

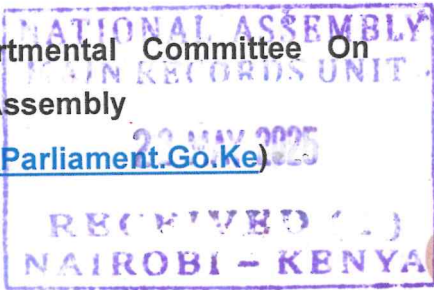


YOUR REFERENCE: OUR REFERENCE: DATE:

TBA GEN/RO/JC/WO/MM/LA 22nd May 2025

MEMORANDUM

TO: The Chairperson And Members, Departmental Committee On
Finance And National Planning, National Assembly
CC: The Clerk of the National Assembly (cna@Parliament.Go.Ke)
FROM: Oraro And Company Advocates
DATE: 22nd May 2025
SUBJECT: PROPOSED AMENDMENTS TO THE FINANCE BILL, 2025



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The Finance Bill, 2025 (hereinafter, “the Bill”) is a Bill for an Act of Parliament to amend the laws relating to various taxes and duties, and for matters incidental thereto. The Bill introduces numerous changes to various statutes thereby resulting in some instances as we shall identify, interpretive ambiguities, increased compliance obligations for taxpayers, and potential inconsistencies with established principles of taxation and constitutional provisions under the Constitution of Kenya, 2010.

OUR SPECIFIC COMMENTS AND PROPOSED AMENDMENTS TO THE FINANCE BILL, 2025

Proposed Provision For Amendment	Proposed Amendment	Our Comments
Clause 2	Delete the proposed amendment to the definition of “royalty”	<ul style="list-style-type: none">The Bill proposes to expand the definition of “royalty” to encompass payments made for software distribution where regular payments are made for its use through a distributor.If enacted, the amendment would bring software distribution payments within the scope of

		<p>Withholding Tax (WHT) , provided they involve regular usage payments.</p> <ul style="list-style-type: none"> • This approach, however, represents a departure from international tax standards, particularly the OECD Model Tax Convention (Article 12 and its accompanying commentary), which provides that payments for the distribution of software—where the recipient does not acquire rights of reproduction or commercial exploitation—should be characterized as business profits rather than royalties, and thus not subject to WHT in the absence of a permanent establishment.
Clause 6	Delete or amend Clause 6 (b)	<ul style="list-style-type: none"> • The Bill proposes the removal of the current exemption for non-residents with an annual turnover of less than KES 5 million from liability under the Significant Economic Presence Tax (SEPT). As a result, all non-resident persons deriving income from Kenya through the provision of services via the internet or electronic networks would be subject to SEPT, irrespective of their turnover. • We recommend retaining the minimum turnover threshold for the application of SEPT to ensure that the tax regime remains proportionate and administratively efficient. • Alternatively, a revised lower threshold could be considered to strike a balance between expanding the tax base and



		<p>minimising the compliance burden on small-scale digital service providers with negligible income from Kenya. This would also align with the best international practices, which favour efficiency, proportionality, and cost-effectiveness in the design of digital taxation frameworks.</p>
Clause 8	Delete Clause 8 (a) (ii) and (iii)	<ul style="list-style-type: none"> • The Bill proposes to delete paragraphs (i) and (j) of Section 15(2), which currently allow for deductions related to the sale of, or the grant of rights to cut down, standing timber. • Under the current provisions, landowners may deduct either the portion of the land's purchase price attributable to the timber or the timber's value at the time the owner acquired the land. This allows the owner to recover their initial investment (either the cost or the initial value) before being taxed on any profit. Similarly, those with a license to cut timber may deduct a portion of the price paid for that right. • If the Bill passes, the gross profits from selling timber would be taxed without any offset rights, thereby leading to a higher income tax burden for both landowners selling their own standing timber and those who purchase the right to fell and sell timber and as such, we recommend that the provision be deleted.
Clause 8	Delete clause 8 (a) (iv)	<ul style="list-style-type: none"> • The Bill proposes to remove the special deductions awarded to expatriates who are employed by a regional office that carries no business in Kenya and if they are



		<p>absent from Kenya on business for at least 120 days in any tax year.</p> <ul style="list-style-type: none"> • Eliminating this deduction would increase the income tax liability for the affected expatriate employees. • The removal of expatriate deductions, alongside other changes in the Finance Bill, could have broader economic consequences, such as affecting the attractiveness of Kenya as a business destination, impacting foreign investment, and potentially leading to a decline in the number of expatriates.
Clause 8	Delete clause 8 (c)	<ul style="list-style-type: none"> • The Bill proposes to amend Section 15(4) to reduce the period within which taxpayers can carry forward tax losses from an indefinite timeframe to a maximum of five (5) years. • If it passes, this proposal would significantly affect businesses engaged in long-term projects or operating in high-risk sectors, where profitability is often delayed. Such businesses may be unable to fully utilise their accumulated tax losses within the shortened carry-forward period, leading to the expiration of unused losses. • We recommend deleting this amendment, as it could result in a higher effective tax burden in future profitable years, thereby undermining financial sustainability and discouraging long-term investment.



Clause 11	Amend clause 11	<ul style="list-style-type: none"> • The Bill proposes that Multinational Enterprises (MNEs) with multiple constituent entities resident in Kenya must designate one of their constituent entities to file the Country-by-Country Report (CbCR) and notify the KRA by the last day of the MNE's financial year. • It further eliminates the option of filing through a Surrogate Parent Entity and shortens the CbCR filing deadline from 12 months after the end of the financial year to the end of the reporting year itself. • This compressed timeline may pose substantial compliance challenges, given that CbCR requires detailed and technical information, such as revenue, profits, taxes paid, employee numbers, and assets, across all jurisdictions where the MNE operates. • In light of these demands, and the additional requirement to submit a master file, local file, and notification, we recommend that consideration be given to retaining the current 12-month timeline or providing a reasonable extension to enable accurate and complete reporting.
Clause 15	Delete Clause 15	<ul style="list-style-type: none"> • The Bill proposes that if a taxpayer makes an application to the Commissioner seeking the approval of the Commissioner to change the financial year end of a company, and the Commissioner fails to respond within six months,



		<p>the application shall be deemed automatically approved.</p> <ul style="list-style-type: none"> • While this provision affords taxpayers wide latitude to determine their year ends and resultant accounting period, taxpayers will face difficulties in implementing the change, unless KRA streamlines iTax to enable this • We recommend that this clause be deleted until the necessary systems and operational frameworks are in place to support its implementation effectively.
Clause 26 (a)	Delete clause 26 (a)	<ul style="list-style-type: none"> • The Bill proposes extending the timeframe for issuing approval on tax exemption applications for charitable institutions from sixty (60) to ninety (90) days. • Although the extended timeline may allow KRA more time to consider an application for exemption, this may delay the period within which such institutions can access tax-exempt status, potentially leading to temporary cash flow challenges due to delayed funding or donor commitments.
Clause 26 (b)	Amend clause 26 (b)	<ul style="list-style-type: none"> • The Bill proposes to exempt contributions and other payments into and out of Social Health Insurance Fund (SHIF), which will align the law with the transition from National Hospital Insurance Fund (NHIF) to SHIF. • The amendment introduces ambiguity on whether payments



		<p>made by SHIF out of the fund are to be exempted from tax. This lack of clarity could lead to unintended tax exemptions and uncertainty for healthcare providers or facilities about the tax treatment of payments they receive.</p> <ul style="list-style-type: none"> • We recommend that the clause be amended to address the ambiguity in order to avoid misinterpretation.
Clause 27	Delete Clause 27	<ul style="list-style-type: none"> • The Bill proposes to eliminate the 100% investment deductions allowance of investments situated outside Nairobi and Mombasa counties, where the total value of investment is more than KES. 1 billion in the three prior years of investment. It further proposes to repeal investment deductions applicable to investments in Special Economic Zones (SEZs). • The removal of these incentives is likely to discourage large-scale capital investments in counties outside the two major cities, as it increases the overall cost of investment. In the long term, this could undermine efforts to promote regional economic development and reduce investment activity in less-developed areas. • We recommend that this clause be deleted to preserve targeted investment incentives that promote equitable regional development and attract capital to strategic areas of the economy.



Clause 32	Delete Clause 32 (a)	<ul style="list-style-type: none"> • The Bill proposes the removal of the ability to offset VAT liabilities against excess VAT input and tax withheld by appointed VAT withholding agents. • The provision, as drafted, will restrict taxpayers to seeking refunds only, potentially delaying access to legitimate credits and increasing the administrative burden on both taxpayers and KRA. • While the intent may be to streamline VAT administration and curb fraudulent claims, the blanket removal of the offset mechanism risks adversely affecting compliant businesses, particularly exporters and capital-intensive enterprises, by creating liquidity challenges and increasing the cost of doing business. • We recommend that this clause be deleted and replaced with a more balanced approach that retains a limited and well-regulated offset mechanism and strike a practical balance between revenue protection and business facilitation. Alternatively, the clause can be amended to establish strict, yet shortened, timelines within which KRA must process valid refund claims.
Clause 35	Amend clause 35	<ul style="list-style-type: none"> • The Bill proposes to introduce a new Section 66A to the VAT Act, requiring persons who import or acquire exempt or zero-rated goods/services to pay VAT if those goods or services are later



		<p>disposed of or used inconsistently with their purpose for which they were exempt or zero-rated. This aims to curb the abuse of VAT exemptions and align usage with policy intent.</p> <ul style="list-style-type: none"> • While the amendment strengthens compliance and complements anti-avoidance provisions under Section 66, it raises concerns about ambiguous terms like “<i>inconsistent use</i>,” which could lead to potential overregulation and increased administrative burden, especially for SMEs. • We recommend the amendment of the proposal to provide clear definitions or a provisional clause to it which defines what “<i>inconsistent use</i>” means as used in the proposed amendment. This will help in reducing ambiguity in implementation and enforcement of the proposed amendment.
Clause 36	Delete clause 36 (o) that introduces paragraphs 155 to 163 to Part 1 of the First Schedule to VAT Act.	<ul style="list-style-type: none"> • The Bill proposes to reclassify certain supplies from zero-rated to exempt for VAT purposes. • While the intended objective appears to be the reduction of refund liabilities for the Kenya Revenue Authority (KRA), this change would eliminate the ability of affected taxpayers to claim input VAT on related purchases. • Consequently, the VAT incurred on inputs would become an additional cost of production, thereby reducing profit margins for suppliers. This increased cost is likely to be passed on to consumers, leading to higher



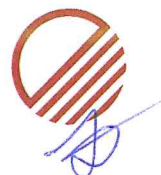
		<p>prices, particularly for essential goods.</p> <ul style="list-style-type: none"> • We recommend the deletion of this clause to promote investment and protect consumers from bearing the indirect burden of higher prices.
Clause 47	Delete clause 47 (m) (v)	<ul style="list-style-type: none"> • The Bill proposes to delete the prohibition on issuing agency notices when a taxpayer has not appealed against an assessment specified in a decision of the Tribunal or Court. • If enacted into law, the Commissioner will be able to issue agency notices to the taxpayers once the case is determined by the Tribunal. The Commissioner will not be required to wait for the taxpayer to exhaust the appeal chances to High Court or Court of Appeal, and this might lead to rendering the appeal nugatory unless stay of execution is sought. • The problem with seeking stay execution in tax matters is that judges insist in depositing the disputed taxes to KRA and this might be difficult to recover even after winning the appeal. • We recommend deleting this clause, as it imposes an additional burden on taxpayers by requiring a separate stay application alongside the appeal. This not only increases procedural complexity but may also expose taxpayers to payment of security to the Commissioner, which can sometimes be difficult to recover.



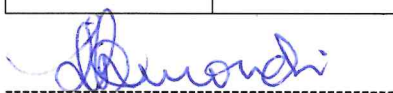
		<ul style="list-style-type: none"> In alternative, we propose the amendment of the Tax Procedure Act and its rules specifically relating to the proceedings in High Court to provide that where security is needed as a requisite of granting stay, such security will be reasonable and will be deposited with the Court and not KRA.
Clause 50	Delete Clause 50	<ul style="list-style-type: none"> The Bill proposes to remove the option for taxpayers to offset input VAT using overpaid taxes. It further seeks to extend the time within which the Commissioner has to ascertain and determine refund and offset application from 90 days to 120 days. Additionally, where the application for offset or refund of overpaid taxes has been subjected to an audit, the Bill proposes to extend the Commissioner's period for consideration of such application from 120 days to 180 days. While the extended timelines may provide the Commissioner with additional time to verify refund and offset claims, they are likely to delay the resolution of tax disputes and hinder timely tax recovery. This could adversely affect taxpayers' cash flow and increase financial strain, especially for businesses relying on prompt refunds to sustain operations. Moreover, the removal of the ability to offset input VAT using overpaid taxes would limit taxpayers' ability to effectively utilise overpayments. Currently, such offsets provide a practical and efficient means of



		<p>reducing tax liability, including VAT obligations.</p> <ul style="list-style-type: none"> • We recommend that Clause 50(a) be deleted to retain the ability to offset input VAT using overpaid taxes, and that the current statutory timelines of 90 days and 120 days be maintained to ensure administrative efficiency and safeguard taxpayers' cash flow. • We further recommend the timelines to be retained and the proposal to extend the timelines be abandoned.
Clause 52	Delete Clause 52	<ul style="list-style-type: none"> • The Bill proposes to delete the existing restriction that bars the Commissioner from demanding integration or data sharing involving trade secrets or private and personal data held by taxpayers on behalf of customers or collected in the course of business. • As such, taxpayers, especially those handling large volumes of personal data, may face heightened compliance obligations, increased legal risk, and the need to reassess how they manage and disclose such information to Commissioner. We therefore recommend the deletion of this proposed amendment as it give unchecked powers to KRA that might be abused thus infringing that right to privacy and principles of data protection.



<p>Clause 56</p>	<p>Amend clause 56</p>	<ul style="list-style-type: none"> • The Bill proposes to empower the Cabinet Secretary responsible for matters relating to finance, upon recommendation by the Commissioner, to waive penalties and interests where non-compliance arises from specific systemic errors. • While the provision promotes procedural fairness and upholds the principle of proportionality in enforcement, the reliance on the Cabinet Secretary's approval may introduce administrative delays and raise concerns about the consistency and objectivity of decision-making, particularly in the absence of clear criteria or timelines. • We recommend that such power should be exercised by the Commissioner directly upon application by the taxpayer. This will reduce administrative bottlenecks and create efficiency in tax administration and collection.
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