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SENATE BILLS, 2024

NAIROBI, 31st May, 2024

CONTENT

Bill for Introduction into the Senate—

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THE RETIREMENT BENEFITS LAWS (AMENDMENT) BILL, 2024

A Bill for

AN ACT of Parliament to amend various statutes to facilitate the collection of unremitted contributions by the Kenya Revenue Authority; and for connected matters.

ENACTED by the Parliament of Kenya, as follows—

Short title.

1. This Act may be cited as the Retirement Benefits Laws (Amendment) Act, 2024.

Amendment of section 2 of Cap. 197.

2. The Retirements Benefits Act is amended in section 2 by inserting the following new definitions in their proper alphabetical sequence—

"agency notice" means the notice issued under this Act to a person to remit contributions on behalf of an employer;

"Commissioner" means a commissioner appointed under section 13 of the Kenya Revenue Authority Act.

Amendment of section 53B (7) of Cap. 197.

3. Section 53B of the Retirements Benefits Act is amended by deleting subsection (7) and substituting therefore the following new subsection —

(7) (a) In this section, the expression "Third Party" refers to a person who—

(i) owes or may subsequently owe money to the employer;

(ii) holds or may subsequently hold money, for or on account of the employer;

(iii) holds or may subsequently hold money on account of some other person for payment to the employer; or

(iv) has authority from some other person to pay money to the employer.

(b) Where an employer fails to comply with the notice issued under subsection (6), the Commissioner shall by an agency notice in writing, require a Third Party, to pay the amount specified in the agency notice to the Commissioner being an amount that shall not exceed the amount of the unremitted contributions, interests, and penalties.

(c) The Commissioner shall serve the employer with a copy of the agency notice at the time of service upon the Third Party.

(d) A Third Party shall pay the amount specified in the agency notice by the date specified in the notice, being a date that does not occur before the date that the amount owed by the Third Party to the employer becomes due to the employer or is held on the employer's behalf.

(e) This section shall apply to a joint account where—

(i) all the holders of the joint account have unremitted contributions; or

(ii) the employer can withdraw the funds from their accounts without the signature or authorisation of the other account holders.

(f) When a Third Party fails to comply with the agency notice by reason of lack of money held by the Third Party on behalf of, or due by the Third Party to an employer, the person shall notify the

Commissioner in writing within fourteen days of receiving the notice setting out the reasons for the Third Party's inability to comply with the agency notice.

(g) When the Commissioner is satisfied that the Third Party is unable to pay the amount due under section 53B (1), the Commissioner shall within a period of thirty days in writing to the Third Party—

(i) accept the notification and cancel or amend the agency notice.; or

(ii) reject the notification.

(h) Where the employer pays the whole or part of the contributions due, or has made an arrangement satisfactory to the Commissioner for the payment of the contributions, the Commissioner shall notify the Third Party, in writing, of a revocation or amendment of an agency notice given under paragraph (b).

(i) A payment made by a Third Party to the Commissioner in accordance with an agency notice issued under this section shall be treated as having been made on behalf of the employer and shall discharge the Third Party of any liability through the employer or any other person.

(j) The Commissioner may require in writing any person, within a period of at least thirty days to provide a return to the Commissioner showing any monies which may be held by that person for an employer referred to in this subsection or monies held by that person which are due to an employer referred to in this subsection.

(k) A Third Party who without reasonable cause fails to comply with an agency notice or any other requirement by the Commissioner under this section shall be personally liable for the amount specified in the agency notice or requirement.

(l) The Commissioner shall remit the funds paid by a Third Party to the Scheme within thirty days of receipt of the funds.

Amendment of Cap. 412A.

4. Section 149 of the Public Finance Management Act is amended in subsection (2) by inserting a new paragraph immediately after paragraph (l)—

(la) comply with any tax, levy, duty, pension, and audit commitments as may be provided for by legislation.

Amendment of the First Schedule of Cap. 469.

5. The Kenya Revenue Authority Act is amended in the First Schedule by inserting the following new paragraph in Part II—

16. The Retirement Benefits Authority Act (Cap. 197).

MEMORANDUM OF OBJECTS AND REASONS

Statement of the Objects and Reasons for the Bill

The main object of the Bill is to amend section 53B (7) of the Retirement Benefits Act, Cap 197 to clarify how the Kenya Revenue Authority, once appointed by retirement benefit schemes as a collecting agent in respect of unremitted pension contributions, is to go about issuing agency notices and recovering the unremitted contributions on the schemes' behalf. This amendment is necessitated by the current situation whereby county governments owe billions to retirement benefit schemes, with most of the debt being attributed to failure to remit contributions, as well as accrued interest and penalties. This high level of debt threatens the well-being of persons retiring from the service of county governments.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill does not delegate any legislative powers and it does not limit any fundamental rights or freedoms.

Statement on how the Bill concerns county governments

County governments are among the largest public sector employers and pension contributors in Kenya. It seeks to ensure that counties meet their pension obligations, and is therefore a Bill concerning counties within the meaning of Article 110 of the Constitution.

Statement that the Bill is not a money Bill within the meaning of Article 114 of the Constitution

The Bill is not a money Bill within the meaning of Article 114 of the Constitution.

Dated the 3rd April, 2024.

GODFREY OSOTSI,
Chairperson, Select Committee on
County Public Investments and Special Funds.

Section 2 of Cap. 197, which it is proposed to amend –

2. Interpretation

In this Act, unless the context otherwise requires—

“actuary” means a person who is a Fellow of the Institute of Actuaries in England, or the Faculty of Actuaries in Scotland, or the Canadian Institute of Actuaries, or the Society of Actuaries of the United States of America or the Institute of Actuaries of Japan or the Institute of Actuaries of Australia or a person holding such equivalent qualification as the Board may, by notice in the Gazette, prescribe;

“administrator” means a person appointed by trustees to administer a scheme in accordance with such terms and conditions of service as may be specified in the instrument of appointment;

“authority” means the Retirement Benefits Authority established by section 3;

“Board” means the Board of Directors of the Authority constituted under section 6;

“Chief Executive Officer” means the Chief Executive Officer of the Authority appointed under section 11;

"corporate trustee" means a limited liability company incorporated under the Companies Act, 2015 (No.17 of 2015), which is, for the time being, empowered under any written law, its charter, memorandum of association, deed of settlement or other instrument constituting it or defining its powers to mainly undertake trusts, and includes a trust corporation;

“custodian” means a company whose business includes taking responsibility for the safe custody of the funds, securities, financial instruments and documents of title of the assets of scheme funds;

“financial year”—

(a) in relation to the Authority, has the meaning assigned to it in section 19;

(b) in relation to a scheme, means such accounting period as may be prescribed in the scheme rules;

“Fund” means the Retirement Benefits Authority Fund established by section 17;

“Levy” means the Retirement Benefits Levy to be imposed under section 16;

"manager" means a company whose business includes—

(i) undertaking, pursuant to a contract or other arrangement, the management of the funds and other assets of a scheme fund for purposes of investment;

(ii) providing consultancy services on the investment of scheme funds; or

(iii) reporting or disseminating information concerning the assets available for investment of scheme funds;

"member" means a member of a retirement benefits scheme and includes a person entitled to or receiving a benefit under a retirement benefits scheme;

"Minister" means the Minister for the time being responsible for matters relating to Finance;

"pooled fund" means a fund established by a limited liability company, other than an approved issuer, for purposes of pooling scheme funds for collective investment;

"post-retirement medical fund" means a fund established under this Act into which contributions are made and from which costs of medical benefits can be met in accordance with the medical fund rules;

"retirement benefits scheme" means any scheme or arrangement (other than a contract for life assurance) whether established by a written law for the time being in force or by any other instrument, under which persons are entitled to benefits in the form of payments or post-retirement medical cover determined by age, length of service, amount of earnings or otherwise and payable primarily upon retirement, or upon death, termination of service, or upon the occurrence of such other event as may be specified in such written law or other instrument;

"scheme" means a retirement benefits scheme;

"scheme fund" means the retirement benefits scheme fund to be established pursuant to the provisions of section 32;

"scheme rules" means the rules specifically governing the constitution and administration of a particular scheme;

"sponsor" means a person who establishes a scheme;

"statutory fund" has the meaning assigned to it in section 2 of the Insurance Act (Cap. 487);

"Tribunal" means the Appeals Tribunal established under section 48;

"trust corporation" means a company incorporated under the Companies Act (Cap. 486) having a subscribed capital of not less than ten million shillings and which is for the time being empowered (by or under any written law, its charter, memorandum of association, deed of settlement or other instrument constituting it or defining its powers) to undertake trusts:

Provided that such company does not, by any prospectus, circular, advertisements, or other documents issued by it or on its behalf, state or hold out that any liability attaches to the Public Trustee or to the Consolidated Fund in respect of any act or omission of the company when acting as an executor or administrator;

"trustee" means a trustee of a scheme fund and includes a trust corporation.

Section 53B of Cap. 197, which it is proposed to amend—

53B. Powers to recover unremitted contributions

(1) Notwithstanding the provisions stated under section 53A, where there is non-remittance of the contribution by the employer, the Authority shall —

(a) require the employer to —

(i) pay the contributions and interest accrued to the scheme in full within the period specified in the notice and a penalty of five per cent of unremitted contributions or twenty thousand shillings whichever is higher, payable to the Authority within seven days of receipt of the notice;

(ii) pay the penalty specified in paragraph (a)(i) and submit to the Authority for approval a remedial plan providing the period within which the accumulated contributions and interest thereon shall be offset; or

(iii) immediately cease further deductions from employees' emoluments and notify all the members of the scheme of the cessation: Provided that —

(b) initiate the process of winding up the scheme and facilitate members to join individual schemes where their contributions shall be remitted.

(2) Where an employer has failed to remit contributions, the Trustees may with the approval of the Authority, appoint the Kenya Revenue Authority, as an agent, to collect unremitted contributions, interests, and penalties.

(3) Subject to subsection (2), the Trustees shall in writing request the Authority for approval and shall demonstrate that they have taken all reasonable effort to recover unremitted contributions from a defaulting employer without any success.

(4) The Authority shall either approve or reject the request in writing within twenty-one days from the date of receipt of the request.

(5) Despite subsection (2), where the Authority is of the opinion that the Trustees have failed or have not made reasonable effort to recover the unremitted contributions, interests and penalties, the Authority shall give notice to the Trustees instructing them to appoint the Kenya Revenue Authority as an agent to recover the unremitted contributions, interests and penalties.

(6) Upon appointment under subsection (2) or (5), the Kenya Revenue Authority shall issue a twenty-one-day notice in writing to the defaulting employer requiring it to remit the unremitted contributions, interests, penalties and recovery costs.

(7) Where an employer fails to comply with the notice, the Kenya Revenue Authority shall—

(a) serve such employer and the employers bank with an agency notice;

(b) attach the bank accounts of the defaulting employer; and

(c) remit the attached funds to the Scheme, within thirty days.

(8) The cost of the recovery of unremitted contributions shall be borne by the defaulting employer.

Section 149 of Cap. 412A, which it is proposed to amend—

149. Responsibilities of accounting officers designated for county government entities

(1) An accounting officer is accountable to the county assembly for ensuring that the resources of the entity for which the officer is designated are used in a way that is—

(a) lawful and authorised; and

(b) effective, efficient, economical and transparent.

(2) In carrying out a responsibility imposed by subsection (1), an accounting officer shall, in respect of the entity concerned—

(a) ensure that all expenditure made by the entity complies with subsection (1);

(b) ensure that the entity keeps financial and accounting records that comply with this Act;

(c) ensure that all financial and accounting records that the entity keeps in any form including in electronic form are adequately protected and backed up;

(d) ensure that all contracts entered into by the entity are lawful and are complied with;

(e) ensure that all applicable accounting procedures are followed when acquiring or disposing of goods and services and that, in the case of goods, adequate arrangements are made for their custody, safe guarding and maintenance;

(f) bring a matter to the attention of the County Executive Committee member responsible for the entity if, in the accounting officer's opinion a decision or policy or proposed decision or policy of the entity may result in resources being used in a way that is contrary to subsection (1);

(g) prepare a strategic plan for the entity in conformity with the medium term fiscal framework and financial objectives of the county government;

(h) prepare estimates of expenditure of the entity in conformity with the strategic plan referred to in paragraph (g);

(i) submit the estimates of an entity, which is not a county corporation, to the County Executive Committee member for finance;

(j) submit the estimates of an entity, which is a county corporation, to the executive committee member responsible for the entity who, after approving it, shall forward it to the County Executive Committee member for finance;

(k) not later than three months after the end of each financial year, prepare annual financial statements for that financial year and submit them to the Auditor-General for audit, with a copy to the County Treasury;

(l) try to resolve any issues resulting from an audit that remain outstanding;

(m) manage the assets of the entity to ensure that it receives value for money when acquiring, using or disposing of its assets;

(n) dispose of assets at the most competitive price and at the lowest possible cost ensuring that the proceeds from all asset disposals are deposited in a bank account of the entity;

(o) ensure that the respective county government entity has adequate systems and processes in place to plan for, procure, account for, maintain, store and dispose of assets, including an asset register that is current, accurate and available to the relevant County Treasury or the Auditor-General;

(p) provide the County Treasury with any information it requires to fulfil its functions under this Act;

(q) provide information on any frauds, losses, or any violations of subsection (1) and provide explanations for the actions taken to prevent similar conduct in future; and

(r) carry out such other responsibilities as may be specified in regulations by the County Executive Committee member for finance.

(3) Not later than three months after the county assembly has adopted a report by a committee of the county assembly with respect to a report submitted by the Controller of Budget under Article 228(6) of the Constitution, an accounting officer shall, for each entity for which the officer is designated—

(a) prepare a report on actions taken by the entity to implement any recommendations made in the committee's report as adopted by the county assembly; and

(b) submit the report to the county assembly with a copy to the County Treasury.

(4) Not later than one month after receiving a report by an accounting officer under subsection (3), the County Treasury shall submit to the county assembly the accounting officer's report and any comments on the report by the County Treasury.

(5) The report referred to in subsection (3) shall be published and publicised.

Second Schedule of Cap. 469, which it is proposed to amend—

FIRST SCHEDULE

[s. 2 & 5]

WRITTEN LAWS RELATING TO REVENUE

PART I

1. The Income Tax Act (Cap. 470).
2. The Customs and Excise Act (Cap. 472).
3. The Value Added Tax Act (Cap. 476).
4. The Road Maintenance Levy Fund Act, 1993 (No. 9 of 1993).
5. The Air Passenger Service Charge Act (Cap. 475).
6. The Entertainment Tax Act (Cap. 479).
7. The East African Community Customs Management Act, 2004.
8. The Annexes to the Protocol on the Establishment of the East African Community Customs Union.
9. Value Added Tax Act, 2013.
10. Excise Duty Act, 2015.
11. Tax Procedures Act, 2015.
12. Miscellaneous Fees and Levies Act, 2016.
13. The Alcoholic Drinks Act, 2010.

PART II

1. The Traffic Act (Cap. 403).
2. The Transport Licensing Act (Cap. 404).
3. The Second-Hand Motor Vehicles Purchase Tax Act (Cap. 484).
4. The Civil Aviation Act (Cap. 394).
5. The Widows' and Children's Pensions Act (Cap. 195).
6. The Parliamentary Pensions Act (Cap. 196).
7. The Betting, Lotteries and Gaming Act (Cap. 131).
8. The Stamp Duty Act (Cap. 480).
9. The Horticultural Crops Development Authority (Imposition of Fees and Charges) Order, 1995 (L.N. 225 of 1995).

10. The Standards Levy Order, 1990 (L.N. 267 of 1990).
11. The Industrial Training Act (Cap. 237).
12. The Government Lands Act (Cap. 280).
13. The Sugar Act (No. 10 of 2001).
14. The National Social Security Fund Act, 2013.
15. Public Finance Management Act, 2012.

PART III

[Section 25.]

1. The Income Tax Act (Cap. 470).
2. The Customs and Excise Act (Cap. 472).
3. The Value Added Tax Act (Cap. 476).
4. The Entertainment Tax Act (Cap. 479).
5. The East African Community Customs Management Act, 2004.
6. The Annexes to the Protocol on the Establishment of the East African Community Customs Union.

The Sugar (Imposition of Levy) Order, 2002 (L.N. 385/2002).