING**

Effective Date: 01 July 2023

- A change of **20%** or more in the ownership of a licensee or contractor SHALL be notified to the Commissioner. This is up from **10%**.

VALUE ADDED TAX

Tax heads	Enacted changes
Fuel	<ul style="list-style-type: none">VAT on fuel and other petroleum products has been revised to 16%.
Place of supply of services in Kenya	<ul style="list-style-type: none">A supply by a non-resident is deemed to be a supply made in Kenya, whether made to registered or unregistered persons.
Time of Supply of a national carrier	<ul style="list-style-type: none">Time of supply of a national carrier shall be the date on which goods are delivered or services performed.
Qualification for deduction of input tax by a registered person	<ul style="list-style-type: none">A person will only be allowed to claim input tax if the person holds a valid tax invoice and the supplier has declared the sale in return.
Introduction of VAT on insurance compensation	<ul style="list-style-type: none">Where owners of taxable supplies and input VAT has been deducted are compensated for the loss of the taxable supply, the compensation shall be charged VAT.
VAT Registration for persons supplying digital services	<ul style="list-style-type: none">Suppliers of digital services tax shall be required to register for VAT whether they meet the registration threshold of Kes. 5 Million or not.
Location for maintaining written records Effective Date: 01 July 2023	<ul style="list-style-type: none">The Act has deleted the requirement to maintain written records in Kenya.
VAT refund on bad debts Effective Date: 01 July 2023	<p>The allows application for VAT refunds provided;</p> <ul style="list-style-type: none">No application is within 10 years from the time of supplyThe application complies with section 47(5) of Tax Procedures Act.The amount may be used to offset future VAT liabilitiesIf the refund is recovered, the taxpayer shall refund the commissioner within 60 days. Other interest of 2% shall apply on the amount refunded.





RECLASSIFICATION OF VAT TREATMENT	Previous	Current
Liquefied petroleum gas	8%	0%
Transfer of business as a going concern	16%	Exempt
Inputs or raw materials locally purchased or imported by manufacturers of fertilisers as approved by the Cabinet Secretary	0%	Exempt
Exportation of taxable services	16%	0%
Transportation of sugarcane from farms to milling factories	0%	Exempt
Fertilizers of Chapter 31	0%	Exempt
Agricultural pest control products.	0%	Exempt
All inputs and raw materials, whether produced locally or imported, supplied to manufacturers of agricultural pest control products upon recommendation by the Cabinet Secretary responsible for matters relating to agriculture	0%	Exempt
Inputs or raw materials (either produced locally or imported) supplied to pharmaceutical manufacturers in Kenya for manufacturing medicaments, as approved by the Cabinet Secretary in consultation with the Cabinet Secretary responsible for matters relating to health	0%	Exempt
0402.29.10 - Milk, specifically prepared for infants	Exempt	16%
3002.19.00 - Other- Antisera, other blood fractions and immunological products, whether or not modified or obtained by means of biotechnological processes.	Exempt	16%
Taxable goods for direct and exclusive use for the construction of tourism facilities, recreational parks of fifty acres or more, convention and conference facilities upon recommendation by the Cabinet Secretary responsible for matters relating to recreational parks. (Proposed deletion of paragraph 62 First Schedule)	Exempt	16%
3003.90.90 - Other medicaments (excluding goods of heading No. 30.02, 30.05 or 30.06) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measurable doses or in forms or packings for retail sale.	Exempt	16%
3005.90.10 - White absorbent cotton wadding, impregnated or coated with pharmaceutical substances, or put up in forms of packings for retail sale for medical, surgical, dental or veterinary purposes.	Exempt	16%



RECLASSIFICATION OF VAT TREATMENT	Previous	Current
Inbound International sea freight offered by registered person	N/A	0%
The supply of locally assembled and a manufactured mobile phones	N/A	0%
All tea and coffee locally purchased for the purpose of value addition before exportation subject to approval by the commissioner -General	N/A	0%
Supply of motorcycles of tariff heading 8711.60.00	N/A	0%
Supply of electric bicycles	N/A	0%
Supply of solar and lithium-ion batteries	N/A	0%
Supply of electric buses of tariff heading 87.02	N/A	0%
Inputs or raw materials locally purchased or imported for manufacture of animal feeds	N/A	0%
Bioethanol vapour (BEV) stoves classified under HS Code 7321.12.00 (coking appliances and plate for liquid fuel)	N/A	0%
3004.90.90 - Other medicaments (excluding goods of heading No. 30.02, 30.05 or 30.06) consisting of mixed or unmixed products, for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale.	Exempt	16%
3003.90.00- Infusion solutions for ingestion other than by mouth not put up in measured doses or in forms or packings for retail sale and other medicaments consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale	Taxable	Exempt
3003.90.00- Others	Exempt	16%
Other medicaments containing alkaloids or derivatives thereof , put up in measured doses or in forms packagings for retail sale		Exempt
Other medicaments containing hormones or other products of heading no.29.37 not put up in measured doses or in forms or packaging for retail sale	N/A	Exempt
3005.90.11, 3005.90.12, 3005. 90.19- White absorbent cotton wadding, impregnated or coated with pharmaceutical substances, or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes	Taxable	Exempt
3003.90.10- Infusion solutions for ingestion other than by mouth put up in measurable doses or in forms or packings for retail sale	Exempt	16%



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