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23 May 2025

Departmental Committee on Finance & National Planning

THROUGH:

Office of the Clerk of the National Assembly

P. O. Box 41842 – 00100

Main Parliament Buildings

NAIROBI, KENYA

Att: Jeremiah W. Ndombi

cna@parliament.go.ke

Dear Sir,

RE: ERNST & YOUNG LLP (EY) SUBMISSIONS ON THE FINANCE BILL, 2025

We refer to the above captioned matter.

Following the release of the Finance Bill, 2025 and the call for public participation on 15th May 2025, we hereby submit our proposed amendments to the various clauses in the Bill to be considered in the legislative review process, as part of our civic duty.

Our submissions are based on our observations, discussions with various stakeholders and the general everchanging economic environment affecting taxpayers. These have been addressed per tax head for ease of reference.

We believe our submissions will contribute to a conducive business environment for both local and foreign investors as well as cushion individuals from adverse effect of the economic environment. Therefore, we hope that the same will be considered by the respective committee.

Should you require further clarifications on the matters detailed below, please do not hesitate to contact the undersigned or Brian Waruru (brian.waruru@ke.ey.com), Seraphine Anamanjia (seraphine.anamanjia@ke.ey.com), Alice Chuchu (alice.chuchu@ke.ey.com) Lynn Warugu (lynn.warugu@ke.ey.com).

Yours Sincerely,



Francis Kamau
Tax Partner

Submissions on the Finance Bill 2025

Income Tax Act				
No.	Paragraph of the Bill & Section in the respective Act	Proposal in the Bill	EY's submission/recommendation	Justification
1.	Definition of Royalty <i>Paragraph 2(a)(iii) of the FB, 2025 (Section 2 of the Income Tax Act)</i>	<p>The bill seeks to expand the definition of the term royalty to include distribution of software where regular payments are made for the use of the software through the distributor.</p>	<p>We propose that this amendment to be struck out in entirety.</p>	<p>We recommend that the definition of “royalty” should follow international best practice and the OECD definition where the right-based approach is used.</p> <p>Under the right-based approach, only payment for the right of use, right to use and copyrights qualify as royalties.</p> <p>The proposed expansion of the definition of “royalty” deviates from the globally accepted definition of “royalty” that borrows heavily from the OECD's rights-based approach under which only payments for the use of, or the right to use, copyrights qualify as royalties. Payments for copyrighted products (such as off-the-shelf or pre-packaged software) do not qualify as royalties under OECD's rights-based approach.</p> <p>The OECD Model Tax Convention states that royalties arise where payments are for the right to use the copyright in the program (i.e., to exploit the rights that would otherwise be the sole prerogative of the copyright holder).</p> <p>In this regard, the inclusion of distribution of software as royalty negates the whole principle of what a royalty is. The OECD guideline specifically states distribution of software should not be regarded as royalty.</p>

Income Tax Act				
No.	Paragraph of the Bill & Section in the respective Act	Proposal in the Bill	EY's submission/recommendation	Justification
2.	<p>Tax Free limits on withdrawals from registered schemes</p> <p><i>Paragraph 4(b) and (c) of the FB, 2025</i></p> <p><i>(Section 8 of the Income Tax Act, Paragraph 5(d)(ii) of the Third Schedule to the Income Tax Act)</i></p>	<p>The Bill proposes to delete Section 8(4) and Section 8(5) of the Income Tax Act.</p> <p>These sections provide for among other things, that the following amounts are to be exempt from tax;</p> <ol style="list-style-type: none"> <i>1. in the case of a lump sum commuted from a registered pension or individual retirement fund, the first six hundred thousand shilling.</i> <i>2. in the case of a withdrawal from a registered pension registered pension or individual retirement fund upon termination of</i> 	<p>We propose that the deletion of Section 8(4) and Section 8(5) of the Income Tax Act to be struck out in entirety.</p>	<p>The proposed deletion of Section 8(4) and Section 8(5) of the Income Tax Act will create a lacuna in the law given that Paragraph 5(d)(ii) of the Third Schedule makes reference to the tax-free limits as provided for in this section.</p> <p>We recommend that Section 8(4) and Section 8(5) be retained in law in order to allow persons making withdrawals from registered schemes and are not beneficiaries to the exemption provided for under First Schedule to enjoy the tax-free limits.</p> <p>This will also align with the government's overall tax incentives that have the impact of encouraging savings in registered schemes as well as lighten the tax burden during withdrawals from registered schemes.</p>

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		<p><i>employment, the lesser of</i></p> <p>–</p> <ul style="list-style-type: none"> ▪ <i>The first sixty thousand shillings per full year of pensionable service; or</i> ▪ <i>the first six hundred thousand shillings.</i> 		
3.	<p>Extension of period to claim tax losses</p> <p><i>Paragraph 8(d) of the FB, 2025 (Section 15 (5) of the Income Tax Act)</i></p>	<p>The Bill proposes to delete subsection (5) that reads -</p> <p><i>Notwithstanding subsection (4), the Cabinet Secretary may on recommendation of the Commissioner extend the period of deduction beyond 10 years where a person applies through the commissioner for such extension, giving evidence of inability to extinguish the deficit within that period.</i></p>	<p>We note that subsection (5) was repealed by the Finance Act, 2022.</p> <p>We propose re-instatement of the provision to read as below -</p> <p><i>Notwithstanding subsection (4), the Cabinet Secretary may on recommendation of the Commissioner <u>extend the period of deduction beyond 5 years</u> where a person applies through the commissioner for such extension, giving evidence of inability to extinguish the deficit within that period.</i></p>	<p>There are various reasons that result in a tax loss position for taxpayers, key among them is claim of investment deductions (ID) and when businesses are in their start up stages.</p> <p>In both situations, taxpayers have a right to claim the ID/ deductible expenses as provided for in the Income Tax Act. Curtailing the period of claim of tax loss will effectively take away the above right from taxpayers. For this reason, a taxpayer should have a leeway to demonstrate the reason for the tax loss and where this is justifiable, be allowed to claim the entire tax loss by been granted an extension of the claim period.</p>

Income Tax Act				
No.	Paragraph of the Bill & Section in the respective Act	Proposal in the Bill	EY's submission/recommendation	Justification
4.	Tax losses carried forward <i>Paragraph 8(d) of the FB, 2025 (Section 15 (4) of the Income Tax Act)</i>	The Bill proposes to cap the period in which a taxpayer can claim tax losses to a 5 year period.	Add a proviso immediately after subsection (4) to read as below, <i>Provided that the above provision will apply to tax losses incurred from 2025 year of income.</i>	To provide a transition clause for better administration of the change and provide for clarity in tax legislation.
5.	Donations <i>Paragraph 8(a)(v&vi) of the FB, 2025 (Section 15 (2) of the Income Tax Act)</i>	The Bill proposes to - i. Amend paragraph (w) by including <i>expenditure incurred in the construction of a public sports facility</i> as a donation deductible for income tax purposes. ii. Delete paragraph (z) that provided for the deductibility for income tax purposes, <i>expenditure incurred in that year of income by a person sponsoring sports, with the prior approval of the CS responsible for sports.</i>	We propose the amendment of paragraph (w) to include – <i>“expenditure incurred in the construction of a <u>private or public sports facility...</u>”</i>	The proposed changes as highlighted excludes private stakeholders investing in the sports industry from claiming deductions in relation to the sponsoring of sports activities in Kenya. Currently, the sports industry in Kenya is growing at a rapid rate with public private partnerships being a key pillar in the promotion of the Bottom Up Economic Transformation Agenda where the State Department for Sports is identified as a key contributor in economic empowerment through various initiatives including promotion and monetizing of talent amongst the youth through the Talanta Hela Initiatives, promoting of sports tourism through the establishment of infrastructural facilities, marketing of Kenya as a sports destination among others. These initiatives are largely sponsored by private investors. The proposed amendment would attract private investors promoting the sports industry in Kenya.

Income Tax Act				
No.	Paragraph of the Bill & Section in the respective Act	Proposal in the Bill	EY's submission/recommendation	Justification
6.	Advance Pricing Agreements <i>Paragraph 12 of the FB, 2025 (Section 18G of the Income Tax Act)</i>	The Bill proposes to introduce into our tax legislation mechanisms in which a taxpayer may enter into advance pricing agreements with the revenue authority.	As provided for under section 18G (5), we propose that regulations to govern the said advance pricing agreements be introduced.	To provide a guide on how the advance pricing agreements while be administered between taxpayers and the revenue authority.
7.	Withholding tax on gains derived by a non-resident person carrying out the business of a ship owner or charterer in Kenya <i>Paragraph 16 (a) of the FB, 2025 (Section 35 of the Income Tax Act)</i>	The Bill proposes to introduce WHT on gains derived by the non-resident in the business of being a shipowner or charterer in Kenya.	The Bill does not propose the withholding tax rate. The 3 rd Schedule of the Income Tax Act provides that the rate of income tax on the gains to be 2.5% of the gross amount received.	This will facilitate compliance to the proposed tax obligation.
8.	Investment deductions <i>Paragraph 27 of the FB, 2025 (Paragraph 1A & 1B, Second Schedule of the Income Tax Act)</i>	The Bill proposes to delete the provisions of the Act that allowed for an investment deduction of 100% or 150% for investments made outside Nairobi and Mombasa counties, were the cumulative value of the investment exceeded a certain threshold as set.	We propose for the introduction of a transition clause, providing a guide on how company's currently eligible to the investment deduction should treat the same going forward.	Better administration of the change and provide for clarity in tax legislation.

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9.	Amendment to the Eighth Schedule <i>Paragraph 29 of the FB, 2025 (Eighth Schedule of the Income Tax Act)</i>	<p>The Bill proposes an amendment to paragraph 6(2)(h)(v) to insert the words “an individual” immediately after the word “where” to read –</p> <p>(v) to a company <i>an individual</i> where spouses or a spouse and immediate family hold 100% shareholding.</p>	<p>We propose for the amendment to read –</p> <p>(v) to a company where an individual, spouses or a spouse and immediate family hold 100% shareholding.</p>	<p>Provide clarity in relation to the proposed change.</p>
10.	Deemed interest on ordinary trade debts <i>(Section 10(1)(c) as read together with 16(3) of the Income Tax Act)</i>	N/A	<p>We propose that the introduction of a provision prescribing the duration after which an ordinary trade debt, otherwise known as a trade payable, may be regarded as a loan within the meaning of “all loans” under Section 16(3) of the Income Tax Act.</p> <p>We would propose applying the provision to trade debts outstanding for a period exceeding one year.</p>	<p>In Commissioner of Domestic Taxes v Socabelec East Africa Limited [2024] KEHC 3319 (KLR), the High Court interpreted Section 16(3) to the effect that trade payables qualified as loans, and therefore, interest could be deemed on such items for withholding tax purposes.</p> <p>There has been a challenge in administering the legal provisions and applying the decision to other cases as the Act does not prescribe how long a trade payable should be outstanding for it to be regarded as a loan.</p> <p>Prescribing a specified duration in the Act will enhance better certainty for compliance and self-assessment by taxpayers and reduce instances of disputes on the issue with the revenue authority.</p>

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11.	Minimum Tax <i>(Section 12D of the Income Tax Act)</i>	N/A	Repeal of Section 12D of the Income Tax Act that provides for the administration of minimum tax.	Following the Court of Appeal ruling that determined minimum tax as unconstitutional, the repeal of this section of the Income Tax Act would align our tax legislation to the orders as determined by the court.
12	Industrial building allowance <i>(Paragraph 1(a)(viii) of the Second Schedule to the Income Tax Act)</i>	N/A	We proposed that the rate of industrial building allowance be updated to read 10% per year in equal instalments.	Unlike other investment allowances in the Second Schedule to the Income Tax Act, the current wording of the rate of industrial building allowance reads 10% without specifying if the allowance is to be claimed per year in equal instalments. Thus, the current wording provides room for ambiguous interpretation. The proposed amendment will provide clarity to investors.

Value Added Tax Act, 2013				
No.	Paragraph of the Bill & Section in the respective Act	Proposal in the Bill	EY's submission/recommendation	Justification
1.	Offset of Withholding VAT Credits <i>Paragraph 32(a) of the FB, 2025</i> <i>(Section 17 (5) (c) of the Value Added Tax Act)</i>	The bill seeks to repeal section 17(5)(c) which allows offset of withholding VAT Credits VAT payable under the VAT Act or any other written law.	We recommend that the proposed amendment be vacated in its entirety.	<p>We suggest that the current provision allowing for offset of withholding VAT Credits (WHVAT) against VAT payable in each period be retained.</p> <p>The deletion of this provision implies that taxpayers will only be left with the option to either apply for a refund or retain a perpetual WHVAT Credit balance in the tax ledger which cannot be utilized.</p> <p>Taxpayers often utilize Withholding VAT Credits to reduce VAT due in a tax period. This is especially practical where VAT payable is higher than the Withholding VAT credit. Leaving taxpayers with application for refunds as the only avenue for recovering VAT credits withheld will tie cashflows for businesses and impose an undue administrative burden on both taxpayers and the revenue authority in managing VAT refund applications.</p> <p>Additionally, allowing for offset will reduce VAT expenditure by government in terms of actual VAT refunds disbursements.</p>
2	Liability to pay tax for exempt or zero-rated supplies <i>Paragraph 35 of the FB, 2025</i> <i>(Section 66A of the Value Added Tax Act)</i>	The Bill proposes to subject to VAT any prior conditionally approved exempt or zero-rated purchases disposed or used in a manner	The Treasury should provide more precise guidelines on the practicability of this provision.	<p>We suggest that clearer guidelines should be provided in this regard.</p> <p>The proposal does not indicate how the inconsistency of use from the intended purpose will be determined.</p>

Value Added Tax Act, 2013				
No.	Paragraph of the Bill & Section in the respective Act	Proposal in the Bill	EY's submission/recommendation	Justification
		inconsistent with their intended purpose.		

Excise Duty Act

Tax Procedures Act, 2015				
No.	Paragraph of the Bill & Section in the respective Act	Proposal in the Bill	EY's submission/recommendation	Justification
1.	<p>KRA allowed to issue agency notices where a taxpayer has appealed against a TAT or court decision.</p> <p><i>Paragraph 47(m)(v) of the FB, 2025 (Section 42(14)(e) of the Tax Procedures Act</i></p>	<p>The bill proposes to repeal Section 42(14)(e) which precludes the Commissioner from issuing an agency notice where a taxpayer has appealed against an assessment specified in a decision of the Tax Appeal Tribunal or court decision.</p>	<p>We recommend that this proposed amendment be struck out in its entirety.</p>	<p>Allowing the Commissioner to enforce agency notices despite ongoing appeals would significantly undermine taxpayers' rights to due process and fair adjudication. This change is also likely to lead to premature enforcement of adverse rulings and could result in unwarranted cash flow constraints for affected taxpayers.</p> <p>Additionally, given that tax refund mechanisms already pose administrative hurdles, affected taxpayers would be prejudiced in recovering funds in cases where they ultimately prevail in their appeals.</p>
2.	<p>Timeline for the Commissioner to determine a refund or offset application</p> <p><i>Paragraph 50(b) and (c) of the FB, 2025 (Section 47(2) of the Tax Procedures Act</i></p>	<p>The bill proposes to increase of the timeline for the Commissioner to determine a refund or offset application from 90 days to 120 days. However, there is no proposal to amend section 47(3) which currently reads “ <i>Where the Commissioner fails to ascertain and determine an application</i></p>	<p>In line with the proposed amendments to this section, we propose that section 47(3) is also amended to replace “120 days” with “90” days for purposes of ensuring alignment with section 47(2)</p>	<p>In order to avoid confusion and ensure alignment with the new proposed timeline, Section 47(3) should also be amended to reflect the current 120-day timeline as opposed to the 90-day timeline as currently stated.</p> <p>As a general comment on the extension of timelines, while extending the refund or offset determination timeline to 120 days may provide room for detailed audits, it risks prolonging taxpayer wait times for valid refunds.</p>

Tax Procedures Act, 2015				
No.	Paragraph of the Bill & Section in the respective Act	Proposal in the Bill	EY's submission/recommendation	Justification
		<i>under subsection (1) within ninety days, the same shall be deemed ascertained and approved.</i>		
3.	<p>Taxpayers to integrate or share data relating to trade secrets</p> <p><i>Paragraph 52 of the FB, 2025 (Section 59A (1B) of the Tax Procedures Act)</i></p>	<p>The bill proposes to repeal Section 59A(1B) which precludes the Commissioner from requiring a person to integrate or share data relating to—(a)trade secrets; and(b)private or personal data held on behalf of customers or collected in the course of business</p>	<p>We recommend that this proposed amendment be struck out in its entirety.</p>	<p>The proposed amendment would allow the Commissioner to access trade secrets and private customer data, raising serious concerns about business confidentiality, consumer privacy, and regulatory overreach. Businesses rely on these protections to safeguard intellectual property and maintain trust with customers, and removing them could lead to unfair competition, and compliance challenges.</p> <p>Additionally, Kenya's existing data protection laws, along with global frameworks such as the General Data Protection Regulation (GDPR), emphasize the importance of securing personal data and the right to privacy. Weakening these safeguards may deter investment and expose the government to legal challenges, as GDPR sets a precedent for stringent data protection standards that many jurisdictions follow.</p> <p>Further, there is no provision in the TPA outlining the mechanisms of how the data that is collected</p>

Tax Procedures Act, 2015				
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				will be stored, secured and limited to only that which is necessary.
4.	Reverse Invoicing (Section 23A(3A) of the Tax Procedures Act)	N/A	We propose that the removal of the mandatory requirement for purchasers to issue eTIMS invoices where they receive supplies from small businesses or small-scale farmers whose turnover does not exceed KES 5 million.	<p>The current provision imposes an additional burden on the large taxpayers since it is costly and time consuming and requires more resources to configure its procurement systems.</p> <p>Further, the current provision is not an adequate solution since sales between small traders with a turnover of less than KES 5 million may not be fiscalised through ETIMS.</p> <p>Therefore, such a burden imposed on large taxpayers to reverse invoice is redundant and discriminative.</p>
5.	Time Limitation for the Duration of Tax Audits (Section 59 of the Tax Procedures Act)	N/A	<p>We propose that there be set a time limit within which tax audits may be conducted and concluded. We propose a time limitation of 90 working days from the conclusion of audit engagements.</p> <p>Further, we propose the introduction of a mandatory requirement to communicate audit findings within that time, failure to which the audit shall be deemed to be concluded, and the same period may not</p>	<p>The lack of prescribed timelines in the conduct of tax audits has created uncertainties in the conduct of business and the making of major business decisions such as:</p> <ol style="list-style-type: none"> 1. Complicates mergers and acquisitions/transfer of business/dissolutions/sale of business 2. Complicates budgeting and planning due to incomplete audits hence inability to value the risk <p>The prescription of tax audit timelines will boost certainty and confidence to taxpayers in making major business decisions. It will also refine the public image of tax audits from being revenue</p>

Tax Procedures Act, 2015				
No.	Paragraph of the Bill & Section in the respective Act	Proposal in the Bill	EY's submission/recommendation	Justification
			be reopened for another tax audit.	seeking frontiers to compliance improvement focused initiatives.