

SPECIAL ISSUE

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REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

ACTS, 2014

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THE FINANCE ACT**No. 16 of 2014***Date of Assent: 14th September, 2014**Date of Commencement:**Section 5 (a) and (b)—3rd October, 2014**All Other Provisions: See Section 1***AN ACT of Parliament to amend the law relating to various taxes and duties and for matters incidental thereto****ENACTED** by the Parliament of Kenya, as follows—**PART I—PRELIMINARY**

1. This Act may be cited as the Finance Act, 2014, and shall come into operation, or be deemed to have come into operation, as follows—

Short title and commencement.

- (a) sections 5, and paragraph (i) of the proviso; 8, 20 and 25, on the 13th June, 2014;
- (b) sections 40 and 42, on the 1st July, 2014;
- (c) sections 31, 32, 33, 34, 35, 36, 37 and 38, on the 1st October, 2014;
- (d) paragraphs (ii) and (iii) of the proviso to section 5; sections 26, 27, 28, 29, 30, 39 and 41, on publication;
- (e) sections 2, 3, 4, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23 and 24, on the 1st January, 2015.

PART II—INCOME TAX

2. Section 2 of the Income Tax Act, is amended by—

Amendment to section 2 of Cap. 470.

- (a) deleting the words “provisional assessment” appearing in the definition of “assessment”;
- (b) deleting the definition of “permanent establishment” and substituting therefore the following new definition—

“permanent establishment” in relation to a person, means a fixed place of business and includes a place of management, a branch, an office, a factory, a workshop, and a mine, an oil or gas well, a quarry or any other place of extraction of natural resources, a building site, or a construction or installation project which has existed for six months or more where that person wholly or partly carries on business:

Provided that—

- (a) the permanent establishment of the person shall be deemed to include the permanent establishment of the person’s dependent agent;
- (b) in paragraph (a), the expression “dependent agent” means an agent of the person who acts on the person’s behalf and who has, and habitually exercises, authority to conclude contracts in the name of that person;
- (c) deleting the following definitions—
 - (i) “provisional return of income”;
 - (ii) “specified mineral”; and
 - (iii) “oil company”
- (d) inserting the following new definition in proper alphabetical sequence—

“natural resource income” means-

 - (i) an amount including a premium or such other like amount paid as consideration for the right to take minerals or a living or non-living resource from land or sea; or
 - (ii) an amount calculated in whole or in part by reference to the quantity or value of minerals or a living or non-living resource taken from land or sea.

3. Section 3 of the Income Tax Act is amended—

Amendment of
section 3 of Cap.
470.

(a) in subsection (2), by—

(i) deleting paragraph (g) and substituting therefor the following new paragraph—

(g) subject to section 15(5A), the net gain derived on the disposal of an interest in a person, if the interest derives twenty per cent or more of its value, directly or indirectly, from immovable property in Kenya; and

(ii) inserting the following new paragraph immediately after paragraph (g)

(h) a natural resource income;

(b) in subsection (3), by—

(i) deleting the word “and” appearing at the end of paragraph (a);

(ii) deleting paragraph (c) and substituting therefor the following new paragraph -

(c) for the purposes of subsection (2)(g) and section 15(5A) -

(i) “immovable property” means a mining right, an interest in a petroleum agreement, mining information or petroleum information;

(ii) “net gain”, in relation to the disposal of an interest in a person, means the consideration for the disposal reduced by the cost of the interest; and

(ii) the terms “consideration”, “cost”, “disposal”, “interest in a person”, “mining information”, “mining right”, “person”, “petroleum agreement”, and “petroleum information” have the meaning assigned to them in the Ninth Schedule.”

4. Section 4 of the Income Tax Act is amended by deleting paragraph (f) and substituting therefor the following new paragraph—

Amendment of section 4 of Cap. 470.

- (f) in computing the gains or profits of a “licensee”, “contractor” or “subcontractor” as defined in the Ninth Schedule, the provisions of that Schedule shall apply.

5. Section 5 of the Income Tax Act is amended in subsection (4) by—

Amendment to section 5 of Cap. 470.

- (a) inserting the following new paragraph immediately after paragraph (a)—

- (aa) expenditure on vacation trips to destinations in Kenya paid by the employer on behalf of an employee:

Provided that—

- (i) this paragraph shall cease to apply on the 1st July, 2015;
- (ii) the period of vacation shall not exceed seven days; and
- (iii) the term “employee” shall include the immediate family members of the employee;
- (d) deleting the words “low income employees in a canteen or cafeteria operated or established by the employer (whether the meals are supplied by the employer or not) within his premises” appearing in paragraph (f) and substituting therefor the words “employees in a canteen or cafeteria operated or established by the employer or provided by a third party who is a registered taxpayer (whether the meals are supplied in the premises of the employer or the premises of the third party) where the value of the meal does not exceed the sum of forty-eight thousand shillings per year per employee”;

- (c) deleting the definition of “low income employees” appearing in subparagraph (b)(ii) of the proviso to paragraph (g).

6. Section 10 of the Income Tax Act is amended, by—

Amendment to
section 10 of
Cap 470

- (a) inserting the words “or natural resource income” immediately after the word “royalty” appearing in paragraph (b) ;
- (b) deleting paragraph (h);
- (c) deleting the word “section” wherever it appears in the proviso and substituting therefor the word “subsection”;
- (d) inserting the following new paragraph immediately after paragraph (ii) of the proviso-
- (iii) for the avoidance of doubt, the expression “non-resident person” shall include both head office and other offices of the non- resident person.
- (e) re-numbering the existing provision as subsection (1) and inserting the following new subsection -

(2) A net gain referred to in section 3(2)(g) is deemed to be income that accrued in or was derived from Kenya.

7. Section 15 of the Income Tax Act is amended—

Amendment of
section 15 of Cap
470.

- (a) in subsection (2), by deleting paragraph (m);
- (b) by renumbering subsection (4A) as subsection (5) and inserting the following new subsection—

(5A) For the purpose of section 3(2)(g), the amount of the net gain to be included in income chargeable to tax is—

(a) if the interest derives more than fifty per cent of its value, directly or indirectly, from immovable property in Kenya, the full amount of the net gain; or

(b) for any other case, the amount computed according to the following formula—

$$A \times B/C$$

Where –

A is the amount of the net gain;

B is the value of the interest derived, directly or indirectly, from immovable property in Kenya; and

C is the total value of the interest.

(c) in subsection (7), by inserting the following new paragraph immediately after paragraph (ivA)—

(ivB) income of a licensee from one licence area or a contractor from one contract area as determined in accordance with the Ninth Schedule.

8. Section 16 of the Income Tax Act is amended in subsection (2) by deleting the expression “section 5(4)(a)” appearing in paragraph (a)(iii) and substituting therefor the expression “section 5(4)(a) and (aa)”.

Amendment to section 16 of Cap. 470.

9. Section 18 of the Income Tax Act is amended, by –

Amendment to section 18 of Cap. 470

(a) inserting the words “or through its permanent establishment” immediately after the words “resident person” wherever they occur in subsection (3);

(b) deleting the words “the foreign head office or other offices of a non-resident person” appearing in subsection (5) and substituting therefor the words “the non-resident person”;

(c) inserting the following proviso immediately after the subsection-

Provided that for the avoidance of doubt, the expression “non-resident person” shall include both the head office and other offices of the non-resident person.

(d) deleting subsection (7).

10. Section 34 of the Income Act is amended—

Amendment of
section 34 of
Cap 470.

(a) in subsection (1), by inserting the following new paragraph immediately after paragraph (i)—

“(j) tax upon the capital gains of a person charged under section 3(2)(f) shall be charged at the rate of five percent and shall not be subject to further taxation”;

(b) by deleting subsections (1A) and (1B);

(c) in subsection (2), by inserting the words “or natural resource income” immediately after the word “royalty” appearing in paragraph (b)

11. Section 35 of the Income Tax Act is amended—

Amendment of
section 35 of Cap.
470.

(a) in subsection (1), by—

(i) inserting the words “or natural resource income” immediately after the word “royalty” appearing in paragraph (b); and

(ii) deleting paragraph (k);

(b) in subsection (3), by inserting the words “or natural resource income” immediately after the word “royalty” appearing in paragraph (g);

(c) deleting subsections (3A) and (3B).

12. Section 41 of the Income Tax Act is amended—

Amendment of section 41 of Cap. 470.

- (a) in subsection (1), by deleting the words “notwithstanding anything” and inserting the words “subject to subsection (5) but notwithstanding any other provision”; and
- (b) by inserting the following new subsections immediately after subsection (4) –

(5) Subject to subsection (6), where an arrangement made under this section provides that income derived from Kenya is exempt or excluded from tax, or the application of the arrangement results in a reduction in the rate of Kenyan tax, the benefit of that exemption, exclusion, or reduction shall not be available to a person who, for the purposes of the arrangement, is a resident of the other contracting state if fifty per cent or more of the underlying ownership of that person is held by an individual or individuals who are not residents of that other contracting state for the purposes of the agreement.

(6) Subsection (5) shall not apply if the resident of the other contracting state is a company listed in a stock exchange in that other contracting state.

(7) In this section, the terms “person” and “underlying ownership” have the meaning assigned to them in the Ninth Schedule.”

13. The Income Tax Act is amended by repealing section 53.

Repeal of section 53 of Cap. 470

14. Section 54A of the Income Tax Act is amended by inserting the following new subsection immediately after subsection (1)

Amendment of section 54A of Cap.470.

(1A) For the purposes of this section, the carrying on of business includes any activity giving rise to income other than employment income.

15. The Income Tax Act is amended by inserting the following new section immediately after section 54A-

Insertion of section 54B in Cap.470.

Supply of information upon change in particulars.

54B. Every person carrying on a business shall notify the Commissioner of any changes in the following particulars within thirty days of the occurrence of the change—

- (a) the place of business, trading name and contact address;
- (b) in the case of —
 - (i) an incorporated person, of the persons with shareholding of ten per cent or more of the issued share capital;
 - (ii) a nominee ownership, to disclose the beneficial owner of the shareholding;
 - (iii) a trust, full identity and address details of trustees, settlors and beneficiaries of the trust;
 - (iv) a partnership, the identity and address of all partners; or
 - (v) cessation or sale of business, all relevant information regarding liquidation or details of new ownership.

16. Section 72 of the Income Tax Act is amended in subsection (1) by deleting paragraph (b).

Amendment of section 72 of Cap. 470.

17. The Income Tax Act is amended by repealing section 74.

Repeal of section 74 of Cap. 470.

18. Section 74A of the Income Tax Act is amended by deleting the expression “and 74” appearing in subsection (1).

Amendment of section 74A of Cap. 470.

19. Section 92 of the Income Tax Act is amended by deleting subsection (3).

Amendment of section 92 of Cap. 470.

20. The First Schedule to the Income Tax Act is amended by deleting the words “local authority” appearing in paragraph 8 and substituting therefor the words “county government”.

Amendment of the First Schedule to Cap. 470

21. The Second Schedule to the Income Tax Act is amended—

Amendment of Second Schedule to Cap. 470.

(a) in paragraph 7(3), by—

(i) inserting the following new subparagraph immediately after subparagraph (c)—

(cc) petroleum pipeline; and

(ii) deleting the expression “subparagraph (a)” and substituting therefor the expression “subparagraph (cc) or (d)”,

(b) deleting Part III;

(c) inserting the words “or machinery referred to in paragraph (g)” immediately after the expression “machinery referred to in subparagraph (f)” appearing in paragraph 24(1).

22. The Third Schedule to the Income Tax Act is amended—

Amendment of Third Schedule to Cap. 470.

(a) in paragraph 3, by –

(i) deleting the words “other than management or professional fee deductible under paragraph 5(2)(g) of the Ninth Schedule” appearing in subparagraph (a);

- (ii) inserting the words “or natural resource income” immediately after the word “royalty” appearing in subparagraph (b);
- (iii) deleting the words “other than interest which is deductible under paragraph 5(2)(h) of the Ninth Schedule” appearing in paragraph (e)(i);
- (iv) deleting subparagraph (i);
- (v) deleting subparagraph (j);
- (b) in paragraph 5, by inserting the words “or natural resource income” immediately after the word “royalty” appearing in subparagraph (g);
- (c) by deleting paragraph 6.

23. The Eighth Schedule to the Income Tax Act is amended –

Amendment of
Eighth Schedule to
Cap.470

- (a) by deleting paragraph 2 and substituting therefor the following new paragraph –
 - “2. Subject to this Schedule, income in respect of which tax is chargeable under section 3(2)(f) is the whole of a gain which accrues to a company or an individual on or after 1st January, 2015 on the transfer of property situated in Kenya, whether or not the property was acquired before 1st January, 2015”;
- (b) in paragraph 3, by adding the following new subparagraph immediately after subparagraph (2)–
 - “(3) The gain which is exempt from tax under paragraph 36 of the First Schedule is not chargeable to tax under section 3(2)(f)”;
- (c) in paragraph 6, by adding the following new subparagraphs immediately after subparagraph (2)(g)–
 - (h) by the transfer of an asset between spouses, or former spouses, as part of a divorce settlement or *bona fide* separation agreement;

- (i) by the compensation for property acquired by the Government for infrastructure development which is subject to tax under section 3(2)(i);
- (d) in paragraph 7, by deleting the words “deemed to be nil” appearing at the end of subparagraph (3) and substituting therefor the words “the market value as determined by the Commissioner”;
- (e) by deleting Part III.

24. The Income Tax Act is amended by repealing the Ninth Schedule and substituting therefor the new Ninth Schedule set out in the Schedule to this Act.

Repeal and replacement of the Ninth Schedule to Cap. 470.

25. The Thirteenth Schedule to the Income Tax Act is amended by –

Amendment of the Thirteenth Schedule to Cap. 470.

- (a) deleting the item “Local Authorities – Approval of plans and payment of water deposits” and;
- (b) inserting thereof the following new items–
 - County Government – payment of services falling under County Finance Act
 - Water service providers – payment of water deposit and connection of water meters.

PART III—VALUE ADDED TAX

26. The Value Added Tax Act, 2013 is amended by inserting a new section 25A as follows—

Insertion of new section 25A in No. 25 of 2013.

Withholding Value Added Tax

25A.(1) Government Ministries, Departments and agencies shall, on purchasing taxable supplies, withhold six percent of the tax payable thereon at the time of paying for the supplies and remit the same directly to the Commissioner.

(2) Subsection (1) shall not apply to taxable supplies for official aid-funded projects.

(3) For the avoidance of doubt, the withholding of tax under subsection (1) shall not relieve the supplier of taxable supplies of the obligation to account for tax in accordance with this Act and the regulations.

27. Section 68 of the Value Added Tax Act, 2013 is amended by inserting the following new subsection immediately after subsection (4) –

Amendment to
section 68 of No.
25 of 2013

“(4A) For the avoidance of doubt and despite any other provision of this Act or other written law for the time being in force, the expression “remission of tax” in subsection (4) shall, in the case of an official aid-funded project, be deemed to include express provision in the agreement in respect of that project for the remission of tax on any taxable goods or services supplied for the implementation of the project, where the agreement was concluded before the commencement of this Act:

Provided that a remission to which this subsection applies shall remain in force for a period of five years with effect from the commencement of this subsection”.

28. The First Schedule to the Value Added Tax Act, 2013 is amended –

Amendment of the
First Schedule to
No. 35 of 2013

(a) in Section A of Part I, by –

(i) inserting the following tariff numbers and descriptions thereof in item 38 immediately after tariff number 8802.20.00—

8802.30.00 Aeroplanes and other Aircrafts on unladen weight exceeding 2,000 kgs but not exceeding 15,000 kg.

8802.40.00 Aeroplanes and other Aircraft of unladen weight exceeding 15,000 kgs.

8803.30.00 Other parts of aeroplanes or helicopters.

(ii) by inserting the following new item immediately after items 46—

47. Tractors.

48. Inputs or raw materials supplied to solar equipment manufacturers for manufacture of solar equipment or deep cycle-sealed batteries which exclusively use or store solar power as approved from time to time by the Cabinet Secretary for the National Treasury, upon recommendation by the Cabinet Secretary responsible for energy and petroleum.

(b) In Part II by inserting the following new paragraph immediately after paragraph 18—

19. The supply of taxable services in respect of goods in transit.

PART IV—CUSTOMS AND EXCISE

29. Section 117A of the Customs and Excise Act is amended by inserting the following new subsection immediately after subsection (5)—

Amendment of section 117A of Cap.472.

(6) This section shall not apply to goods imported—

(a) for the implementation of an official aid - funded project;

Cap.179 (b) for official use by a diplomatic mission, institution or organization gazetted under the Privileges and Immunities Act; or

(c) by the United Nations or its agencies.

PART V—MISCELLANEOUS

30. Section 6 of the Kenya Revenue Authority Act is amended by deleting subsection (5).

Amendment of section 6 of Cap 469

31. Section 2 of the Competition Act, 2010 is amended by—

Amendment of section 2 of Act No 12 of 2010

2014

- (a) inserting the following new definitions in proper alphabetical sequence –

“agreement” when used in relation to a restricted practice, includes a contract, arrangement or understanding, whether legally enforceable or not;

“concerted practice” means co-operative or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement;

“market power” means the power of a firm to control prices, to exclude competition or to behave to an appreciable extent, independently of its competitors, customers or suppliers;

“unwarranted concentration of economic power” means the existence of cross-directorship between two distinct undertakings or companies producing substantially similar goods or services and whose combined market share is more than forty per cent;

- (b) deleting the definition of the term “undertaking” and substituting therefor the following new definition –

“undertaking” means any business activity intended to be carried on, or carried on, for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or the provision of any service.

32. Section 4 of the Competition Act, 2010 is amended in subsection (2) by deleting the words “defining markets” appearing immediately after the word “in”.

Amendment of section 4 of Act No.12 of 2010.

33. Section 21 of the Competition Act, 2010 is amended–

Amendment of section 21 of No.12 of 2010.

- (a) in subsection (1), by deleting the words “section C of this Part” appearing immediately after the words “the provisions of” and substituting therefor the words “section D of this Part”.

- (b) in subsection (3), by deleting the words “of legal protection” appearing in paragraph (h) and substituting therefor the words “of fair, reasonable and non-discriminatory use”.

34. Section 23 of the Competition Act, 2010 is amended by inserting the following new subsection immediately after subsection (1)–

Amendment of section 23 of No 12 of 2010.

(2) Notwithstanding subsection (1), an undertaking shall also be deemed to be dominant for the purposes of this Act where the undertaking –

- (a) though not dominant, controls at least forty per cent but not more than fifty per cent of the market share unless it can show that it does not have market power; or
- (b) controls less than forty per cent of the market share but has market power.

35. Section 29 of the Competition Act, 2010 is amended by deleting the word “may” appearing in subsection (1) and substituting therefor the word “shall”.

Amendment of section 29 of No 12 of 2010.

36. Section 30 of the Competition Act, 2010 is amended, by—

Amendment of section 30 of No.12 of 2010

- (a) renumbering the existing section as subsection (1);
- (b) inserting the following new subsection immediately after subsection (1)–

(2) The Authority may, with the approval of the Cabinet Secretary, by notice in the Gazette, exclude any category of decisions, practices or agreements by or between undertakings from the application of the provisions this Part.

37. Section 40 of the Competition Act, 2010 is amended in subsection (1) by inserting the words “within thirty days of receiving the Authority’s decision” immediately after the word “Tribunal”.

Amendment of section 40 of No 12 of 2010.

38. The Competition Act, 2010 is amended by inserting the following new section immediately after section 89–

Insertion of section 89A in No.12 of 2010.

Leniency
programme.

89A. (1) The Authority may operate a leniency programme where an undertaking that voluntarily discloses the existence of an agreement or practice that is prohibited under this Act and co-operates with the Authority in the investigation of the agreement or practice, may not be subject to all or part of a fine that could otherwise be imposed under this Act.

(2) The details of the leniency programme under subsection (1) shall be set out in the guidelines of the Authority.

39. Section 2 of the Public Finance Management Act, 2012 is amended by inserting the following definition in proper alphabetical sequence—

Amendment of
section 2 of No.18
2012.

“Government to government loan” means any loan that is negotiated with or covered by any government or national government entity including any government Export Credit Agency (ECA) or investment insurance agency or financial institution that acts as an intermediary between the Government and exporters to facilitate export financing, whether by means of buyer or supplier credit, credit insurance, financial intermediary loans, guarantees, Organization for Economic Co-operation and Development (OECD) tied-aid credit or officially supported export credit depending on the mandate granted to such export credit agency by the relevant government for the purpose of facilitating trade and investment between the two countries.

40. Section 2 of the National Social Security Fund Act, 2013 is amended in subsection (1) by deleting the definition of the word “actuary” and substituting therefor the following new definition—

Amendment of
section 2 of No.
45 of 2013.

“actuary” has the meaning assigned to it in the Retirement Benefits Act, 1997.

(No. 3 of 1997)

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41. The National Social Security Fund Act, 2013 is amended in section 11 by deleting subsection (2) and substituting therefor the following new subsection—

Amendment of section 51 of No. 45 of 2013.

“(2) The quorum for the conduct of meetings of the Board shall be two-thirds of the Trustees, of whom one shall be a representative of employees and one a representative of employers”.

42. Section 51 of National Social Security Fund Act, 2013 is amended by deleting the words “six months” appearing in subsection (2) and substituting therefor the words “three months”.

Amendment of section 51 of No. 45 of 2013.

SCHEDULE (s.23)

NINTH SCHEDULE

TAXATION OF EXTRACTIVE INDUSTRIES

PART I – INTERPRETATION

1. In this Schedule, unless the context otherwise requires—

Interpretation.

“consideration”, in relation to the disposal of an interest in a person, a mining or petroleum right, or mining or petroleum information, means the total amount received or receivable for the disposal, including the fair market value of any amount in kind determined at the time of the disposal;

“contract area” means the area that is the subject of a petroleum agreement and, if any part of that area is relinquished pursuant to the agreement, contract area means the contract area that was originally granted;

“contractor” means a person with whom the Government has concluded a petroleum agreement and includes any successor or assignee of the person;

“cost”, in relation to an interest in a person, a mining or petroleum right, or mining or petroleum information, means the total consideration given for the acquisition of the interest, right, or information, including the fair market value of any amount given in kind determined at the time the amount is given;

“de-commissioning plan” means a plan for the de-commissioning, abandonment, relocating or removal and, if applicable, redeployment of wells, flowlines, pipelines, facilities, infrastructure and assets related to upstream petroleum operations;

“development expenditure” means capital expenditure incurred by a contractor when undertaking operations authorised under a development plan, other than social infrastructure or expenditure to which Part II of the Second Schedule applies, and includes expenditure whenever incurred in acquiring –

- (a) an interest in a petroleum agreement other than an interest referred to in paragraph (a) of the definition of “exploration expenditure”; or
- (b) petroleum information other than information referred to in paragraph (b) of the definition of “exploration expenditure”;

“development plan” means a development plan prepared and adopted under a petroleum agreement;

“disposal”, in—

- (a) relation to an interest in a person, a mining or petroleum right, or mining or petroleum information, means any change in the ownership of the interest, right, or information, including by way of sale, transfer, assignment, or exchange;
- (b) the case of an interest in a person, includes the cancellation or redemption of the interest;

“exploration expenditure” means expenditure incurred by a contractor in undertaking exploration operations authorised under a petroleum agreement, other than social infrastructure expenditure or expenditure to which Part II of the Second Schedule applies, and includes expenditure incurred in acquiring –

- (a) an interest in a petroleum agreement from the Government or under a farm-out agreement; or
- (b) petroleum information relating to exploration operations from the Government or under a farm-out agreement;

“exploration operations” means work authorised under a petroleum agreement in the search for petroleum prior to the approval of a development plan and includes –

- (a) geological, geophysical, and geochemical surveys and analyses;
- (b) aerial mapping;
- (c) investigations of subsurface geology;
- (d) stratigraphic tests;
- (e) the drilling of wells to test a geological feature that has not already been determined to contain producible petroleum sufficient for commercial production; or
- (f) any other work that is necessarily connected with activities described in paragraphs (a) to (e);

“extraction expenditure” means capital expenditure incurred by a licensee when undertaking operations authorised under an extraction right, other than social infrastructure expenditure or expenditure to which Part II of the Second Schedule applies, and includes expenditure whenever incurred in acquiring –

- (a) an interest in a mining right other than an interest referred to in paragraph (a) of the definition of “prospecting expenditure”; or
- (b) mining information other than information referred to in paragraph (b) of the definition of “prospecting expenditure”;
- (c) a right to extract minerals issued or granted under the Mining Act; or
- (d) a right to extract geothermal resources issued or granted under the Geothermal Resources Act;

(Cap 306)

(Cap 314A)

“farm-out agreement” means an agreement to which paragraph 13 applies;

“interest in a person” includes a share or other membership interest in a company, an interest in a partnership or trust, or any other ownership interest in a person;

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“licence area” means the area that is the subject of a mining right;

“licensee” means a person who has been issued with, or granted, a mining right;

“minerals” has the meaning assigned to it in the Mining Act; (Cap. 306)

“mining information” means information relating to mining operations;

“mining operations” means authorised operations undertaken under a mining right;

“mining right” means a prospecting or extraction right;

“person” includes an individual, company, partnership, trust, government, or similar body or association;

“petroleum agreement” has the meaning assigned to it in the Petroleum (Exploration and Production) Act; (Cap. 308)

“Petroleum (Exploration and Production) Act” means the Petroleum (Exploration and Production) Act, or any successor legislation dealing with the exploration, development, production, and transportation of petroleum; (Cap. 308)

“prospecting expenditure” means expenditure incurred in undertaking operations authorised under a prospecting right, other than social infrastructure expenditure or expenditure to which Part II of the Second Schedule applies, and includes expenditure incurred in acquiring –

- (a) an interest in a prospecting right from the Government or under a farm-out agreement; or
- (b) prospecting information from the Government or under a farm-out agreement;

“prospecting information” means mining information relating to the search for minerals under a prospecting right;

“prospecting right” means any of the following –

- (a) a right to prospect for minerals issued or granted under the Mining Act; (Cap. 306)

(b) an authority or right to search for geothermal resources issued or granted under the Geothermal Resources Act;

(Cap 314A)

“social infrastructure expenditure” means capital expenditure incurred by a licensee or contractor on the construction of a public school, hospital, road, or any similar social infrastructure;

“subcontractor” means a person supplying services other than a person supplying services as an employee to –

- (a) a licensee in respect of mining operations undertaken by the licensee; or
- (b) a contractor in respect of petroleum operations undertaken by the contractor;

“underlying ownership”, in relation to a person, means an interest in the person held directly, or indirectly through an interposed person or persons, by an individual or by a person not ultimately owned by the individuals.

(2) Unless the context otherwise requires, any term that is not defined in this Act but is defined in the Mining Act, Geothermal Resources Act or Petroleum (Exploration and Production) Act, has the meaning assigned in the Mining Act, Geothermal Resources Act or Petroleum (Exploration and Production) Act, as the case may be.

(3) Where more than one person has signed a petroleum agreement, each person shall be considered as a contractor for the purposes of this Schedule.

(4) In case of a deduction on social infrastructure expenditure, section 15(2)(x) shall apply.

PART II—MINING OPERATIONS

2.(1) A licensee is subject to tax in accordance with this Act but subject to the modifications in this Schedule.

Taxation of
licenses.

(2) Where there is any inconsistency between this Schedule and any other provision of this Act regarding the taxation of a licensee, this Schedule shall prevail.

(3) The corporate rate specified under paragraph 2 of Head B of the Third Schedule shall be the rate of income tax applicable to a licensee that is a company.

3.(1) Subject to subparagraph (5), a deduction for expenditure to the extent incurred by a licensee when undertaking mining operations in a licence area during a year of income shall only be allowed against the income derived by the licensee from the mining operations in the licence area during that year.

(2) If a licensee suffers a loss in respect of mining operations in a licence area for a year of income, the amount of the loss shall be carried forward and allowed as a deduction against the income of the licensee derived from mining operations in the licence area in the next following year of income of the licensee.

(3) The amount of a loss for a year of income that is not deducted under subparagraph (2) shall be carried forward by the licensee to the next following year of income and be deductible in that year in accordance with subparagraph (2), and so on until the loss is fully deducted or the mining operations in the licence area cease.

(4) If a licensee has carried forward a loss for a licence area under subparagraph (2) for more than one year of income, the loss of the earliest year of income shall be allowed as a deduction first.

(5) If –

- (a) a licensee has ceased mining operations under a mining right in a licence area; and
- (b) the licensee suffers a loss in relation to the mining operations under the mining right in the licence area for a year of income that has not been deducted under subparagraph (2),

the licensee may elect, by notice in writing to the Commissioner, to treat the loss as a loss under subparagraph (2) in relation to another licence area in which the licensee undertakes mining operations if the area covered by the second-mentioned licence area falls wholly within the area covered by the first-mentioned licence area.

(6) If –

- (a) a licensee has ceased mining operations under a mining right in a licence area during a year of income and has a loss in relation to the mining operations under the mining right in the licence area for that year; and
- (b) subparagraph (5) does not apply to the licensee in respect of the ceased mining operations,

the licensee may elect, by notice in writing to the Commissioner, to treat the loss as a loss in relation to the mining operations undertaken by the licensee in the licence area in the previous year of income.

(7) The amount of a loss for a year of income that is not deducted under subparagraph (6) may be carried back for not more than three years of income from the year in which the loss arose.

(8) A licensee has a loss in relation to mining operations in a licence area for a year of income if the total deductions of a licensee in respect of mining operations undertaken by the licensee in the licence area during the year exceed the total amount of income derived from such operations in the area for the year.

4. (1) A licensee shall be allowed a deduction for prospecting expenditure in the year of income in which the licensee incurred the expenditure.

Prospecting
expenditure.

- (2) Subject to paragraph 13, if a licensee –
 - (a) disposes of an interest in a mining right or information the cost of which was deducted as prospecting expenditure under subparagraph (1); or
 - (b) otherwise recovers or recoups an amount deducted as prospecting expenditure under subparagraph (1),

the consideration for the disposal, or the amount recovered or recouped, is income of the licensee charged to tax under section 3(2)(a)(i) in the year of income in which the interest is disposed of or the amount is otherwise recovered or recouped.

(3) For the purposes of Part II of the Second Schedule, the rate of depreciation for machinery first used to undertake operations under a prospecting right is one hundred per cent.

5.(1) Subject to subparagraphs (2) and (3), a licensee shall be allowed a deduction for extraction expenditure in the year of income in which the licensee incurred the expenditure and in the following years of income until the expenditure has been fully deducted and the deduction for each year of income is twenty per cent of the amount of the expenditure.

Extraction
expenditure

(2) If a licensee incurs extraction expenditure before the commencement of commercial production, subparagraph (1) shall apply on the basis that the expenditure was incurred at the commencement of commercial production.

(3) The amount of the deduction allowed under subparagraph (1) for the year of income in which the commencement of commercial production occurs is computed according to the following formula—

$$A \times B/C$$

where: -

A is the amount of the expenditure;

B is the number of days in the period beginning on the date of commencement of commercial production and ending on the last day of the year of income in which commercial production commenced; and

C is the number of days in the year of income in which commercial production commenced.

(4) The total deductions allowed to a licensee under this paragraph for extraction expenditure for the current year of income and all previous years of income shall not exceed the amount of the expenditure.

(5) Subject to paragraph 13, if a licensee disposes of an interest in a mining right or information the cost of which was deducted as extraction expenditure under subparagraph (1) during a year of income, no deduction shall be allowed for the extraction expenditure for that year and—

- (a) if the consideration for the disposal exceeds the written down value of the interest or information at the time of disposal, the amount of the excess is income of the licensee charged to tax under section 3(2)(a)(i) in the year of income in which the disposal occurred; or
- (b) if the written down value of the interest or information at the time of disposal exceeds the consideration for the disposal, the licensee shall be allowed a deduction for the amount of the excess in the year of income in which the disposal occurred.

(6) Except where subparagraph (5) applies, if a licensee recovers or recoups an amount deducted as extraction expenditure under subparagraph (1), the amount recovered or recouped shall be income of the licensee charged to tax under section 3(2)(a)(i) in the year of income in which the amount is recovered or recouped.

(7) In this paragraph –

“commencement of commercial production” means the first period of thirty consecutive days during which the average level of production on the twenty five highest production days in the thirty-day period reaches such production level as may be determined by the Cabinet Secretary responsible for mining; and

“written down value”, in relation to an interest in a mining right or information of a licensee, means the cost of the right or information reduced by the deductions allowed to the licensee in respect of the right or information under this paragraph.

6. (1) A contribution made by a licensee to a rehabilitation fund in accordance with an approved rehabilitation plan relating the licensee’s mining operations shall be allowed as a deduction for the year of income in which the contribution was made.

Rehabilitation
expenditure.

(2) An expenditure incurred by a licensee in carrying out work required by an approved rehabilitation plan in respect of the licensee's mining operations shall be allowed as a deduction for the year of income in which the expenditure is incurred:

Provided that the work is not paid for, directly or indirectly, from money made available out of the licensee's rehabilitation fund for the licensee's mining operations.

(3) An amount accumulated in or withdrawn from a rehabilitation fund to meet expenditure incurred under an approved rehabilitation plan shall be exempt from tax.

(4) Subject to subparagraph (5), an amount withdrawn from a rehabilitation fund and returned to the licensee shall be considered as income of the licensee and shall be charged to tax under section 3(2)(a)(i) in the year of income in which the amount was returned to the licensee.

(5) Any surplus in a rehabilitation fund of a licensee at the time of completion of rehabilitation shall be considered as income of the licensee and shall be charged to tax under section 3(2)(a)(i) in the year of income in which rehabilitation is completed.

(6) In this paragraph –

“approved rehabilitation plan” means a plan for the rehabilitation of a mine site approved by the Cabinet Secretary responsible for mining; and

“rehabilitation fund” means a fund or account required to be established under a mining right to provide for the future payment of remedial work to the licence area covered by the mining right and is managed jointly by the Cabinet Secretary responsible for mining and the licensee.

PART III – PETROLEUM OPERATIONS

7.(1) A contractor is subject to tax in accordance with this Act but subject to the modifications in this Schedule.

Taxation of
contractors.

(2) If there is any inconsistency between this Schedule and any other provision the Act, in relation to the taxation of a contractor, this Schedule shall prevail.

(3) The rate of income tax applicable to a contractor is—

- (a) in the case of a resident company, thirty per cent; or
- (b) in the case of a non-resident company, thirty seven and a half per cent.

8.(1) A deduction for expenditure to the extent incurred by a contractor in undertaking petroleum operations in a contract area during a year of income shall be allowed only against the income derived by the contractor from the petroleum operations in the contract area during the year.

Limitation of deductions relating to petroleum operations.

(2) If a contractor suffers a loss in respect of petroleum operations in a contract area for a year of income, the amount of the loss shall be carried forward and allowed as a deduction against the income of the contractor derived from petroleum operations in the contract area in the next following year of income of the contractor.

(3) The amount of a loss for a year of income that is not deducted under subparagraph (2) shall be carried forward by the contractor to the next following year of income and be deductible in that year in accordance with subparagraph (2), and so on until the loss is fully deducted or the petroleum operations in the contract area cease

(4) If a contractor suffers a loss carried forward for a contract area under subparagraph (2) for more than one year of income, the loss of the earliest year of income shall be allowed as a deduction first.

(5) If a contractor has ceased petroleum operations under a petroleum agreement in a contract area during a year of income and the contractor has a loss in relation to the petroleum operations under the petroleum agreement in the contract area for that year the contractor may elect, by notice in writing to the Commissioner, to treat the loss as a loss in relation to the petroleum operations undertaken by the contractor in the contract area in the previous year of income.

(6) The amount of a loss for a year of income that is not deducted under subparagraph (5) may be carried back for not more than three years of income from the year in which the loss arose.

(7) A contractor suffers a loss in relation to petroleum operations in a contract area for a year of income if the total deductions of a contractor in respect of petroleum operations undertaken by the contractor in the contract area during the year exceed the total amount of income derived from such operations in the area for the year.

9.(1) A contractor shall be allowed a deduction for exploration expenditure in the year of income in which the contractor incurred the expenditure.

Exploration
expenditure

(2) Subject to paragraph 13, if a contractor—

- (a) disposes of an interest in a petroleum agreement or information the cost of which was deducted as exploration expenditure under subparagraph (1); or
- (b) otherwise recovers or recoups an amount deducted as exploration expenditure under subparagraph (1),

the consideration for the disposal, or the amount recovered or recouped, shall be considered as income of the contractor and be charged to tax under section 3(2)(a)(i) in the year of income in which the interest is disposed of or the amount is otherwise recovered or recouped.

(3) For the purposes of Part II of the Second Schedule, the rate of depreciation for machinery first used to undertake exploration operations shall one hundred per cent.

10.(1) Subject to subparagraphs (2) and (3), a contractor shall be allowed a deduction for development expenditure in the year of income in which the contractor incurred the expenditure and in following years of income until the expenditure has been fully deducted and the deduction for each year of income shall be twenty per cent of the amount of the expenditure.

Development
expenditure.

(2) If a contractor incurs development expenditure before the commencement of commercial production, subparagraph (1) shall apply on the basis that the expenditure was incurred at the time of commencement of commercial production.

(3) The amount of the deduction allowed under subparagraph (1) for the year of income in which commencement of commercial production occurs shall be computed according to the following formula:

$$A \times B/C$$

where—

A is the amount of the expenditure;

B is the number of days in the period beginning on the date of commencement of commercial production and ending on the last day of the year of income in which commercial production commenced; and

C is the number of days in the year of income in which commercial production commenced.

(4) The total deductions allowed to a contractor under this paragraph for development expenditure for the current year of income and all previous years of income shall not exceed the amount of the expenditure.

(5) Subject to paragraph 15, if a contractor disposes of an interest in a petroleum agreement or information the cost of which was deducted as development expenditure under subparagraph (1) during a year of income, no deduction shall be allowed for the development expenditure for that year and –

- (a) the consideration for the disposal exceeds the written down value of the interest or information at the time of disposal, the amount of the excess shall be considered income of the contractor charged to tax under section 3(2)(a)(i) in the year of income in which the disposal occurred; or
- (b) the written down value of the interest or information at the time of disposal exceeds the consideration for the disposal, the contractor shall be allowed a deduction for the amount of the excess in the year of income in which the disposal occurred.

(6) Except where subparagraph (5) applies, if a contractor recovers or recoups an amount deducted as development expenditure under subparagraph (1), the amount recovered or recouped shall be considered income of the contractor charged to tax under section 3(2)(a)(i) in the year of income in which the amount is recovered or recouped.

(7) In this paragraph –

“commencement of commercial production” means the first day of commercial production as determined under the petroleum agreement; and

“written down value”, in relation to an interest in a petroleum agreement or information of a contractor, means the acquisition cost of the interest or information reduced by the deductions allowed to the contractor in respect of the interest or information under this paragraph.

11.(1) A contractor shall be allowed a deduction for the amount that the contractor transfers to a an escrow account during a year of income as required under an approved decommissioning plan for a contract area made under a petroleum agreement to finance expenditure expected to be incurred by the contractor in the abandonment and decommissioning of petroleum operations undertaken under the petroleum agreement.

Decommissioning expenditure.

(2) Subject to subparagraph (3), a contractor shall be allowed a deduction for expenditure incurred by the contractor under an approved decommissioning plan in the abandonment and decommissioning of petroleum operations in a contract area.

(3) A deduction shall not be allowed under subparagraph (2) for expenditure incurred in the abandonment and decommissioning of petroleum operations in a contract area if the expenditure is paid for, directly or indirectly, from money made available out of the escrow account established under the decommissioning plan for the contract area to finance such expenditure.

(4) An amount accumulated in an escrow account, or an amount withdrawn from an escrow account to meet expenditure incurred under an approved decommissioning plan for a contract area, shall be exempt from tax.

(5) An amount withdrawn from the escrow account and returned to the contractor shall be considered income of the contractor charged to tax under section 3(2)(a)(i) in the year of income in which the amount was returned to the contractor.

(6) Any surplus in an escrow account established under an approved decommissioning plan for a contract area by a contractor at the time of completion of decommissioning of the contract area to which the account relates is included in the income of the contractor for the year of income in which decommissioning is completed.

(7) In this section –

“approved decommissioning plan” has the meaning assigned to it under the Petroleum (Exploration and Production) Act

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12.(1) This paragraph shall apply where the portion of profit oil and gas that the Government is entitled to take and receive under a petroleum agreement is inclusive of taxes payable by the contractor under this Act.

Paid-on-behalf.

(2) For the avoidance of doubt, where this paragraph applies, the portion of profit oil and gas that the Government is entitled to take and receive under a petroleum agreement with a contractor shall be inclusive only of the taxes payable by the contractor under this Act directly in relation to the petroleum operations undertaken by the contractor and shall exclude –

- (a) the tax payable on any gain made by the contractor or any other person on a disposal, directly or indirectly, of an interest in the petroleum agreement; or
- (b) any tax that the contractor is liable under the Act to deduct from a payment made by the contractor.

PART IV—COMMON RULES APPLICABLE TO MINING AND PETROLEUM OPERATION

13. (1) This paragraph shall apply where –

Farm-outs

- (a) a licensee or contractor has entered into an agreement (referred to as a “farm-out agreement”) with a person (referred to as the “transferee”) for the transfer of an interest in a mining right or petroleum agreement; and
- (b) the consideration given by the transferee for the interest wholly or partly includes the transferee undertaking some or all of the work commitments of the licensee or contractor under the right or agreement.

(2) If this paragraph applies, and the transfer of the interest occurs at the time the farm-out agreement is entered into, the consideration received by the licensee or contractor for the interest shall not include the value of any work undertaken by the transferee on behalf of the licensee or contractor.

(3) If this paragraph applies and the transfer of the interest is deferred until the transferee completes some or all of the work commitments of the licensee or contractor under the mining right or petroleum agreement –

- (a) any amount in money payable under the farm-out agreement before the transfer of the interest shall be included in the income of the contractor charged to tax under section 3(2)(a)(i) in the year of income in which the amount is payable; and
- (b) the value of any work undertaken by the transferee on behalf of the licensee or contractor shall be excluded in –
 - (i) the consideration received by the licensee or contractor for the transfer of the interest; or
 - (ii) the income of the contractor charged to tax under this Act.

(4) If an interest referred to in subparagraph (3) is subsequently transferred, the consideration received by the licensee or contractor shall not include any amount included in the income of the licensee or contractor charged to tax under subparagraph (3)(a).

14.(1) A licensee or a contractor shall immediately notify the Commissioner, in writing, if there is a ten per cent or more change in the underlying ownership of a licensee or contractor.

Indirect transfers of interest

(2) If the person disposing of the interest to which the notice under subparagraph (1) relates is a non-resident person, the licensee or contractor shall be liable, as agent of the non-resident person, for any tax payable under this Act by the non-resident person in respect of the disposal.

15.(1) Subject to subparagraph (3), a non-resident subcontractor who derives a fee for the provision of services (referred to in this paragraph as a “services fee”) to a licensee or contractor in respect of mining or petroleum operations shall be liable to pay non-resident withholding tax at the rate specified in subparagraph (2) on the gross amount of the services fee.

Taxation of subcontractors.

(2) The rate of withholding tax under subparagraph (1) is—

- (a) for a service fee paid by a contractor, 5.625%; or
- (b) for a service fee paid by a licensee, twenty per cent.

(3) Subparagraph (1) shall not apply if the subcontractor provides the services giving rise to the fee through a permanent establishment in Kenya.

(4) A services fee to which subparagraph (3) applies shall be deemed to be income that accrued in or was derived from Kenya for the purposes of section 3 and be assessed to the subcontractor under section 44.

(5) A licensee or contractor paying a services fee to a non-resident subcontractor that is subject to non-resident withholding tax under subparagraph (1) shall deduct tax from the gross amount paid at the rate specified in subparagraph (2).

(6) A licensee or contractor to whom subparagraph (5) applies shall deduct the withholding tax at the earlier of—

- (a) the time the licensee or contractor credits the services fee to the account of the non-resident subcontractor; or

(b) the time the fee is actually paid.

(7) Section 35(5) and (6) shall apply to non-resident withholding tax that a licensee or contractor is required to deduct under subparagraph (5) on the basis that the tax is tax deducted under section 35(1).

(8) Non-resident withholding tax imposed under subparagraph (1) shall be a final tax on the services fee and shall not be included in the calculation of the total income of the subcontractor.

(9) In this section, “non-resident subcontractor” means a subcontractor that is not a resident and includes a subcontractor that is a foreign government or foreign government body.

16. The rate of withholding tax to be deducted by a contractor under section 35(1) is—

Deduction of withholding tax by contractor.

- (a) in the case of dividends, ten per cent of the gross amount of the dividend payable;
- (b) in the case of interest, fifteen per cent of the gross amount of the interest payable;
- (c) in the case of royalties or a natural resource income twenty per cent of the gross amount of the royalty payable or natural resource income; or
- (d) in the case of management or professional fees, twelve and a half per cent of the gross amount of the management or professional fee payable.

17. An amount that is by virtue of this Schedule charged to tax under section 3(2) (a) (i) shall be deemed to be income that accrued in or was derived from Kenya.

Source of income.

18. Section 16(2)(j)(i) applies to a contractor or licensee on the basis that the reference to “three” is treated as a reference to “two”.

Deductibility of interest.

19.(1) Subject to subparagraph (2), hedging transactions entered into by a licensee or contractor shall be treated as a specified source of income for the purposes of section 15(7).

Hedging transactions.

(2) Subparagraph (1) does not apply to an approved hedging transaction entered into by a licensee or contractor that has an annual turnover of less than ten million shillings as required to obtain project finance and approved by the Commissioner.

(3) In this paragraph, “hedging transaction” means a transaction entered into by a licensee or contractor to manage commodity price risk.

