(Legislative Supplement No. 3)

LEGAL NOTICE NO. 4

THE INCOME TAX ACT

(Cap. 470*)*

THE INCOME TAX (FINANCIAL DERIVATIVES) REGULATIONS, 2023

ARRANGEMENT OF REGULATIONS

Regulation

THE INCOME TAX ACT

(Cap. 470)

THE INCOME TAX (FINANCIAL DERIVATIVES) REGULATIONS, 2023

IN EXERCISE of the powers conferred by section 9(4) of the Income Tax Act, the Cabinet Secretary for the National Treasury and Economic Planning makes the following Regulations—

THE INCOME TAX (FINANCIAL DERIVATIVES) REGULATIONS, 2023

1. These Regulations may be cited as the Income Tax (Financial Derivatives) Regulations, 2023. Citation.

2. In these Regulations, unless the context otherwise requires— Interpretation.

"call option" means an option that gives the holder of a financial derivative the right to buy the underlying assets at a stipulated price on or before a specified future date;

"currency swap" means a contract between two parties to exchange two currencies at a future date at a predetermined exchange rate;

"forward contract" means a customised over-the-counter traded financial derivative contract that provides for the purchase or sale of an underlying asset whose delivery or settlement is to be made at a future date at a price agreed upon on the date when the contract is entered into;

"futures contract" means a standardised agreement traded in a recognised exchange market for the acquisition or disposal of an underlying asset whose delivery is to be made at a future date at a price agreed upon on the date when the contract is entered into including a reference to a date and price determined in accordance with the terms of the contract;

"gain" means any profit earned by a person from a financial derivative contract including any premium or fee paid in respect of an option contract;

"interest rate swap" is an agreement between two parties to exchange one stream of interest payments for another over a specified period;

"option contract" means a financial derivative which offers the holder the right, but not the obligation, to buy or sell the underlying assets or security at a specified price on or before the expiry date of the option contract;

"option premium" is the price the holder of an option contract pays to buy or sell the option contract;

"put option" means an option contract that gives the holder the right to sell the underlying asset within a specified period at a specified price;

"swap" means an option contract to purchase or sell the underlying asset at a specified price at a specified time and may involve several settlements before maturity; and

"underlying assets" include bonds, commodities, currencies, interest rates, securities, stock indices, price indices, credit ratings or similar assets.

Scope of gains from financial derivatives.

3. (1) Any realized gain to a non-resident person, being a realized loss to the resident person who is a party to the financial derivative contract, shall be chargeable to tax in accordance with the Act.

(2) For the purposes of subregulation (1), a financial derivatives contract, unless exempted under the Act, includes—

(a) a futures contract including interest rate futures, stock index futures, volatility futures, weather futures or a similar futures contract whether cash settled or not;

(b) a forward contract, whether cash settled or not;

(c) a swap contract including a contract for interest rate swap, currency swap, credit default swap and hybrid swap;

(d) an options contract including put options, call options and option spreads; or

(e) any other financial derivative instrument.

Realisation of gain or loss.

4. (1) Subject to these Regulations, a gain or loss from a financial derivative shall be deemed to have been realized at the earlier of—

(a) the underlying asset changing hands;

(b) the settlement of the contract; or

(c) the expiry of the contract:

Provided that in the case of an options contract, the gain or loss shall be deemed to have been realised at the time of payment of the option premium and at the time the option is exercised.

(2) A realised loss by a resident person from a financial derivative shall be allowed as a deduction against any gain accruing from similar activities to the extent that it has not been claimed.

Record and characterisation of income from financial derivatives.

5. (1) A person involved in a financial derivatives transaction shall keep a record of all contracts and financial activities resulting from such a contract.

(2) Any income from a financial derivative transaction shall—

(a) clearly be characterised as other income (financial derivative gains/losses) in the tax returns for the period; and

(b) be treated as a separate source in accordance with section 15(7) of the Act for a resident person or a permanent establishment in Kenya.

6. The tax payable under these Regulations shall be due and payable by the 20th day of the month after which the loss from the transaction with the non-resident person is realised. Payment of taxes.

Made on the 19th January, 2023.

NJUGUNA NDUNG'U,
Cabinet Secretary for the
National Treasury and Economic Planning.

LEGAL NOTICE NO. 5

THE COMPETITION ACT

(No. 12 *of* 2010*)*

EXCLUSION

THE PROPOSED ACQUISITION OF CONTROL OF AMROD INVESTMENTS PROPRITARY LIMITED BY ALCHEMY PROMOTIONS HOLDINGS LIMITED

IN EXERCISE of the powers conferred by section 42(1) of the Competition Act, 2010, the Competition Authority of Kenya excludes the proposed acquisition of control of Amrod Investment Proprietary Limited by Alchemy Promotions Holdings Limited from the provisions of Part IV of the Act due to the following reasons—

(a) the merger will not affect competition negatively;

(b) although the combined value of assets, which is higher than the turnover, was above KSh. 1 billion for the preceding year, 2021, the target's value of assets was KSh. 63,300,000 which is less than KSh. 500 million; and

(c) the transaction meets the threshold for exclusion provided under the Competition (General) Rules, 2019.

Made on the 17th January, 2023.

ADANO WARIO,
Acting Director-General.

LEGAL NOTICE NO. 6

THE COMPETITION ACT

(No. 12 *of* 2010*)*

EXCLUSION

THE PROPOSED ACQUISITION OF SOLE CONTROL OF AG LAND HOLDINGS S1 LIMITED BY EVERGREEN AVOCADOS LIMITED

IN EXERCISE of the powers conferred by section 42(1) of the Competition Act, 2010, the Competition Authority of Kenya excludes the proposed acquisition of sole control of AG Land Holdings S1 Limited by Evergreen Avocados Limited from the provisions of Part IV of the Act due to the following reasons—

(a) the merger will not affect competition negatively;

(b) the value of the assets, which is higher than the turnover, of the acquirer was KSh. 477,574,120 for the preceding year, 2021 while that of the target was KSh. 287,732,185; and

(c) the combined value of assets of KSh. 765,306,305 meets the threshold for exclusion provided under the Competition (General) Rules, 2019.

Made on the 17th January, 2023.

ADANO WARIO,
Acting Director-General.

LEGAL NOTICE NO. 7

THE COMPETITION ACT

(No. 12 *of* 2010*)*

EXCLUSION

THE PROPOSED ACQUISITION OF SOLE CONTROL OF REAL PEOPLE KENYA LIMITED BY CHIKE AFRICA LIMITED

IN EXERCISE of the powers conferred by section 42(1) of the Competition Act, 2010, the Competition Authority of Kenya excludes the proposed acquisition of sole control of Real People Kenya Limited by Chike Africa Limited from the provisions of Part IV of the Act due to the following reasons—

(a) the merger will not affect competition negatively;

(b) the combined value of assets, which is higher than the turnover, for the preceding year, 2021 was KSh. 579,951,000; and

(c) the transaction meets the threshold for exclusion provided under the Competition (General) Rules, 2019.

Made on the 17th January, 2023.

ADANO WARIO,
Acting Director-General.

PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

EXPLANATORY MEMORANDUM TO THE INCOME TAX (FINANCIAL DERIVATIVES) REGULATIONS, 2023

LEGAL NOTICE NO. 4, KENYA GAZETTE SUPPLEMENT NO. 6 OF 2023

PART I

Name of Statutory Instrument	:	The Income Tax (Financial Derivatives) Regulations, 2023
Name of Parent Act	:	Income Tax Act, Cap. 470
Enacted Pursuant to	:	Section 9(4) as read with section 130 of the Income Tax Act, Cap 470
Name of the Ministry/Department	:	The National Treasury and Economic Planning
Gazetted on	:	27^{th} January,2023

PART II

1.0 Purpose of the Statutory Instrument

1.1 The objective of this Memorandum is to submit the Legal Notice No. **4, Gazette Supplement No. 6 of 2023** for Tabling in The National Assembly in accordance with the provisions of Section 11 of the Statutory Instruments Act, 2013.

1.2 The Legal Notice introduces the Income Tax (Financial Derivatives) Regulations, 2022 in line with the requirements of the Income Tax Act, Cap 470.

2.0 Legislative Context

2.1 The Legal Notice on the Income Tax (Financial Derivatives) Regulations, 2022 is made pursuant to section 9(4) as read with section 130 of the Income Tax Act, Cap 470. Section 9(4) empowers the Cabinet Secretary for the National Treasury and Economic Planning to make regulations for ease of administration and implementation of the financial derivatives contracts provisions.

2.2 The Finance Act, 2022 introduced a 15% withholding tax on income from financial derivatives contracts earned by a non-resident person through an amendment to Section 3(2), 9(3) and the Third Schedule to the Income Tax Act, Cap 470. This amendment takes effect from 1st January 2023.

3.0 Policy Background

3.1 The primary objective of the Legal Notice is to provide a legal instrument to enable the government to implement the tax measures necessary for funding its economic development and growth agenda.

3.2 Trading in financial derivatives is steadily growing as an integral part of the financial market. There has been significant growth and development of the derivatives market in the world in the last three decades.

3.3 Derivatives include forward contracts, futures, swaps, and options. In contrast with a stock issued by a company and purchased by an investor, a derivative contract is a private agreement between a buyer and a seller, which specifies how the value of the contract evolves over time.

3.4 The taxation of the financial derivatives contract is a positive development for Kenya as it provides a good platform to widen the tax base and spread the burden of tax across the tax-paying public; both residents and non-residents who derive income or accrue income from Kenya.

4.0 Currently, gains by non-residents from financial derivatives are not taxed, thus creating unfairness and room for tax avoidance in the Kenyan legislation. The Finance Act 2022 therefore, bridged this gap by creating a provision to equally impose a tax on non- resident persons.

4.1 Further, to allow for growth in the emerging financial derivatives market, the Finance Act, 2022 exempted taxation of gains arising from transactions in the Nairobi Securities Exchange Derivatives Market.

4.2 The provision is expected therefore to widen the tax base by taxing gains accrued by non-resident persons while still maintaining the competitiveness of financial derivatives traded at the Nairobi Securities Exchange (NSE).

4.3 Kenya joins a host of other jurisdictions that have introduced provisions to bring to tax gains from derivative transactions. These include; United Kingdom, Brazil, US, India and Belgium among others. This will help her to keep abreast with best practise.

5.0 Public Consultation Outcome

5.1 In developing this Legal Notice, public participation was undertaken in compliance with the provisions of Section 5 of the Statutory Instruments Act, 2013 and Article 201 (a) of the Constitution.

5.2 The National Treasury and Economic Planning through the Kenya Revenue Authority invited business organizations and members of the public to submit their views for consideration in the development of the Income Tax (Financial Derivatives) Regulations, 2022 on ***2nd September, 2022*** through a public notice on the KRA website and **6th September 2022** in the newspapers.

5.3 Further, the Kenya Revenue Authority upon considering comments from Citi Corporate and Investment Banking, Kenya Bankers Association, Kelvin Mbithi, Ernest Muriu among others, developed the draft Income Tax (Financial Derivatives) Regulations, 2022. These were then subjected to a second round of public participation from ***Thursday, 17th November, 2022*** in compliance with the law. A copy of the public notice is attached. Feedback was received from various stakeholders including Citibank N.A Kenya, Ernst & Young LLP , Ernest & Martin Associates, EABX Public Limited Company, Deloitte & Touche LLP and Kenya Bankers Association.

5.4 The Authority invited and held an online meeting with the stakeholders among them Kenya Bankers Association, EABX Public Limited Company, Stanchart Bank, Eco Bank, Stanbic Bank, PwC, Absa Africa, Equity Bank among other members of the business community and the general public on ***5th December, 2022*** to review their comments and submissions.

5.5 All stakeholders' comments were reviewed and their feedback incorporated, where appropriate, to improve the regulations as explained below.

5.6 In particular, a definition of "gains" was provided in the regulations. This was borrowed from the suggestions given by the stakeholders and fortified by KRA to ensure it includes all anticipated gains. It was also clarified when a gain or loss shall be deemed to have been realize.

6.0 Impact

6.1 The Legal Notice provides a mechanism for the implementation of the withholding tax on gains arising from financial derivatives contract. It is expected that implementation of the tax will have positive impact as it will increase revenues collected as it is bringing into the ambit of taxation persons who were previously not taxable with regard to the gains from financial derivative transactions.

6.2 Section 9 of the Statutory Instrument Act, 2013 provides that a regulatory impact statement need not be prepared for a proposed statutory instrument if the proposed legistaltion only provides for an amendment of a fee, charge, or tax consistent with announced government policy. Since the Regulations are done in line with the provisions of the Income Tax Act, Cap 470 a regulatory impact statement is unnecessary.

6.3 It is expected that the additional revenue will positively impact government activities by enhancing financial capacity to provide public services, and reduce reliance on loans, which are more expensive on the tax-paying public. It will also result in tax base expansion and bring equity in taxation of gains arising from financial derivatives which are earned by non-residents.

7.0 Monitoring and review

The Legal Notice will be implemented by the Kenya Revenue Authority, will be operational from 1st January 2023 and will be reviewed from time to time to address any challenges for better implementation of the provisions.

8.0 Request to the National Assembly

The National Assembly is invited to:

a) Note the contents of this memorandum.

b) Adopt Legal Notice No. 4, **Gazette Supplement No. 6 of 2023**.

9.0 Contact

Cabinet Secretary
The National Treasury and Economic Planning
P. O. Box 30007-00100
NAIROBI

KENYA REVENUE AUTHORITY

ISO 9001:2015 CERTIFIED

Office of the Commissioner General

KRA/5/1002/26(8299)

15th December 2022

Prof. Njuguna Ndung'u, CBS
The Cabinet Secretary
National Treasury &
Economic Planning
P. O. Box 30007 - 00100
Nairobi

Dear CS,

DRAFT LEGAL NOTICE ON INCOME TAX (FINANCIAL DERIVATIVES) REGULATIONS, 2022

Reference is made to our letter Ref: KRA/5/1002/26(8176) dated 14th November 2022 on the above subject matter.

As already advised, the Finance Act, 2022 amended Section 3(2) of the Income Tax Act, Cap 470 to introduce income tax on gains accrued in or derived from Kenya by a non-resident person from financial derivatives. This amendment will take effect from 1st January 2023.

The Authority has developed the draft Legal Notice on Income Tax (Financial Derivatives) Regulations, 2022 pursuant to Section 9(4) of the Income Tax Act, Cap 470 which requires the Cabinet Secretary to make Regulations for effective implementation of this legal provision.

In compliance with the Statutory Instruments Act, 2013, the Authority invited interested members of the public and stakeholders to submit their inputs and comments for consideration through public notices on 2nd September and 16th November 2022. In addition, an online meeting with key stakeholders was held on 5th December 2022. The stakeholders' comments were analyzed and considered in the preparation of the final draft of the Regulations. Copies of the public notice calling for stakeholders' engagement along with the comments received from stakeholders on the draft Regulations are attached.

The purpose of this letter therefore is to forward the updated draft Legal Notice and the explanatory memorandum on the same for your consideration and publication, subject to your concurrence.

Yours sincerely,

FCPA Githii Mburu, MGH, CBS
COMMISSIONER GENERAL

Copy to: Dr. Chris Kiptoo, CBS
Principal Secretary
National Treasury
Nairobi

THE NATIONAL ASSEMBLY
PAPERS LAID

DATE: 28 FEB 2023	DAY: TUESDAY
TABLED BY:	Leader Of The Majority Party (LOM)
CLERK-AT THE-TABLE:	Inzofu Mwale

KENYA REVENUE AUTHORITY

ISO 9001:2015 CERTIFIED

Office of the Commissioner General

KRA/5/1002/26(8299)

15th December 2022

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The Cabinet Secretary
National Treasury &
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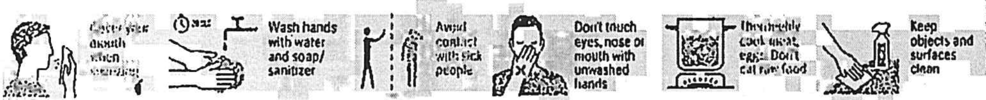


Embassy to expedite issuance of visas, US envoy pledges

CONTINUED FROM PAGE 1

embassy was committed to ensuring normal operations resume.

"The visa backlog situation has caused unnecessary hardship and is unacceptable. One of my top priorities is to reduce the visa backlog that faces Kenyan citizens seeking visas of any kind to travel to the US," she said.

Meg acknowledged that the delay in visa processing was a global issue brought about by the Covid-19 pandemic where most nations had restricted travelling forcing closures of visa applications.

Kenyans seeking the travel document to visit the US for business, study, medication, employment or leisure endured interminable wait times to get their visa applications approved.

At the same time, the newly appointed Ambassador commended Kenyans for the peaceful electoral process during the August general elections.

Noting that the US embassy takes a neutral stand in Kenya's politics, Meg hailed the Azimio la Umoja One Kenya presidential candidate Raila Odinga for petitioning the election outcome at the Supreme Court.

"Candidates aggrieved with the presidential results peacefully and thoughtfully filed their grievances with the Supreme Court," also said while pleading with Kenyans to uphold a peaceful environment and calmness ahead of the adjudication by the same court on September 5.

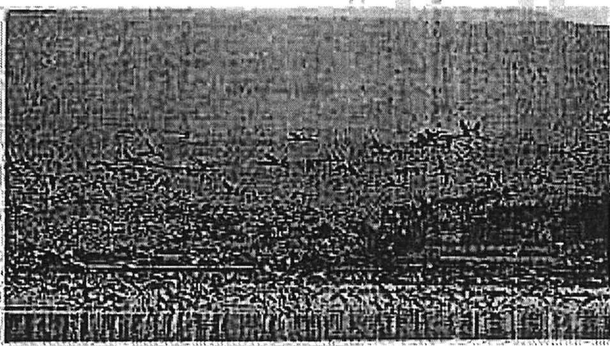
Meg expressed the US government's satisfaction with how the election process was conducted hailing Raila and President-elect William Ruto for following the appropriate legal processes.

Government to launch Sh6b project to improve control of waste water

BY YOBESH ONWONG'A

The Ministry of Water Sanitation and Irrigation through Central Rift Valley Water Works Development Agency (CRVWWDA) will unveil the Nakuru Biodiversity Conservation Project to improve water supply and management of waste water in Nakuru City.

The multi-billion project funded by German Development Bank (KfW) and Government of Kenya at a cost of Euros 50.6 million (approximately Sh6 billion) is expected to be completed by 2027.



Biodiversity ecosystem in Lake Nakuru. PHOTO : COURTESY

David Thiongo, Program Officer from the Ministry of Water Sanitation and Irrigation said the project received a major boost on its journey to implementation following the final presentation of the technical report based on the earlier findings and technical studies undertaken by the consultant.

The project's feasibility study review was undertaken by Eng. Reuben Onunga, Consulting Engineers, and the inception report presented in February this year.

In a workshop held in Nakuru, the consultant presented the proposals to a team of stakeholders for the purpose of agreeing on the water supply and waste water disposal options for adoption into the final detail design.

In their presentation on Water Supply and Wastewater Management, Eng. Reuben Onunga of COWI explained on the optimization of existing water sources, which will see an increase of water supply to above 30 million litres per day for Nakuru city.

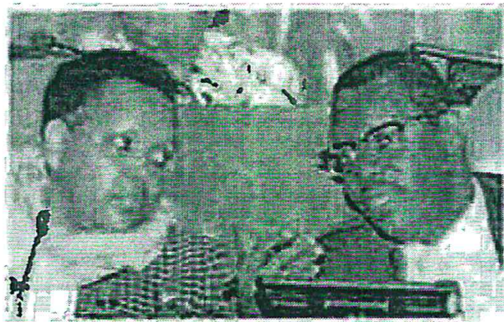
Further, Eng. Onunga gave a summary on selected water supply measures, selected waste water disposal measures and the cost estimates.

Thiongo applauded CRVWWDA for fast tracking the preliminary assignments towards the implementation for the project funded by KfW, German Government Bank.

Speaking on behalf of the Chief Executive Officer, Eng. Samuel Oruma, CPA Douglas Murei, General Manager Corporate Services, lauded the bank, the consultant and the stakeholders for their continued support.

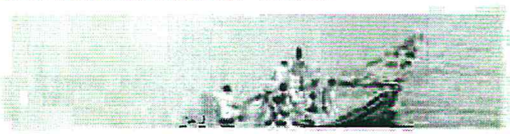
Labour CS and PS reveal challenges state faces in protecting Kenyans in Middle East

Cite insufficient budget, lack of enabling legislation and inadequate labour personnel



Labour CS Florence Bore and PS Peter Tum yesterday.

Government bans destructive seine fishing in Lake Victoria



Kenya Revenue Authority

The National Treasury & Planning

The National Treasury

Public Notice

Development of Income Tax (Financial Derivatives) Regulations, 2022

Commissioner General

KENYA REVENUE AUTHORITY

ISO 9001:2015 CERTIFIED

INTERNAL

STAKEHOLDER VIEWS ON INCOME TAX (FINANCIAL DERIVATIVES) REGULATIONS, 2022

PREPARED BY:
CORPORATE POLICY DIVISION

9TH DECEMBER 2022

Tulipe Ushuru, Tujitegemee!

MATRIX OF RECEIVED STAKEHOLDER SUBMISSION

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
1.	Citibank N.A Kenya & Ernst & Young LLP	Regulation 2: Interpretation	"underlying asset" include bonds, commodities, currencies, interest rates, security, stock index, price indices, credit ratings or similar assets	"underlying asset" include bonds, commodities, currencies, interest rates, security, stock index, price indices, credit ratings or similar assets and does not include: i) assets that are not within Kenya; ii) commodities including oil, coffee or tea; and iii) government securities.	If an asset is not within Kenya and the currency in use is not Kenya Shillings, then the said income is not derived in Kenya and should not be taxable under the parent Act. In addition, the hedging on Kenyan cash crops will make them uncompetitive in the global market. Oil is a critical factor in ensuring certainty in the market both for the government and industry players like airlines.	The exclusion of the items will reduce the scope for imposition of the tax. This will be against the tax base expansion. In addition, the financial derivative acquired by a resident person from a non-resident person for various reasons may result in a gain which is to be subject to tax. Section 3 of the Income Tax Act provides that income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya. The issues of the exclusion of assets does not arise and the tax will provide fairness of taxation of any gains or profits derived in or accrued from Kenya.
2.			No definition of "gain"	Include the following definition *"gain" means any profit earned by a non-resident from financial derivatives, subject to conditions under this Regulations.*	This will provide clarity in the definition of a gain.	The Income Tax Act does not define the term "gain". Defining the term in the regulation may be ultra vires, problematic & limiting the scope of application against the intention of the statute. However, Regulation 3 has been reviewed to provide for the scope of taxation of the gain. This will clearly indicate the realization of a gain to be

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
						subject to the tax or loss to be deducted by the resident person.
3.			No definition of "non-deliverable forward contract"	Include the following definition *"non-deliverable forward contract" means a net settled forward contract.*	This will provide clarity in the definition of a non-deliverable forward contract which is easier to compute net gains.	Non-deliverable forward contract is a form of forward contract. The current definition of a forward contract is wide enough and provides for the concept of settlement which the proposed definition of non-deliverable forward contract is trying to clarify. However, adopting the proposed definition will make the Regulations complex as it will require we define many other forms of forward contract or other type of already defined concepts. The common financial derivative contracts have been defined and this is in line with international practices on the common financial derivatives.
4.		**Regulation 3: Imposition of tax**	i) Gains, including option premium on a financial derivative transaction accruing to a non-resident person, other than a non-resident person having a permanent establishment in Kenya shall be chargeable to a final tax at the rate specified in the Act	Amend to read as follows – *i) Gains on a financial ~~derivative~~ transaction accruing to a non-resident person, other than a non-resident person having a permanent establishment in Kenya shall be chargeable to a final tax at the rate specified in the Act.*	Recommend the deletion of option premium, which is not the gain on the derivative but includes a cost element of the derivative.	The option premium is a cost to the resident person and an income to the non-resident person. The recommendation by the stakeholder to exclude option premium will leave it untaxed which is unfair and against broadening the tax base. All forms of financial derivatives except those traded in the Nairobi Securities Exchange should be brought to charge.

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
5.			ii) For purposes of Regulation 3(i), financial derivatives, contracts unless specifically exempt under the Act include; a) Futures contracts b) Forward contracts c) Swap contracts d) options including put options, and call options.	Amend to read as follows – *ii) For purposes of Regulation* *3(i), financial derivatives, contracts unless specifically exempt under the Act shall be limited to:* *a) futures contracts;* *b) non-deliverable forward contracts; and* *c) options including put options, and call options.*	Swaps are funding transactions which enable investors access to the market, they mature at zero value so there is no gain or loss from the transaction.	Swap contracts may result in a gain or loss to any person and this should be included in the taxation. Non-deliverable forward contract will be limiting in the scope for imposition of tax as clearly outlined in 3 above. Introducing any limitation will go against the policy intention on the withholding tax on gains from financial derivatives.
6.		**Regulation 4: Realization of gain or loss**	Subject to the provisions of these Regulations, a gain or a loss from a financial derivative shall be deemed realized when the underlying asset changes hands, or on settlement of the contract, or on the payment of option premium, or on the expiry of the financial derivative contract.	Amend to read as follows - *Subject to the provisions of these Regulations, a gain or a loss from a financial derivative shall be realized on the expiry of the financial derivative contract and a net payment has been made to one of the parties.*	The proposed amendment provides clarity on when to account for the realised gain. Eliminating the changing hands of the underlying asset because it is usually not held as part of a derivative transaction. Also removed the on-settlement date of the derivative contract; because transactions like swaps settle at inception and at maturity.	The proposed amendment will lead to limited scope for taxation. In addition, regulation 4 has been reviewed to provide that the gain is deemed realized at the earlier of the following events happening- a) the underlying asset changes hands; or b) on settlement of the contract; or c) an option premium is paid or payable; or d) on the expiry of the financial derivative contract

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
						This will also provide clarity on the timing for taxation of the gain.
7.		**Regulation 5: Tax avoidance**	(b) A person shall not claim a deduction in respect of a loss arising from a financial derivative transaction if it enters into a substantially identical transaction thirty days before or after the loss was realized.	Recommend deletion of this provision.	The main reason why a party enters into these transactions is to hedge against certain risks. The person might not be aware of the expected loss or might be hedging against further loss. In addition, tax avoidance is well covered under the provisions of the parent Act.	Section 23 of the Income Tax Act provide for general provision on anti-avoidance. Regulation 4 restricts the allowability of the realized loss on resident person under certain circumstance to curb against aggressive tax planning and avoidance by taxpayers. The regulations adopt international best practice from countries such as South Africa, UK, India, among others.
8.		**Regulation 6: Record keeping**	b) all incomes arising from financial derivatives shall clearly be characterized as other income in the tax returns for the period and shall be treated as a separate source in accordance with Sec 15 of the Act.	Amend as follows: *b) all incomes arising from financial derivatives shall clearly be characterized as other income in the tax returns for the period and shall be treated as a separate source in accordance with Section 15 of the Act for resident persons.*	For clarity in implementation of the new provision.	The proposed recommendation was considered and incorporated. In addition, it was also noted that non-resident persons with Permanent Establishment in Kenya be added to the provision.
9.	**Ernest & Martin Associates**	**Regulation 2: Interpretation**	"financial derivative" has the meaning assigned to it in Section 2 of the Act;	Amend the definition of financial derivatives as follows	To merge the definition of financial derivatives with the proposed paragraph 3	The financial derivative has been defined in the Income Tax Act. Expanding the definition in the Regulations will be *ultra vires*. The subsidiary legislation should not

S/No	Stakeholder	Regulation	Comments/issue	Proposed amendment	Justification	KRA remarks
				"Financial derivative" has the meaning assigned to it in Section 2 of the Act; and shall include a) Futures contracts b) Forward contracts c) Swap contracts d) options including put options, and call options.	delete subparagraph (ii) in the draft regulations.	introduce a different or expanded definition against what is already provided in the Act.
10.			Consider including carbon credits, emission allowances in the definition of a financial derivative.	In the definition of financial derivative include "carbon credits, emission allowances certificate"	To give impetus to carbon market exchange or emission trading system per the paragraph 2(n) of the Third Schedule.	The provided definition of "underlying asset" include bonds, commodities, currencies, interest rates, security, stock index, price indices, credit ratings or similar assets. Therefore, carbon credits are traded as commodities in carbon market exchange or emission trading system. The proposed amendment is already provided for in the regulations.
11.		**Regulation 3: Imposition of tax**	i) Gains, including option premium on a financial derivative transaction accruing to a non-resident person, other than a non-resident person having a permanent establishment in Kenya shall be chargeable to a final tax at the rate specified in the Act;	Amend paragraph 3 by deleting subparagraph i) and replace it as follows: *a) realized gains derived from or accrued in Kenya to a non-resident person without a permanent establish in Kenya from a financial derivative transaction shall be chargeable to a final tax*	None	As indicated in the Citibank N.A Kenya & Ernst & Young LLP submissions no. 4, the option premium is a cost to the resident person which is allowable for the business and therefore an income to the non-resident person. The recommendation by the stakeholder to exclude option premium will leave it untaxed which is unfair and against broadening the tax base. All forms of financial derivatives except those

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
				at the rate specified in the Act. *b) any losses realized, with effect from the date of commencement of these regulations, from a financial derivative transaction shall be an allowable deduction in ascertaining the gain of such person for that month and the succeeding month of income*		traded in the Nairobi Securities Exchange should be brought to charge.
12.			The main Act already exempts any derivatives traded in the NSE. Section 3(2) of the Act - Subject to this Act, income upon which tax is chargeable under this Act is income in respect of - *gains from financial derivatives, excluding financial derivatives traded at the Nairobi Securities Exchange*	In paragraph 3 delete subparagraph (ii) and the proviso	To merge the definition of financial derivatives with the proposed paragraph 3, delete subparagraph (ii) in the draft regulations. To remove the proviso since the main Act already exempts any derivatives traded in the NSE.	The comments on the proviso to the Regulation 3 has been considered and therefore the Regulation reviewed. The proviso under Regulation 3(ii) has been deleted. However, subparagraph (ii) has been retained as per the comments in number 11 above. This is to simplify the regulation.
13.		**Regulation 4: Realisation of gain or loss.**	Section 9 of the main Act deals with any gain accruing to the non-resident person and the	Replace paragraph 4(a) as follows: *A gain or loss is realized from a financial*	Delete 4(b) as the Regulations are made in accordance with section 9(4) of the main Act.	Regulations 4 has been reviewed to provide that a gain or loss is realized from financial derivative at the earlier of any of the listed events occurring.

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
			regulations are made only for that purpose. As such the proposed 4(b), which deals with **<u>"Realised losses by a resident person"</u>** has no foundation from the main Act. *<u>Realised losses by a resident person from financial derivatives shall be allowed as a deduction against gains accruing from similar activities</u>* Section 9(3) and (4) reads as follows: (3) Where a resident person enters into a financial derivatives contract with a non-resident person, ***<u>any gain accruing to the non-resident person</u>*** from that arrangement shall be subject to tax at the rate specified in the Third Schedule. (4) The provisions of subsection (3) shall be carried out in accordance	*derivative transaction when:* *a) the underlying asset changes hands, or* *b) on settlement of the contract, or* *c) on the payment of option premium, or* *d) on the expiry of the financial derivative contract.* *e) An option premium is paid or payable* Delete the proposed 4(b) and replace as follows: *A gain or loss from a financial derivative transaction shall include:* *a) the difference between the purchase or offer price, at the date the derivative is granted or purchased, and the amount realised from the transaction or the fair market value where the*		The proposed amendment to regulation 4(b) to provide for the determination of the gain would make the regulation complex. In addition, section 18(3) of the Act addresses any transactions between related parties which does not necessitate to be provided in the regulations.

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
			with Regulations made by the Cabinet Secretary	*transaction is not at arm's length.* b) *b) any option premium realized*		
14.		**Regulation 5: Tax avoidance**	Regulation currently reads: a) No deduction shall be allowed in respect of realized losses against the income of a resident person where no tax has been paid contrary to the provisions of these Regulations. b) A person shall not claim a deduction in respect of a loss arising from a financial derivative transaction if it enters into a substantially identical transaction within thirty days before or after the loss was realized.	Delete the proposed paragraph 5	Not provided.	Section 23 of the Income Tax Act provide for general provision on anti-avoidance. Regulation 4 restricts the allowability of the realized loss on resident person under certain circumstance to curb against aggressive tax planning and avoidance by taxpayers. The regulations adopt international best practice from countries such as South Africa, UK, India, among others.
15.		**Regulation 6: Records and Characterisation of income from financial derivatives**	As noted above, the regulations are made under section 9(4), as such applicable to non-residents only. As such 6(b) has no basis from the main Act.	Delete paragraph 6(b)	Regulation 6(b) has no basis from the main Act.	Regulations 6(b) is important to address the characterization of the gain from financial derivate as separate of income which requires to be accounted separately. Further, the characterization of the gain from financial derivative as separate source is aligned to the Kenya's Double Taxation Agreement policy which will provide Kenya the

S/No	Stakeholder	Regulation	~~Comments/Issue~~	Proposed amendment	Justification	KRA remarks
						taxing rights in line with Articles 7, 14, of the model DTA. Also, this will clearly provide Kenya with the right to tax when undertaking DTA negotiation.
16.		**New paragraph**	N/A	Add the following new paragraph Simplified tax registration. *A non-resident person without a permanent establishment in Kenya, to whom these regulations apply, may register under the simplified tax registration framework specified in THE INCOME TAX (DIGITAL SERVICE TAX) REGULATIONS, 2020*	Not provided	The tax is a withholding tax and does not require registration by a non-resident person without a permanent establishment in Kenya. The collection of the tax is undertaken by the resident person or non-resident with a permanent establishment in Kenya.
17.		**New paragraph**		Add the following new paragraph Appointment of a tax representative. No. 29 of 2015. *A non-resident person without a permanent establishment in Kenya who elects not to register*	Not provided	Since it is a withholding tax on gains from financial derivatives accrued by non-resident person without a permanent establishment in Kenya, the appointment of a tax representative is unnecessary. In addition, it is a final tax.

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
				in accordance with regulation x shall appoint a tax representative in accordance with section 15A of the Tax Procedures Act, 2015.		
18.		**Regulation 7: Payment of Taxes**	The tax under these regulations shall be due and payable by the 20th of the month, after which the loss from the transaction with the non-resident person is realised.	Delete paragraph 7 and replace as follows <u>Accounting and payment</u> *The tax due shall be paid by—.* *(a) the non-resident person; or* *(b) the tax representative appointed under regulation 8. (2)* *A person liable to pay digital service tax under paragraph (1) shall submit a return in the prescribed form and remit the tax due by the twentieth day of the month following the end of the month that the gain was realised.*	N/A	As noted in number 17 above, this is a withholding tax and the non-resident person without a permanent establishment does not account for the tax. The tax point is quite different from the approach undertaken in regards to the application of digital service tax.
19.	**EABX Public Limited**	**Regulation 3: Imposition of tax**	In its current form, the proposed regulation seeks to grant an exemption to	EABX proposes that Regulation 3 be amended to read:	The regulations incorrectly grant an exemption to the Nairobi Securities	The Income Tax Act exempts gains from financial derivatives traded in the Nairobi Securities Exchange. The

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
	Company (EABX)		the Nairobi Securities Exchange (NSE) alone. This is prejudicial to other players who also have a right to operate as securities exchanges. In order to provide a level playing field for market participants and stakeholders, the provisions of the law and relevant regulations must apply uniformly across a given category of license holders. This has been demonstrated consistently with other laws and regulations in the country: such Regulation by CBK, Capital Markets Authority, Insurance Regulatory Authority, Retirement Benefits Authority. It should also be noted that the financial derivatives in question, particularly forwards, swaps and options, are traded locally over the counter via commercial banks rather than through the NSE	i) *Gains, including option premium on a financial derivative transaction accruing to a non-resident person, other than* ***financial institutions registered under the Banking Act Cap 88 in Kenya, banks registered in other jurisdictions, financial derivatives traded on a Securities Exchange duly approved and licensed by the Capital Markets Authority and a*** *non-resident person having a permanent establishment in Kenya shall be chargeable to a final tax at the rate specified in the Act;* ii) *For purposes of Regulation 3(i), financial derivatives, contracts unless*	Exchange alone rather than to any duly approved and licensed Securities Exchange.	government policy intention is to provide for the growth of the nascent securities exchange market in Kenya. Exclusion of financial derivatives traded by Banks or licensed securities exchange entities as proposed by the stakeholder is *ultra vires* and will go against the policy intention of the withholding tax. Most of these products are traded by Banks and therefore their exclusion would erode the tax base. The idea of the tax was to expand the tax base and create fairness in taxation of income earned in or derived from Kenya by non-residents persons.

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
			which only offers futures contracts. Further, any proposals relating to marketable securities should apply across board to any financial market infrastructure that is licensed by the CMA.	*specifically exempt under the Act include;* *a) Futures contracts* *b) Forward contracts* *c) Swap contracts* *d) options including put options, and call options* *Provided that these Regulations shall not apply to gains accruing to a non-resident person from financial derivatives traded **on** a **Securities Exchange duly approved and licensed by the Capital Markets Authority.***		
20.	Deloitte & Touche LLP	**Regulation 2: Interpretation**	Regulation 2 defines various terms as are applicable in its interpretation. Regulation 2, however, does not define the term 'gain' as would be applicable in taxing gains accruing to non-resident	We recommend that Regulation 2 be amended to define the term 'gain'. The definition should provide for offset of realised losses to the non-resident person in respect to the given contract.	The inclusion of a definition for the term 'gain' as pertains to the draft Regulations will ensure certainty and clarity, key tenets of taxation, in the interpretation and application of the draft Regulations to financial	The definition of "gain" includes stake which may bring a challenge in its implementation. The proposal by the stakeholder on the computation of gain will make the administration of the provision complex. As outlined above in Citibank N.A Kenya & Ernst & Young LLP, no. 2 Regulations 3 has been reviewed to

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
			persons from financial derivative transactions.	We provide below a definition that you may consider: "'Gain" refers to the positive *difference between the staked amount and the value at realization provided that a taxable realised gain accruing to non-resident parties shall be the net of any realized losses arising with respect to that contract'*	derivative transactions. In addition, the elimination of ambiguity in the determination of what constitutes a gain for purposes of the draft Regulations will eliminate unnecessary tax controversies between the KRA and impacted taxpayers. Further, the express recognition that realised losses arising with respect to a financial derivative contract shall be considered in determining the realised taxable gains accruing resultant of that contract, irrespective of whether the gain accrues to the non-resident or resident party, will align the taxation of financial derivative transactions with established taxation principles as applied in the Income Tax Act ("ITA"). This will further ensure equity and fairness in the taxation of financial derivative transactions as	address the scope of the gain arising from financial derivatives.

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
					it will recognize business realities.'	
21.		**Regulation 3:** **Imposition of tax**	Regulation 3 (i) provides for the imposition of a final tax on gains accruing to non-resident persons from financial derivative transactions in accordance with the provisions of the ITA. Further, Regulation 3(ii) stipulates financial derivative contracts that are envisaged under the Act.	We recommend that Regulation 3 (i) be amended to read as below: *'Realised gains accruing to a non-resident person, other than a non-resident person having a permanent establishment in Kenya shall be chargeable to a final tax at the rate specified in the Act.'* We further recommend that Regulation 3 (ii) be amended to include the below additional type of contract: *'(e) Warrants.'*	The proposed amendment to Regulation 3(i) seeks to achieve two key objectives: (a) The inclusion of the term 'realised' serves to offer certainty and clarity that only realised gains are subject to tax in accordance with the provisions of the ITA. Where this ambiguity is not cured, there is a likelihood of double taxation where unrealised gains are taxed and further taxed at the point of realisation. (b) The deletion of the phrase *'including option premium on a financial derivative transaction'* recognizes practical considerations applicable to such transactions to the extent that an option	This has been comprehensively dealt with in no. 4 of Citibank N.A Kenya & Ernst & Young LLP comments. The deletion of option premium from imposition of the tax will erode the tax base since the payment on option premium is an income to the non-resident person without a PE in Kenya. Therefore, it must be within the scope of the tax in order to be brought to charge. It was noted that "warrants" are similar to options and the Regulations provides for any other financial derivative instruments which shall be able to cover any other instrument not provided for explicitly. Additionally, "warrants" are not common.

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
					premium, in practice, does not equate to a taxable gain. Rather an option premium is a fee/ commission paid to a hedging party to lock a future value of an underlying asset. The value of the option premium, however, is not linked to the value of the underlying asset/financial derivative contract. The recommendation to expand the financial derivative contracts recognised under the ITA as read together with the draft Regulations through the inclusion of warrants will broaden the tax base by ensuring that more financial derivative contracts are captured within the auspices of the ITA. This proposal will likely translate to increased tax revenue.	
22.		**Regulation 4:**	Regulation 4(a) speaks to the realisation of gains or losses arising from a	We recommend that Regulation 4(a) be	The proposed amendment to Regulation 4(a) seeks to align the criteria for	The proposed amendment will lead to limited scope for taxation. The deletion of option premium from

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
		Realisation of gain or loss	financial derivative transaction. Specifically, while the draft Regulations consider the 'payment of option premium' as a criterion for realisation of gains or losses, a practical analysis of financial derivative markets indicates that the payment of option premium does not equate to the realisation of a gain with respect to financial derivative contracts in the form of an option premium, but rather relates to a fee / commission to access or secure the option. Where this criterion is retained, the same stands to adversely impact investors to the extent that it may capture and subject to tax unrealised gains arising from financial derivative transactions.	amended to read as provided below: *'Subject to the provisions of these Regulations, a gain or a loss from a financial derivative shall be deemed realized when the underlying asset changes hands, or on settlement of the contract, or on expiry of the financial derivative contract.'*	realisation of a gain or loss arising with respect to financial derivative transactions to practicalities existing in financial derivative markets.	imposition of the tax will erode the tax base since the payment on option premium is an income to the non-resident person without a PE in Kenya. Therefore, it must be within the scope of the tax in order to be brought to charge. In addition, regulation 4 has been reviewed to provide that the gain is deemed realized at the earlier of the following events happening- e) the underlying asset changes hands; or f) on settlement of the contract; or g) an option premium is paid or payable; or h) on the expiry of the financial derivative contract This will also provide clarity on the timing for taxation of the gain.
23.		**Regulation 5:** **Tax avoidance**	Regulation 5, speaks to tax avoidance. With specific reference to Regulation 5(a), it is noted that the retention of this provision	We recommend that Regulation 5 be deleted in its entirety.	The recommendation to delete Regulation 5 in its entirety is informed by its redundancy to the extent that Section 23 of the ITA	As indicated above, section 23 of the Income Tax Act provide for general provision on anti-avoidance.

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
			would amount to double penalisation of resident taxpayers to the extent that Section 39A of the TPA similarly seeks to penalise taxpayers who fail to withhold tax where required under any applicable tax law. Conversely, with respect to Regulation 5 (b), we are of the view that the frequency of financial derivative transactions should not be viewed as a tax avoidance risk, but rather, as a commercial decision outside the control of the KRA, particularly in recognition of free-market principles. Additionally, the nature of the transactions and the market in which they are traded is extremely volatile and therefore unpredictable. The adoption of this Regulation serves to punish market participants for outcomes not within their control. The above notwithstanding,		as read together with Section 85 of the Tax Procedures Act, 2015 ("TPA") expressly address the issue of tax avoidance.	Regulation 4 restricts the allowability of the realized loss on resident person under certain circumstance to curb against aggressive tax planning and avoidance by taxpayers. The regulations adopt international best practice from countries such as South Africa, UK, India, among others.

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
			Regulation 5(b) may be retained where the same is amended to specifically target financial derivative transactions concluded between related parties. This is on the understanding that there can be deliberate attempts by related parties to incur losses to avoid the tax when the transacting parties have some form of control over the transaction.			
24.		**Regulation 6:** **Records and characterisation of income from financial derivatives**	Section 23 of the TPA as read together with Section 82 of the TPA achieves the same objective to the extent that they legislate on record keeping. The attribution of the same in the guidelines duplicates a provision already covered in a substantive legislation unless there is a specific need to have this provision. Regulation 6(b) seeks to amend a substantive piece of legislation vide subsidiary legislation. It is trite law that substantive legislation cannot be	We recommend the deletion of • Regulation 6 (a). • Regulation 6 (b).	Regulation 6(a) duplicates a provision already covered in a substantive legislation. We recommend the deletion of Regulation 6(b) on the basis that the provision seeks to amend a substantive piece of legislation vide subsidiary legislation.	Regulation 6(a) is aligned with section 23 of the Tax Procedures Act, 2015. The Regulation will enhance the records required for the assessment of the tax. The Authority will be able to verify the gains. Regulations 6(b) is important to address the characterization of the gain from financial derivate as separate of income which requires to be accounted separately. Further, the characterization of the gain from financial derivative as separate source is aligned to the Kenya's Double Taxation Agreement policy which will provide Kenya the taxing rights in line with Articles 7, 14,

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
			amended by subsidiary legislation.			of the model DTA. Also, this will clearly provide Kenya with the right to tax when undertaking DTA negotiation.
25.		**New proposal: Specific exemptions**	Introduction of the tax is a good way to widen the tax base. However, we must be keen to ensure that it does not serve to scare away investors in retrospect and kill a nascent industry that has a very positive outlook with the requisite support.	We propose that resident banks are exempted from the requirement to withhold tax. Resident banks are key players in the derivative market but lack the capacity to hold the risks in their balance sheets. Introducing the withholding tax will further dampen their efforts to enter such contracts. To this end, we propose gains on transactions that are below KES 5,000,000 (annually) to be exempt.	Tax laws should serve to incentivise taxpayers as well. We believe this move will motivate low scale investors to invest in our derivatives market.	Exemption of resident banks from the requirement to withhold the tax through the Regulations will be *ultra vires*. Banks are major traders of the derivatives. In addition, any resident person accounting for loss from financial derivative must account for the tax. The proposal to introduce a threshold to exempt such transactions from tax will result and aid tax planning and tax evasion. This may also lead to split financial derivative transactions. Therefore, this should be discouraged.
26.	**Kenya Bankers Association**	**Regulation 2- Interpretations**	The Draft Regulations does not define a gain for purposes of the taxation of financial derivatives. This makes it difficult for stakeholders to determine how tax will be determined on derivative contracts. In addition, in some cases, banks act as intermediaries	We propose that the Draft Regulations provide a means of determining the gain accruing to residents and non-resident persons from financial derivatives.	This would provide the much-needed clarity on how to determine the tax base.	This has already been addressed under the Citibank N.A Kenya & Ernst & Young LLP comments number 3.

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
			and transfer the risks associated with the financial derivatives to other non-resident parties. It therefore becomes impossible to determine the gains made by the non-residents which would be subject to withholding tax in Kenya.			
27.		**Regulation 3- Imposition of tax**	It is noteworthy that taxable gains accruing to non-resident banks from derivative contracts with resident banks may be difficult to determine especially if the non-resident counterpart in turn hedges this contract with another entity and this occurs over a continuous series of hedging transactions.	We propose that resident financial institutions registered as such under the Banking Act Cap 488 be exempted from the requirement to withhold tax on gains, if any, accruing to non-resident related entities. In addition, we propose the following wording to Regulation 3 (i): *(i) Gains, including option premium on a financial derivative transaction accruing to a non-resident person, other than financial institutions registered under the Banking Act Cap 488 in Kenya, banks*	This will help the budding Kenyan derivative market to flourish as it will not be unnecessarily expensive for customers to trade in the derivatives market.	This is comprehensively addressed under EABX Public Limited Company (EABX) number 19.

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
				registered in other jurisdictions, financial derivatives traded on a Securities Exchange duly approved and licensed by the Capital Markets Authority and a non-resident person having a permanent establishment in Kenya shall be chargeable to a final tax at the rate specified in the Act;		
28.		**Regulation 4- Realization of gain or loss**	The Draft Regulations provide for the point at which a gain is realized and not how the gain is realized. This omission means banks will not be able to determine the amount chargeable to tax on their derivative contracts as per the Draft Regulations.	As per our comments under regulation 2, we propose that the Draft Regulations provide a means of determining the gains and losses accruing to a residents and non-resident persons from financial derivatives	This would provide the much-needed clarity on how to determine the tax base.	Regulation 3 and 4 has been reviewed to address these concerns. However, the method for determination of a gain or loss in respect to financial derivatives was not provided due to its complexity. Regulation 3 and 4 have simplified the provision.
29.		Regulation 5 (b)- Tax avoidance	This provision has the apparent policy intention of preventing banks from intentionally getting into a loss position in order to offset previously accrued gains.	We propose that this provision be deleted from the Draft Regulations.	The Draft Regulations will prevent banks from entering a wide pool of derivative transactions considering the limitation placed under Regulation 5(b). This will significantly lower activity within the	Section 23 of the Income Tax Act provide for general provision on anti-avoidance. Regulation 4 restricts the allowability of the realized loss on resident person under certain circumstance to curb against aggressive tax planning and avoidance by taxpayers. Regulation 5

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
			This is not a realistic presupposition because banks would be placed at a net zero position from a revenue perspective should they adopt the avoidance scheme envisaged in this provision. Moreover, banks generally enter into a wide pool of transactions both simultaneously and on a consecutive series. This provision imposes an unnecessary limitation on banks entering into such contracts and will restrict the trading activity of financial derivatives in Kenya.		derivatives market in Kenya and will make Nairobi unattractive as a financial center.	is not expected to curtail activity within the derivatives market but to safe guard tax revenue. The regulations adopt international best practice from countries such as South Africa, UK, India, among others.
30.		Regulation 6(b) - Records and characterization of income from financial derivatives	Taxation of financial derivatives was introduced under Section 3(2)(i) of the Income Tax Act. However, it has not been explicitly provided for as a separate source of income under Section 15 (7) of the Income Tax Act. Moreover, Section 15(7)(v) defines other income to	For financial institutions, including banks, trading in financial derivatives is part of the main business activities. We propose the introduction of the proviso below: *Provided that this will not apply to financial institutions registered under the Banking Act*	The proposed amendment will ensure consistency and clarity in the drafting of tax provisions in the Income Tax Act and the regulations thereto.	Section 15(7) of the Income Tax Act provides for separate source of income. Gains from financial derivatives should be accounted as separate source of income in line with the provision of section 15(7) of the Act. The proposal by the stakeholder to exclude to financial institutions registered under the Banking Act Cap 488 and financial derivatives traded

S/No	Stakeholder	Regulation	Comments/Issue	Proposed amendment	Justification	KRA remarks
			include income chargeable under Section 3(2) (a) and not listed in any of the preceding sources under the same section. This would not encompass gains from financial derivatives which are provided for in Section 3(2) (i).	*Cap 488 and financial derivatives traded on a Securities Exchange duly approved and licensed by the Capital Markets Authority*		on a Securities Exchange duly approved and licensed by the Capital Markets Authority from accounting the gains from financial derivatives will be against the provisions of the law. Regulation 6(b) clarifies that gains from financial derivatives should be accounted as separate source of income.
31.		Regulation 7 – Payment of Taxes	The Regulations do not define what a loss is and whether the loss referred to is the loss on the local bank or the non-resident counterparty. In addition, as indicated above, it is not possible to determine the loss that the non-resident party is making.	We propose that the Draft Regulations provide a different tax point.	This would provide the much-needed clarity on the tax point.	Regulation 4 stipulates when the gain from financial derivatives becomes taxable. Regulation 7 speaks to the payment of taxes. Therefore, there is no need to duplicate the regulation 4 which is very clear.

Prepared by:	Leonard Cheserem		**09.12.2022**
Reviewed & approved by:	Josephine Mugure		**09.12.2022**

engagement after publication of the final regulations. Nevertheless, Parliament would undertake another public participation. He mentioned that the Authority has had a better understanding of the financial industry from the stakeholders' comments.

Sign off:

Prepared by:

Miriam Onyango

Sign...Date......13/12/2022..................

Elizabeth Roimen

Sign...Date......13/12/2022..................

Reviewed by:

Sharon Kirai

Sign...Date......13/12/2022..................

Approved by:

Josephine Mugure

Sign: Jo

Date 13th December 2022

person is not in full perview of the costs of the non-resident hence a lower rate as compared to corporate tax of 37.5%.

- KRA stated that just because financial derivatives are main activities of banks they cannot be exempted from paying tax since taxes are levied on a taxpayer's main activities anyway.
- On determining of losses, financial derivatives are based on an underlying asset for which prices are determined before transactions take place and on balancing the books at the end of the period, the business can determine the gain or loss incurred. A loss to the resident bank is a gain to the non-resident counterparty.
- KRA would review the ISDA agreement to identify how it can be considered in the regulations, but only to the extent that the Kenyan government is a signatory to it and if it specifically provides for tax exemptions.
- KRA agreed with one the stakeholder's comments that no one gets into a financial derivative contract expecting a loss. However, if a gain is made by a resident person, taxation would apply thus the same should apply to non-residents when the resident person makes a loss.
- On the issue of taxation hindering competitiveness, KRA stated that taxes are a cost to business but it is not fair when some individuals are exempted even though gains are incurred.
- KRA has trained officers to deal with tax avoidance thus; stakeholders should not worry about it.
- KRA asserted that they would review how to handle current swaps in the regulations.
- The Chair requested stakeholders to send their views on how gain or loss should be defined by Thursday 8th December 2022. He suggested that the scope of the definition should not be limited to non-deliverable contracts.

5.0 Conclusion

The stakeholders appreciated KRA team for the opportunity to give their views on the draft regulations and discuss the challenges. They hoped that their submissions would be taken into consideration in the final regulations. They looked forward to further engagements.

The Chair thanked stakeholders for their participation. He assured stakeholders that their challenges would be addressed. However, KRA may not call for another

S/No.	Stakeholder	Submission
		on the local bank or the non-resident counterparty. In addition, it is not possible to determine the loss that the non-resident party is making. • International Swaps & Derivatives Association (ISDA) governs any over-the-counter (OTC) derivatives entered into a bilateral arrangement. Members were concerned on how the financial derivatives regulations would affect ISDA agreements and an overlay of OTC derivatives where netting off is required.
2.	Citibank, EY	• Central Bank of Kenya (CBK) restricts offshore banks from borrowing Kenya shillings in any form for a tenor less than one year. That means that whenever they come into the market to buy the Infrastructure Bonds (IFBs) issued by the Treasury, they enter into swaps longer than a year. Imposing a tax on this funding would thus negate the reason behind the IFBs and would see reduced participation in these auctions. • Taxation of financial derivatives in Kenya will lead to non-competitiveness of the sector. Unlike other jurisdictions where their derivatives markets are developed and traded in the stock markets, this is not the case in Kenya. Financial derivatives in Kenya are mainly used for hedging purposes and not for investment.

4.0 KRA Response

- The provisions of this tax are under Section 9 and not Section 35 of the Income Tax Act.
- Taxes are not meant to stifle or hold back investments, but are just portions of profits made. Countries have developed unilateral measures in taxing financial derivatives, which may not be uniform. For instance, India charges financial derivatives gains as interest while other countries charge it as capital gains. If Kenya were to tax it as capital gains, it would not make any difference considering the CGT rate is 15% effective from January 2023.
- KRA would consider defining the term "gain" in the regulations. However, hedging activities undertaken by businesses result in a gain or a loss hence why they cannot be excluded from the tax.
- Option premiums are claimed as a cost for the person undertaking the financial derivative. Therefore, the counterparty to that transaction recognizes the income thus should be taxed. The tax rate of 15% was decided on the basis that the resident

3.0 Summary of Presentation by Stakeholders

S/No.	Stakeholder	Submission
1.	KBA, PWC, EABX	• Withholding tax is applicable on payments, not gains. The provisions of Sections 35 of the Income Tax Act envisage that withholding tax should be deducted upon payment. Draft regulations impost WHT tax on gains, which is taxable under corporate income tax. • Draft regulations do not provide a definition for the term "gains". The regulations bring out an erroneous assumption that the expense by a Kenyan resident bank is a gain to the non-resident counterparty. On the contrary, the gain to the counterparty is the difference between the price they get from a Kenyan bank and the price they have agreed with their customer in the back end. • Proposed WHT will stifle the budding derivatives market. Imposition of tax on derivatives will drive non-residents from Kenyan derivatives market, which works against the agenda of making Kenya a financial hub. • Proposed WHT would be a consumption tax, as it would be passed on to the customers or possibility of grossing up the resident bank ends up being a local resident bank cost. • The Draft regulations assume that the expense paid by the local bank including option premium is equal to the gain by the non-resident counterparty. The local bank expense is the difference between pricing to foreign banks and market pricing in Kenya, which is not a gain on the non-resident counterparty. • Stakeholders proposed that resident financial institutions registered as such under the Banking Act be exempted from the requirement to withhold tax on gains, if any, accruing to non-resident related entities. • Tax avoidance due to successive loss making contract that offsets a preceding profit making contract is not practical considering banks enter into a wide pool of transactions both simultaneously and on a consecutive series. • Regulation 7 requires that WHT would be due on the 20th day of the month after which the non-resident realizes the loss. The Regulations does not define what a loss is and whether the loss referred to is the loss

KENYA REVENUE AUTHORITY

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REPORT ON PUBLIC PARTICIPATION ON INCOME TAX (FINANCIAL DERIVATIVES) REGULATIONS, 2022

1.0 Preamble

The Finance Act 2022 introduced taxation of gains from financial derivatives transactions accruing to a non-resident person. The amendment took into account that gains accruing to non-residents from derivatives transactions were not subject to tax. Following this, a public notice was issued requesting stakeholders to present their submissions as the team was drafting the regulations. Thereafter, the draft regulations on financial derivatives were put out for public participation. The stakeholders had a window to give feedback till 30th November 2022.In this regard, Kenya Revenue Authority (KRA) held a webinar on **Monday, 5th December 2022** from **10:00am** to **01:00pm** to discuss the submissions presented.

The webinar hosted about 55 participants drawn from Kenya Bankers Association (KBA), EABX Public Limited Company (EABX), Pricewaterhouse Coopers (PWC Kenya), Citibank and Ernst & Young LLP (EY).

Deputy Commissioner - Corporate Policy, Mr. Maurice Oray chaired the webinar in conjunction, with Assistant Manager Stakeholder Engagement and Events Management, Ms. Sharon Kirai as the moderator.

2.0 Opening remarks

In his opening remarks, the Chair welcomed members to the engagement and stated the necessity to align the laws to ensure that the tax system was fair irrespective of the residency such that gains due to non-residents were subject to tax. Furthermore, there was need to encourage growth and development in the financial sector thus transactions carried out in Nairobi Securities Exchange (NSE) were exempted. The Chair noted that regulations would be effective 1st January 2023. The purpose of the engagement was therefore to get views of stakeholders on the draft regulations before final regulations were published.

Kindly acknowledge receipt.

Regards,

Arnold Wangila

Senior Accountant

Kenya Bankers Association

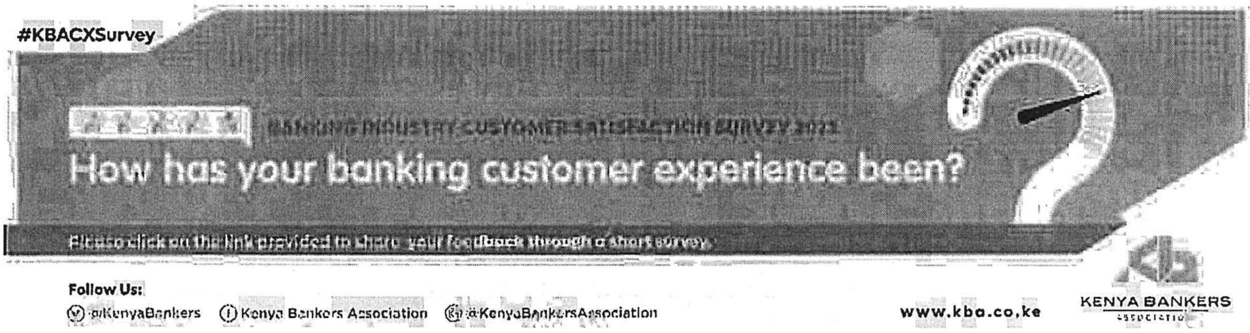
13th Floor, International House, Mama Ngina Street

Nairobi, Kenya

Mobile: +254714207875

www.kba.co.ke Kenya Bankers Association @KenyaBankers

"Tell me and i forget.Teach me and i remember.Involve me and i learn."



Click Here To Share Feedback

[attachment "Submissions on the Draft Income Tax (Financial Derivatives) Regulations 2022.pdf" removed by KRAStakeholder Engagement/KRA]

https://www.kra.go.ke/images/KRA-Mail-Disclaimer.pdf

Re: Submissions on the draft Income Tax (Financial Derivatives) Regulations 2022KRAStakeholder Engagement to: Josephine Mugure 09/12/2022 17:17
Cc: Silas Okeyo Oure, Leonard Kipkorir Cheserem

Please see below invite mail

Regards,

Stakeholder Engagement Unit | Marketing & Communication| Kenya Revenue Authority
P. O. Box 48240 - GPO 00100 Nairobi | +254 (020) 499 2045 or Ext. 2045 | 254 (0711) 099 999|
Email: stakeholder.engagement@kra.go.ke

-----Forwarded by KRAStakeholder Engagement/KRA on 12/09/2022 05:17PM -----
To: "Arnold Wangila" <awangila@kba.co.ke>
From: KRAStakeholder Engagement/KRA
Date: 12/01/2022 04:17PM
Cc: "Kennedy Mutisya" <kmutisya@kba.co.ke>, Tobias Maurice/DTD/KRA@KRA, Sharon Kirai/MKT/KRA@KRA, Calinael Kianga/MKT/KRA@KRA, Elizabeth Keranta Roimen/MKT/KRA@KRA
Subject: Re: Submissions on the draft Income Tax (Financial Derivatives) Regulations 2022

Good afternoon Sir,

This is well received, with thanks.

KRA invites you to a public participation on Income Tax (Financial Derivatives) Regulations, 2022 on ***Monday, 5th December, 2022*** between **10:00am - 12noon,** with the meeting link below:

https://kra.webex.com/kra/j.php?MTID=m21b44db1298f24e77a1bcafe7f77bf35

Meeting number:
2373 583 2332

Password:
XKtYZUwF735

Please share the invite with your membership.

Regards,
Tobias Maurice
Regards,

Stakeholder Engagement Unit | Marketing & Communication| Kenya Revenue Authority
P. O. Box 48240 - GPO 00100 Nairobi | +254 (020) 499 2045 or Ext. 2045 | 254 (0711) 099 999|
Email: stakeholder.engagement@kra.go.ke

-----"Arnold Wangila" <awangila@kba.co.ke> wrote: -----
To: "Stakeholder.Engagement@kra.go.ke" <stakeholder.engagement@kra.go.ke>, "Kennedy Mutisya" <kmutisya@kba.co.ke>
From: "Arnold Wangila" <awangila@kba.co.ke>
Date: 12/01/2022 02:57PM
Subject: Submissions on the draft Income Tax (Financial Derivatives) Regulations 2022

Good afternoon,

Find attached banking industry submission.

Public Participation on Income Tax (Financial Derivatives) Regulations, 2022Tobias Maurice to: Josephine Mugure 09/12/2022 17:13
Cc: Silas Okeyo Oure, Leonard Kipkorir Cheserem

Please see below invite mail

-----Forwarded by Tobias Maurice/DTD/KRA on 12/09/2022 05:19PM -----
To: kelvinmbithi52@gmail.com
From: Tobias Maurice/DTD/KRA
Date: 11/28/2022 01:30PM
Cc: Sharon Kirai/MKT/KRA@KRA, Calinael Kianga/MKT/KRA@KRA, Elizabeth Keranta Roimen/MKT/KRA@KRA
Subject: Public Participation on Income Tax (Financial Derivatives) Regulations, 2022

Dear Kelvin,

KRA invites you to a public participation on Income Tax (Financial Derivatives) Regulations, 2022 on ***Monday, 5th December, 2022*** between **10:00am - 12noon,** with the meeting link below:

https://kra.webex.com/kra/j.php?MTID=m21b44db1298f24e77a1bcafe7f77bf35

Meeting number:
2373 583 2332

Password:
XKtYZUwF735

Regards,
Tobias Maurice

https://www.kra.go.ke/images/KRA-Mail-Disclaimer.pdf

https://www.kra.go.ke/images/KRA-Mail-Disclaimer.pdf

Hope this finds you well.

Following the notice requesting for comments from the public on the Draft Income Tax (Financial Derivatives) Regulations 2022, please find attached proposed amendments by EY.

Kind regards

David King'ori

Ernst & Young LLP
Kenya-Re Towers, Upperhill, Kenya
Office: +254-20-2886000 | Mobile: +254 722 646450 | david.kingori@ke.ey.com
Website: http://www.ey.com

[attachment "Legislative Memorandum Income Tax (Financial Derivatives) Regulations 2022 EY.pdf" removed by KRAStakeholder Engagement/KRA]

Re: Draft Income Tax (Financial Derivatives) Regulations 2022KRAStakeholder Engagement to: Josephine Mugure 09/12/2022 17:15
Cc: Silas Okeyo Oure, Leonard Kipkorir Cheserem

Please see below invite mail

Regards,

Stakeholder Engagement Unit | Marketing & Communication| Kenya Revenue Authority
P. O. Box 48240 - GPO 00100 Nairobi | +254 (020) 499 2045 or Ext. 2045 | 254 (0711) 099 999|
Email: stakeholder.engagement@kra.go.ke

-----Forwarded by KRAStakeholder Engagement/KRA on 12/09/2022 05:14PM -----

> To: "David King'ori" <David.Kingori@ke.ey.com>
> From: KRAStakeholder Engagement/KRA
> Date: 12/01/2022 04:21PM
> Cc: "Francis N Kamau" <francis.kamau@ke.ey.com>, "Rachel W Njuguna" <Rachel.W.Njuguna@ke.ey.com>, "Ann Magondu" <ann.magondu@ke.ey.com>, "Robert W Maina" <robert.maina@ke.ey.com>, Sharon Kirai/MKT/KRA@KRA, Calinael Kianga/MKT/KRA@KRA, Elizabeth Keranta Roimen/MKT/KRA@KRA
> Subject: Re: Draft Income Tax (Financial Derivatives) Regulations 2022
>
> Dear David,
>
> KRA invites you to a public participation on Income Tax (Financial Derivatives) Regulations, 2022 on ***Monday, 5th December, 2022*** between **10:00am - 12noon,** with the meeting link below:
>
> https://kra.webex.com/kra/j.php?MTID=m21b44db1298f24e77a1bcafe7f77bf35
>
> Meeting number:
> 2373 583 2332
>
> Password:
> XKtYZUwF735
>
> Regards,
>
> Stakeholder Engagement Unit | Marketing & Communication| Kenya Revenue Authority
> P. O. Box 48240 - GPO 00100 Nairobi | +254 (020) 499 2045 or Ext. 2045 | 254 (0711) 099 999|
> Email: stakeholder.engagement@kra.go.ke
>
> -----"David King'ori" <David.Kingori@ke.ey.com> wrote: -----
>
>> To: "stakeholder.engagement@kra.go.ke" <stakeholder.engagement@kra.go.ke>
>> From: "David King'ori" <David.Kingori@ke.ey.com>
>> Date: 12/01/2022 07:39AM
>> Cc: "Francis N Kamau" <francis.kamau@ke.ey.com>, "Rachel W Njuguna" <Rachel.W.Njuguna@ke.ey.com>, "Ann Magondu" <ann.magondu@ke.ey.com>, "Robert W Maina" <robert.maina@ke.ey.com>
>> Subject: Draft Income Tax (Financial Derivatives) Regulations 2022
>>
>> Dear KRA team,

Derivatives) Regulations, 2022 by the Kenya Revenue Authority.

As a stakeholder, we are pleased to submit to you our comments and proposals relating to the regulations for consideration. We are happy to provide additional

information or clarifications as appropriate. We would also appreciate an opportunity to discuss our submissions with you.

Please find attached our submission.

Regards,

Geoffrey Radier

Chief of Staff

EABX

[attachment "EABX Submission to KRA - Derivatives Taxation - 30 Nov 22.pdf" removed by KRAStakeholder Engagement/KRA]

https://www.kra.go.ke/images/KRA-Mail-Disclaimer.pdf

EABX Submission on the Income Tax (Financial Derivatives) Regulations, 2022KRAStakeholder Engagement to: Josephine Mugure 09/12/2022 17:16
Cc: Silas Okeyo Oure, Leonard Kipkorir Cheserem

Please see below invite mail

Regards,

Stakeholder Engagement Unit | Marketing & Communication| Kenya Revenue Authority
P. O. Box 48240 - GPO 00100 Nairobi | +254 (020) 499 2045 or Ext. 2045 | 254 (0711) 099 999|
Email: stakeholder.engagement@kra.go.ke

-----Forwarded by KRAStakeholder Engagement/KRA on 12/09/2022 05:16PM -----

> To: "Geoffrey Radier" <gradier@eabxgroup.com>
> From: KRAStakeholder Engagement/KRA
> Date: 12/01/2022 04:24PM
> Cc: Sharon Kirai/MKT/KRA@KRA, Calinael Kianga/MKT/KRA@KRA, Elizabeth Keranta Roimen/MKT/KRA@KRA
> Subject: Re: EABX Submission on the Income Tax (Financial Derivatives) Regulations, 2022
>
> Dear Geoffrey,
>
> KRA invites you to a public participation on Income Tax (Financial Derivatives) Regulations, 2022 on ***Monday, 5th December, 2022*** between **10:00am - 12noon,** with the meeting link below:
>
> https://kra.webex.com/kra/j.php?MTID=m21b44db1298f24e77a1bcafe7f77bf35
>
> Meeting number:
> 2373 583 2332
>
> Password:
> XKtYZUwF735
>
> Regards,
>
> Stakeholder Engagement Unit | Marketing & Communication| Kenya Revenue Authority
> P. O. Box 48240 - GPO 00100 Nairobi | +254 (020) 499 2045 or Ext. 2045 | 254 (0711) 099 999|
> Email: stakeholder.engagement@kra.go.ke
>
> -----"Geoffrey Radier" <gradier@eabxgroup.com> wrote: -----
>
>> To: "stakeholder.engagement@kra.go.ke" <stakeholder.engagement@kra.go.ke>
>> From: "Geoffrey Radier" <gradier@eabxgroup.com>
>> Date: 11/30/2022 05:36PM
>> Subject: EABX Submission on the Income Tax (Financial Derivatives) Regulations, 2022
>>
>> Dear Sir/Madam,
>>
>> We write in response to the call for proposals and comments on the Income Tax (Financial

Calinael Kianga	calinael.kianga@kra.go.ke	Yes	N/A	VoIP
Diana M	Diana.Mukosi@outlook.com	No	N/A	VoIP
Tanveer	tanveer.nandhra@sc.com	No	N/A	VoIP
Tanveer	tanveer.nandhra@sc.com	No	N/A	VoIP
Leonard Cheserem	leonard.cheserem@kra.go.ke	No	N/A	VoIP
Andrew Ragui	andrew.r.ragui@pwc.com	No	N/A	VoIP
Kingsley Onyia	konyia@ecobank.com	No	N/A	VoIP
Dolton Nzano	dolton.nzano@kra.go.ke	Yes	N/A	VoIP
Betty Chuma	chumab@stanbic.com	No	N/A	VoIP
kmutisya	kmutisya@kba.co.ke	No	N/A	VoIP
Tabitha	tabitha.ruitururi@ke.ey.com	No	N/A	VoIP
Maurice oray	oray346@gmail.com	No	N/A	VoIP
Arnold	awangila@kba.co.ke	No	N/A	VoIP
Ndegwa Mucheru SCB	Ndegwa.Mucheru@sc.com	No	N/A	VoIP
Maurice oray	oray346@gmail.com	No	N/A	VoIP
KRA Stakeholder Engagement	Stakeholder.engagement@kra.go.ke	No	N/A	VoIP
Tonny	Tonny.langat@absa.africa	No	N/A	VoIP
Simeon	Simeon.cheruiyot@pwc.com	No	N/A	VoIP
Gabriel Kimatu	Gabriel.Kimatu@kra.go.ke	No	N/A	VoIP
Gabriel Kimatu	Gabriel.Kimatu@kra.go.ke	No	N/A	VoIP
Gachara Ng'ang'a	gachara.nganga@citi.com	No	N/A	VoIP
Silas Oure	Silas.Oure@kra.go.ke	No	N/A	VoIP
Silas Oure	Silas.Oure@kra.go.ke	No	N/A	VoIP
John Keru	john.keru@gmail.com	No	N/A	VoIP
Nathan Njoroge Kihungi	nathan.njoroge@citi.com	No	N/A	VoIP
PwC - Andrew Wanjiru	andrew.w.wanjiru@pwc.com	No	N/A	VoIP

KENYA REVENUE AUTHORITY

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Session Detail Report

Session detail for **'Public Participation on Income Tax (Financial Derivatives) Regulations, 2022'**:
All sessions in Nairobi Time (Nairobi, GMT+03:00)

Meeting information

Topic:	Public Participation on Income Tax (Financial Derivatives) Regulations, 2022	Meeting type:	Meetings
Start date:	12/5/22	Start time:	9:50 am
Duration:	168 mins	Invited:	8
Registered:N/A		Client attended:	55

Client participant list55

Name	Email	Invited	Registered	Audio types used
Nickson Omondi	noodondi@yahoo.com	No	N/A	VoIP
Haron	haron.wangeci@absa.africa	No	N/A	VoIP
Josephinr	Josephine.Mugure@kra.go.ke	No	N/A	VoIP
Moses Kiboi	Moses.Kiboi@sc.com	No	N/A	VoIP
Geoffrey Radier	gradier@eabxgroup.com	No	N/A	VoIP
Eric	eotonglo@eabxgroup.com	No	N/A	VoIP
ernest muriu	ernest@ernestandmartin.com	No	N/A	VoIP
Andrew	andrew.warambo@dentons.com	No	N/A	VoIP
Haron	haron.wangeci@absa.africa	No	N/A	VoIP
Miriam Onyango	miriam.onyango@kra.go.ke	Yes	N/A	VoIP
Calinael Kianga	calinael.kianga@kra.go.ke	Yes	N/A	VoIP
Silas Oure	silas.oure@kra.go.ke	No	N/A	VoIP
Josephine	Josephine.Mugure@kra.go.ke	No	N/A	VoIP
Oscar Chesire	oscarchesire@gmail.com	No	N/A	VoIP
Victor Waruingi	victor.waruingi@absa.africa	No	N/A	VoIP
Arnold Ombasa	arnold.ombasa@gmail.com	No	N/A	VoIP
lydia	lydia.ndirangu@equitybank.co.ke	No	N/A	VoIP
James Kimani	jameskimani003@gmail.com	No	N/A	VoIP
Nicholas Lisero	Nicholas.Lisero@Absa.Africa	No	N/A	VoIP
rachel	rachel.w.njuguna@ke.ey.com	No	N/A	VoIP
John Joshua Karanja	John.Karanja@kra.go.ke	No	N/A	VoIP
Simon Ngure	Simon.Ngure@sc.com	No	N/A	VoIP
Edna	Edna.Gitachu@pwc.com	No	N/A	VoIP
patrick mwangi	patrick.mwangi@ke.ey.com	No	N/A	VoIP
patrick mwangi	patrick.mwangi@ke.ey.com	No	N/A	VoIP
David King'ori	david.kingori@ke.ey.com	No	N/A	VoIP
Sharon Kirai	sharon.kirai@kra.go.ke	Yes	N/A	VoIP
Martin Runo	martin.runo@sbmbank.co.ke	No	N/A	VoIP
Joe gichuru	jgichuru@eabxgroup.com	No	N/A	VoIP

provisions of the Income Tax Act, Cap 470 a regulatory impact statement is unnecessary.

6.3 It is expected that the additional revenue will positively impact government activities by enhancing financial capacity to provide public services, and reduce reliance on loans, which are more expensive on the tax-paying public. It will also result in tax base expansion and bring equity in taxation of gains arising from financial derivatives which are earned by non-residents.

7.0 Monitoring and review

The Legal Notice will be implemented by the Kenya Revenue Authority, will be operational from 1st January 2023 and will be reviewed from time to time to address any challenges for better implementation of the provisions.

8.0 Request to the National Assembly

The National Assembly is invited to:

a) Note the contents of this memorandum.

b) Adopt Legal Notice No. xx of 2022.

9.0 Contact

Cabinet Secretary
The National Treasury and Economic Planning
P. O. Box 30007-00100
NAIROBI

various stakeholders including Citibank N.A Kenya, Ernst & Young LLP , Ernest & Martin Associates, EABX Public Limited Company, Deloitte & Touche LLP and Kenya Bankers Association.

5.4 The Authority invited and held an online meeting with the stakeholders among them Kenya Bankers Association, EABX Public Limited Company, Stanchart Bank, Eco Bank, Stanbic Bank, PwC, Absa Africa, Equity Bank among other members of the business community and the general public on ***5th December, 2022*** to review their comments and submissions.

5.5 All stakeholders' comments were reviewed and their feedback incorporated, where appropriate, to improve the regulations as explained below.

5.6 In particular, a definition of "gains" was provided in the regulations. This was borrowed from the suggestions given by the stakeholders and fortified by KRA to ensure it includes all anticipated gains. It was also clarified when a gain or loss shall be deemed to have been realize.

6.0 Impact

6.1 The Legal Notice provides a mechanism for the implementation of the withholding tax on gains arising from financial derivatives contract. It is expected that implementation of the tax will have positive impact as it will increase revenues collected as it is bringing into the ambit of taxation persons who were previously not taxable with regard to the gains from financial derivative transactions.

6.2 Section 9 of the Statutory Instrument Act, 2013 provides that a regulatory impact statement need not be prepared for a proposed statutory instrument if the proposed legistaltion only provides for an amendment of a fee, charge, or tax consistent with announced government policy. Since the Regulations are done in line with the

4.1 Further, to allow for growth in the emerging financial derivatives market, the Finance Act, 2022 exempted taxation of gains arising from transactions in the Nairobi Securities Exchange Derivatives Market.

4.2 The provision is expected therefore to widen the tax base by taxing gains accrued by non-resident persons while still maintaining the competitiveness of financial derivatives traded at the Nairobi Securities Exchange (NSE).

4.3 Kenya joins a host of other jurisdictions that have introduced provisions to bring to tax gains from derivative transactions. These include; United Kingdom, Brazil, US, India and Belgium among others. This will help her to keep abreast with best practise.

5.0 Public Consultation Outcome

5.1 In developing this Legal Notice, public participation was undertaken in compliance with the provisions of Section 5 of the Statutory Instruments Act, 2013 and Article 201 (a) of the Constitution.

5.2 The National Treasury and Economic Planning through the Kenya Revenue Authority invited business organizations and members of the public to submit their views for consideration in the development of the Income Tax (Financial Derivatives) Regulations, 2022 on ***2nd September, 2022*** through a public notice on the KRA website and **6th September 2022** in the newspapers.

5.3 Further, the Kenya Revenue Authority upon considering comments from Citi Corporate and Investment Banking, Kenya Bankers Association, Kelvin Mbithi, Ernest Muriu among others, developed the draft Income Tax (Financial Derivatives) Regulations, 2022. These were then subjected to a second round of public participation from ***Thursday, 17th November, 2022*** in compliance with the law. A copy of the public notice is attached. Feedback was received from

2.2 The Finance Act, 2022 introduced a 15% withholding tax on income from financial derivatives contracts earned by a non-resident person through an amendment to Section 3(2), 9(3) and the Third Schedule to the Income Tax Act, Cap 470. This amendment takes effect from 1st January 2023.

3.0 Policy Background

3.1 The primary objective of the Legal Notice is to provide a legal instrument to enable the government to implement the tax measures necessary for funding its economic development and growth agenda.

3.2 Trading in financial derivatives is steadily growing as an integral part of the financial market. There has been significant growth and development of the derivatives market in the world in the last three decades.

3.3 Derivatives include forward contracts, futures, swaps, and options. In contrast with a stock issued by a company and purchased by an investor, a derivative contract is a private agreement between a buyer and a seller, which specifies how the value of the contract evolves over time.

3.4 The taxation of the financial derivatives contract is a positive development for Kenya as it provides a good platform to widen the tax base and spread the burden of tax across the tax-paying public; both residents and non-residents who derive income or accrue income from Kenya.

4.0 Currently, gains by non-residents from financial derivatives are not taxed, thus creating unfairness and room for tax avoidance in the Kenyan legislation. The Finance Act 2022 therefore, bridged this gap by creating a provision to equally impose a tax on non- resident persons.

KENYA REVENUE AUTHORITY

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EXPLANATORY MEMORANDUM TO THE INCOME TAX ACT (CAP. 470): FINANCIAL DERIVATIVES REGULATIONS, 2022

LEGAL NOTICE NO. xx of 2022

PART I

Name of Statutory Instrument	:	Financial Derivatives Regulations, 2022
Name of Parent Act	:	Income Tax Act, Cap. 470
Enacted Pursuant to	:	Section 9(4) as read with section 130 of the Income Tax Act, Cap 470
Name of the Ministry/Department	:	The National Treasury and Economic Planning
Gazetted on	:	Xx December 2022

PART II

1.0 Purpose of the Statutory Instrument

1.1 The objective of this Memorandum is to submit the Legal Notice No. xx of 2022 for tabling in the National Assembly in accordance with the provisions of Section 11 of the Statutory Instruments Act, 2013.

1.2 The Legal Notice introduces the Income Tax (Financial Derivatives) Regulations, 2022 in line with the requirements of the Income Tax Act, Cap 470.

2.0 Legislative Context

2.1 The Legal Notice on the Income Tax (Financial Derivatives) Regulations, 2022 is made pursuant to section 9(4) as read with section 130 of the Income Tax Act, Cap 470. Section 9(4) empowers the Cabinet Secretary for the National Treasury and Economic Planning to make regulations for ease of administration and implementation of the financial derivatives contracts provisions.

		ii. settlement of the contract, or iii. Expiry of the contract Provided that in the case of an option contract the gain or loss shall be deemed realised at the time of payment of the option premium and at the time the option is exercised. 2) Realised losses by a resident person from financial derivatives shall be allowed as a deduction against gains accruing from similar activities to the extent that it has not been claimed.
5.	Realized loss not allowable on resident person	(1) No deduction shall be allowed in respect of realised losses against the income for that period where no tax has been paid contrary to the provisions of these Regulations. (2) A person shall not claim a deduction in respect of a loss arising from a financial derivative transaction if it enters into a substantially identical transaction within thirty days before or after the loss was realized.
6.	Records and characterisation of income from financial derivatives	(1) A person involved in financial derivatives transactions shall keep records of all contracts and financial activities resulting from such contracts. (2) All incomes arising from financial derivative activities shall clearly be characterised as other incomes (financial derivative gains/losses) in the tax returns for the period and shall be treated as a separate source in accordance with Section 15(7) of the Act for a resident person or a permanent establishment in Kenya.
7.	Payment of Taxes	The tax under these regulations shall be due and payable by the 20th of the month, after which the loss from the transaction with the non-resident person is realised.

Made on the __________ 2022.

NJUGUNA NDUNGU,

Cabinet Secretary for National Treasury and Economic Planning

		"gain" means any profit earned by a person from a financial derivative contract and includes any premium or fee paid in respect of an option derivative contract;
		"interest rate swap" is an agreement between two parties to exchange one stream of interest payments for another, over a set period of time;
		"option contract" means a financial derivative which offers the holder the right, but not the obligation, to buy or sell the underlying asset or security at a specific price on or before the option's expiry date;
		"option premium" is the price the option holder pays to buy or sell option contract;
		"put option" means an option that gives the holder the right to sell an underlying asset within a specific period of time at a stipulated price;
		"swap" is a contract to purchase or sell an underlying asset at a stipulated price at a certain time and may involve several settlements before maturity.
		"underlying asset" include bonds, commodities, currencies, interest rates, security, stock index, price indices, credit ratings or similar assets.
3.	Scope of gains from financial derivatives	(1) Any realized gain to a non resident person , being a realized loss to the resident person who is a party to the financial derivative contract shall be chargeable to a final tax in accordance with the Act; (2) For purposes of Regulation 3(1), financial derivatives contracts, unless specifically exempt under the Act, include; (a) futures contracts including interest rate futures, stock index futures, volatility futures, weather futures or similar future contracts whether cash settled or not; (b) forward contracts whether cash settled or not; (c) swap contracts including interest rate swaps, currency swaps, credit default swaps, hybrid swaps or similar contracts; (d) options including put options, call options and option spreads; or (e) any other financial derivative instrument.
4.	Realisation of gain or loss	1) Subject to the provisions of these Regulations, a gain or a loss from a financial derivative shall be deemed realized, at the earlier of: i. underlying asset changing hands, or

LEGAL NOTICE No. ____ OF 2022

THE INCOME TAX ACT

(Cap. 470)

THE INCOME TAX (FINANCIAL DERIVATIVES) REGULATIONS, 2022

THE INCOME TAX ACT		
(Cap. 470)		
IN EXERCISE of the powers conferred by Section 9(4) as read with section 130 of the Income Tax Act, the Cabinet Secretary for the National Treasury and Economic Planning makes the following Regulations—		
THE INCOME TAX (FINANCIAL DERIVATIVES) REGULATIONS 2022		
1.	Citation and commencement	These Regulations may be cited as the Income Tax (Financial Derivatives) Regulations, 2022 and shall come into force on 1st January 2023
2.	Interpretation	In these Regulations, unless the context otherwise requires—
		"Act" means the Income Tax Act, Cap 470 Laws of Kenya;
		"call option" means an option that gives the holder the right to buy the underlying assets at a stipulated price on or before a specific future date;
		"currency swap", is a contract between two parties to exchange two currencies at a later date, but at a predetermined exchange rate
		"financial derivative" has the meaning assigned to it in section 2 of the Act;
		"forward contract" is a customised, over-the-counter traded financial derivative contract that provides for the purchase or sale of an underlying asset whose delivery or settlement is to be made at a future date at a price agreed upon when the contract is entered into;
		"futures contract" means a standardised agreement traded in a recognised exchange market for the acquisition or disposal of an underlying asset whose delivery is to be made at a future date and at a price agreed upon when the contract is entered into and shall include a reference to a date and a price determined in accordance with the terms of the contract;