

## BDO East Africa Kenya Tax Newsletter

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### COURT'S INJUNCTION AGAINST IMPLEMENTATION OF THE FINANCE ACT 2023

On July 28, 2023, a three-judge bench of the Court of Appeal in Kenya lifted the injunctions suspending the implementation of the Finance Act 2023. The initial conservatory orders issued on June 30, 2023, staying the Act's enforcement was overturned. According to the National Treasury Cabinet Secretary, the freeze will cost the government KES 211 billion in additional revenue annually, equivalent to over KES 500 million daily.

This is the first time that the provisions of the Finance Act have been challenged both in terms of the procedure of enactment and its contents. It is also the first time that orders of these nature were issued suspending the Finance Act in its entirety.

The court's decision in exercising their discretion took into consideration several factors including:

- The petition challenged both the entirety of the Finance Act 2023 and specific components within it. The court believed that the High Court should have considered suspending only those provisions of the Act that could have had irrevocable consequences and could not be easily reversed.
- That there is a system in place where citizens can seek refunds for overpayment of taxes and levies in subsequent tax payments.
- The High Court's decision to suspend the entire Act was questioned because it did not adequately assess the substantial and irreversible public interest which in their conclusion.
- Public interest tilts in favour of setting aside the conservatory orders.

#### Implications

With the revocation of the injunction barring the implementation of the Finance Act 2023, all the amendments made in the Act will now take effect on their respective specified effective dates, with most of the changes taking effect from July 1, 2023.

Therefore, the Kenya Revenue Authority (KRA) has the authority to assess taxpayers for backdated issues relating to taxes and levies impacted by the Finance Act 2023.

At the point of releasing this alert KRA's legal department has issued an internal opinion clarifying that the effective dates are as stipulated in the Finance Act and a public notice may be issued in the next few days.

In addition, the Ministry of Lands, Public Works, Housing and Urban Development issued a public notice on August 2, 2023 confirming July 1, 2023 as the implementation date with KRA appointed as the collecting agent. The relevant KRA tax returns have been configured to reflect the new changes.

## The key changes effective from July 1, 2023

- **Housing Levy:** Both employees and employers are required to contribute 1.5% of the monthly gross salary.  
**PAYE (Pay as You Earn):** Individuals earning between KES 500,000 to 800,000 per month are subject to a tax rate of 32.5%, while those earning above KES 800,000 per month are subject to a tax rate of 35%.
- **VAT on fuel and petroleum products:** A 16% Value Added Tax (VAT) is applicable.
- **VAT on exported Services:** Exported services are now zero-rated for VAT purposes.
- **Withholding tax on digital content monetization:** A 5% withholding tax is applicable on amounts paid to local residents and 20% for non - residents.
- **Sales, promotion, marketing, advertising payments:** A 5% withholding tax applicable to payments to residents.
- **Effective date for VAT and excise duty changes:** All changes relating to Value Added Tax and Excise Duty came into effect on July 1, 2023.

Despite the Court of Appeal's ruling lifting the injunction and allowing the implementation of the Finance Act 2023, the petition challenging the Act's implementation is still scheduled to be heard by a three-judge bench appointed by the Honourable Chief Justice, to be heard and determined within sixty days from the date of ruling.



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