

# THE FINANCE BILL 2025

#	CLAUSE & ISSUE OF CONCERN	RECOMMENDATION	RATIONALE/ LIKELY IMPACT
<b>Part I – PRELIMINARY</b>			
[1]	<b>Clause 1</b> <ul style="list-style-type: none"> <li>Some measures have an effective date of July 1, 2025, which is too soon and does not allow enough time for compliance or could result to taxpayers bearing excessive VAT burden. These include: <ul style="list-style-type: none"> <li>[a] Clause 32(b) which aims to reduce the time for filing VAT refund from 24 months to 12 months.</li> <li>[b] Clause 54 whose object is to reverse Section 77(2) of the Tax Procedures Act, which was only introduced less than 6 months ago.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li><b>The commencement date be changed from 1<sup>st</sup> July 2025 to 1<sup>st</sup> January 2026</b> – Clause 1(a) of the Bill be amended to include Section 32(b) and Section 54 or their respective new numbering that may arise following the processing of amendments approved by the National Assembly to the Bill.</li> </ul>	<ul style="list-style-type: none"> <li>[1] Commencement dates are essential for both taxpayers and the Revenue Authority.</li> <li>[2] Ensure compliance is smooth and that the taxpayers have sufficient time to prepare and comply.</li> <li>[3] Section 77(2) of the Tax Procedures Act only became effective on 27<sup>th</sup> December 2024 and has been in operation for less than 6 months. It is unclear why the same is now being repealed without adequate notice to the taxpayers.</li> </ul>
<b>Part II – INCOME TAX</b>			
[2]	<b>Clause 4</b> <ul style="list-style-type: none"> <li>Clause 4(c) of the Bill deletes Section 8(5) of the Income Tax Act (ITA). However, Section 5A of the ITA, linked to Section 5(c)(ii), is retained, rendering it moot.</li> </ul>	<ul style="list-style-type: none"> <li><b>Deletion of Section 5A of the ITA -</b> Introduce Clause 4(d) in the Bill to delete Section 5A of the ITA and renumber the rest of Clause 4</li> </ul>	<ul style="list-style-type: none"> <li>This is a mere clean-up of the Bill to address drafting aspects. The deletion is not expected to have any adverse effect.</li> </ul>

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[3]	<p><b>Clause 10</b></p> <ul style="list-style-type: none"> <li>The heading to Section 10 of the ITA reads “<i>Income from management or professional fees, royalties, interest and rents</i>”. This section now includes many other payments beyond those listed in the heading. Clause 5 of the Bill proposes to include payments for the supply of goods to a public entity and the sale of scrap not envisaged in the heading.</li> </ul>	<ul style="list-style-type: none"> <li><b>Repeal of Section 10 Heading</b> – Introduce Clause 5(1) in the Bill to repeal the current Section 10 heading and replace it with “<i>Payments deemed to be income accrued in or derived from Kenya</i>” and renumber the amendment in Clause 5 as 5(2).</li> </ul>	<ul style="list-style-type: none"> <li>The proposal is simply a legislation clean-up to ensure that the title of Section 10 accurately reflects the section's contents.</li> <li>The change will remove any ambiguity regarding the scope of Section 10.</li> </ul>
[4]	<p><b>Clause 6(b)</b></p> <ul style="list-style-type: none"> <li>The Clause proposed to delete Section 12E(3)(d) of the ITA. This section sets the “<i>significant economic presence</i>” threshold.</li> <li>The deletion will leave no criteria for determining when a non-resident has significant economic presence (SEP) in Kenya, considering there is also no criteria for determining “where the user is located in Kenya”.</li> <li>This means a non-resident with only one customer will fall within the scope of SEP tax regardless of the quantum of sales. Further, where a customer of the non-resident is on holiday or short-stay in Kenya could see that non-resident being liable to SEP tax.</li> </ul>	<p>[a] <b>Option I - Deletion of Clause 6(b) of the Bill</b> – Humbly plead for Clause 6(b) in the Bill to be deleted to maintain the threshold of KES 5 million for SEP tax.</p> <p>[b] <b>Option II – SEP Criteria</b> - Set a criterion for “significant economic presence” as well as criteria for establishing that a user is in Kenya. The criteria in the regulation 5(2) of the now-defunct Income Tax (Digital Service Tax) Regulations, 2020 may be adopted.</p>	<ul style="list-style-type: none"> <li><b>Remove ambiguity and enhance compliance</b> – The proposal aims at ensuring that there is no ambiguity and that the targeted non-residents can easily determine the starting point of their tax obligations in Kenya.</li> </ul>
[5]	<p><b>Clause 8(c) &amp; 8(d)</b></p> <ul style="list-style-type: none"> <li>This amendment aims to introduce a cap on the carryforward and utilization of a tax loss to 5 years from the current 10-year period.</li> <li>The amendment does not consider the factors behind the tax losses, such as capital allowances, the nature of the sector, or the business lifecycle.</li> </ul>	<p>[a] <b>Option I - Deletion of Clauses 8(c) and 8(d) of the Bill</b> – Humble plea for Clauses 8(c) and 8(d) in the Bill to be deleted to allow taxpayers to continue utilizing tax losses beyond 5 years and where the loss</p>	<ul style="list-style-type: none"> <li>The proposal aims to protect taxpayers with legitimate losses in a challenging business environment, ensuring that those whose tax losses extend beyond</li> </ul>

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	<ul style="list-style-type: none"> <li>The amendment appears to impose a blanket penalty on the assumption that tax losses older than five years indicate tax avoidance or evasion. This is the case even if the taxpayer has undergone a thorough audit by the KRA and the loss has been verified as legitimate.</li> </ul>	<p>goes beyond 10 years, the taxpayer can apply for approval from the KRA.</p> <p>[b] <b>Option II – Segregating capital allowances from tax losses and excluding them from loss carryforward cap</b> – Since capital allowances are a reflection of capital investment and specifically provided for in the ITA in the place of depreciation, they present no risk of misuse hence the benefit thereof the benefit of the same ought not be denied where the taxpayer is still in tax losses for more than 5 years. This option is currently employed in other countries such as Nigeria.</p>	<p>five years are not unfairly penalised.</p> <ul style="list-style-type: none"> <li>Further, the KRA is mandated to audit and investigate tax losses instead of being provided a legislative shortcut. When the KRA has audited and confirmed the loss as legitimate, the taxpayer should not lose this tax loss.</li> </ul>

## Part III – VALUE ADDED TAX

[6]	<p><b>Clauses 31(a)(ii) and 31(b)</b></p> <ul style="list-style-type: none"> <li>The purpose of these amendments is to integrate the radio or television broadcasting services provided by non-resident suppliers and received at a location in Kenya, as outlined in Section 8(2)(c) of the VAT Act, under electronic services detailed in Section 8(2)(d) and defined in Section 8(3).</li> <li>This move triggers the following two challenges: <ul style="list-style-type: none"> <li>[1] <b>Ambiguity</b> – by merely adding the services to Section 8(3)(g) <p><i>“political, cultural, artistic, sporting, scientific and other broadcasts and events including <del>broadcast television</del>, internet, radio or television broadcasting services.”</i></p> </li> </ul> </li> </ul>	<p>[1] <b>Option I – Deletion of Clauses 31(a)(ii) and 31(b)</b> – The de facto purpose of Clauses 31(a)(ii) and 31(b) <u>is to expand the list of VAT-registered persons who are not allowed to claim input VAT in Kenya, without offering any justification for this restriction.</u> Therefore, I respectfully and humbly urge the National Assembly to consider deleting clauses 31(a)(ii) and 31(b) from the Bill.</p> <p>[2] <b>Option II – Scrapping the input VAT deduction limitation</b> – this can be achieved by introducing a proviso in Section 17(1) of</p>	<ul style="list-style-type: none"> <li>Denial of input VAT deduction in Kenya carries various adverse ramifications some of which are highlighted</li> <li>Doing away with the input VAT deduction limitation would yield various benefits, including: <ul style="list-style-type: none"> <li>[1] <b>Encourage local purchases</b>, hence boosting local businesses.</li> </ul> </li> </ul>
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	<p>The current Section 8(3)(g) addresses very specific broadcasts and events. The services proposed for inclusion in this provision are somewhat dissimilar, leading to ambiguity. For instance:</p> <ul style="list-style-type: none"> <li>When a provider offers a subscription-based broadcasting service that partially includes specific broadcasts mentioned in section 8(3)(g), does this imply that VAT would be partially applied to that supply?</li> <li>The reference to “<i>internet, radio or television broadcasting services</i>” is unclear whether the intent is to include the “<i>internet services</i>” as “<i>radio or television broadcasting services</i>” in the provision.</li> </ul> <p><b>[2] <i>Input VAT denial to electronic services providers</i></b></p> <ul style="list-style-type: none"> <li><b>Regulation 11 of VAT (Electronic, Internet, and Digital Marketplace Supply) Regulations, 2023</b> prohibits non-resident providers of electronic services falling within Section 8(2)(d) read with Section 8(3) of the VAT Act from claiming any input VAT incurred in Kenya.</li> <li>While no explanation is given for the amendment, it seems that the primary purpose of moving services from section 8(2)(c) to section 8(2)(d) is to broaden the scope of non-resident service providers who are prohibited from claiming any input VAT in Kenya. This applies even to those who are required to register and account for VAT in Kenya.</li> </ul>	<p>the VAT Act to make it clear that the suppliers falling within the scope of Section 8(2) read with 8(3) of the VAT Act would be entitled to deduct claimable input VAT incurred in Kenya.</p> <p>This may be achieved by introducing the proviso in clause 32 of the Bill which is already carrying an amendment to Section 17(5) of the VAT Act.</p>	<p><b>[2] Encourage VAT compliance</b> amongst non-resident suppliers.</p> <p><b>[3] Restore the neutrality principle</b> in the Kenya VAT system.</p> <p><b>[4] Fair competition</b> between similar local and foreign supplies.</p> <p><b>[5] Restore fairness in the taxation</b> of residents and non-residents providing similar services to Kenyans.</p>

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	<ul style="list-style-type: none"> <li>The adverse implications on denial of genuine input VAT to a properly VAT registered person include: <ul style="list-style-type: none"> <li>[i] Discourages non-resident suppliers from procuring goods/services in Kenya due to higher tax cost, thus encouraging affected non-residents to source the same from outside Kenya.</li> <li>[ii] Discourages VAT registration for non-residents since inability to claim input VAT would be seen as a “punishment” for registration;</li> <li>[iii] Contradicts international VAT principle of neutrality advocated for in the OECD’s International VAT/GST Guidelines. These guidelines require that a supplier should be entitled to a full right of deduction of input tax so that the tax burden eventually rests on the final consumer instead of the intermediaries in the supply chain;</li> <li>[iv] Contradicts the Africa Tax Administrators’ Forum (“ATAF”) VAT Digital Toolkit for Africa which inter alia requires input tax recovery to remain available for non-resident suppliers of digital platforms under the normal VAT registration and collection regime or via an independent mechanism for VAT refunds for non-resident businesses;</li> <li>[v] Results in excessive burden to the non-residents since they now must bear the</li> </ul> </li> </ul>		

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	irrecoverable VAT costs which is not the essence of VAT, and [vi] Creates an unfair competition issue between VAT-registered residents and non-residents providing similar services.		