

# Tax alert

## Affordable Housing Levy - August 2023



### Introduction

This alert brings to your attention the new Affordable Housing Provisions as stipulated in the Finance Act 2023. The Finance Act amended the Employment Act, 2007 by inserting new sections on Affordable Housing Levy (AHL).

Following the Court of Appeal ruling of 28 July 2023 that lifted the conservatory orders paving way for operationalization of the Finance Act 2023,

the AHL provisions became effective from 1 July 2023. As per the new amendments to the Employment Act, 2007, both employees and employers are to each pay monthly AHL equivalent to 1.5% of the employee's gross salary.

The AHL legislative provisions state that the funds collected are to be strictly utilized for development of affordable housing and associated social and physical infrastructure as well as the provision of affordable home financing to Kenyans.

Similar to Pay-as-you-Earn (PAYE), AHL is to be remitted within nine (9) working days after the end of the month in which payments are due. A 2% penalty will apply on amounts unpaid by the due date. The penalty is applicable for every month the amounts remain unpaid.

The Ministry of Lands, Public Works, Housing and Urban Development issued a public notice dated 3 August 2023 appointing the Kenya Revenue Authority (KRA) as the collection agent for the AHL.

KRA subsequently issued a notice dated 4 August 2023 stating that employers must declare the AHL under sheet 'M' of the PAYE return on iTax and generate a payment slip under the tax head 'agency revenue' and sub-head 'Housing Levy.' KRA also confirmed that the AHL payment slip will be generated separately from that of PAYE and other payroll levies such as National Industrial Training Authority levy (NITA).

Further, in the 4 August 2023 notice, the KRA asserted that the employer's contribution is an allowable deduction under Section 15 of the Income Tax Act.

The KRA also made the following additional clarifications regarding the AHL through a notice issued on 15 August 2023:

1. **"Gross monthly salary"** constitutes basic salary and regular cash allowances. This includes housing, travel or commuter, car allowances and such regular cash payments and would exclude those that are non-cash as well as those not paid regularly such as leave allowance, bonus, gratuity, pension, severance pay or any other terminal dues and benefits.
2. All employees irrespective of their contract of service shall pay the affordable housing levy.
3. Taxpayers paying housing levy under Section 31B of the Employment Act are not eligible for Affordable Housing Relief under the Section 30A of the Income Tax Act Cap. 470.

### Analysis of legislative provisions

#### i. Scope of AHL

AHL's legislative provisions have been anchored in the Employment Act and not through tax statutes like the Income Tax Act (ITA). This therefore means that any recourse by employees and employers in relation to AHL will be sought through the Employment Act and not tax legislation, as would be the case for PAYE.

The TPA defines "tax law" to include:

- a) Tax Procedures Act;
- b) The Income Tax Act, Value Added Tax (VAT) Act, Excise Duty Act, 2015 and Miscellaneous Fees and Levies Act, 2016; and
- c) Any regulations or other subsidiary legislation made under the TPA or the ITA, VAT Act, Excise Duty Act and Miscellaneous Fees and Levies Act, 2016.

Section 32(1) of the TPA further states:

- (1) A tax payable by a person under a tax law shall be a debt due to the Government and shall be payable to the Commissioner.

Therefore, despite KRA being appointed the collection agent, the Tax Procedures Act (TPA) would not be the applicable law guiding disputes relating to AHL.

#### ii. Employees subject to AHL

Section 31B of the Employment Act provides:

*"(1) Notwithstanding the provisions of section 3(2) (a), (b), (c) and (d) of the Act, each employee and employer shall pay a monthly levy to be known as the Affordable Housing Levy"*

The Employment Act defines an "employee" as:

*"a person employed for wages or a salary and includes an apprentice and indentured learner."*

Further, the Employment Act defines "contract of service" as:

*"an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies."*

Based on the above, AHL will be applicable to all employers and employees except Kenyans working outside the country with a contract in the foreign jurisdiction.

#### iii. Definition of gross salary

Though the new provisions state that the AHL will be levied on an employee's gross salary, the Employment Act does not expressly define "gross salary." However, basic salary is defined as:

*"an employee's gross salary excluding allowances and other benefits."*

Further, the Income Tax Act (ITA) also does not contain a definition of "gross salary", however Section 5(2) defines gains and profits from employment income as:

*"any wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling, entertainment or other allowance received in respect of employment or services rendered."*

KRA's notice dated 15 August 2023 however provides the following guidance specific to AHL:

*"Gross monthly salary constitutes basic salary and regular cash allowances. These include housing, travel or commuter, car allowances and such regular cash payments and would exclude those that are non-cash as well as those not paid regularly such as leave allowance, bonus, gratuity, pension, severance pay or any other terminal dues and benefits."*

In our view, despite the above guidance from KRA, the lack of an explicit definition of "gross salary" in either the Employment Act or the ITA may give rise to different interpretations on exactly what amounts constitute the gross salary that is subjected to AHL.

For instance, it is unclear if overtime pay will be classified as "regular cash payments" especially if the frequency and amounts paid to employees vary from time to time.

### Conclusion

The introduction of the AHL is a significant change to taxpayers' payroll operations and tax compliance obligations. However, its full implementation may be hampered by some of the gaps identified above.

It is important to take note that even though KRA has stated that AHL deductions by employers will be an allowable expense for corporate income tax purposes, we note that this has not been anchored in law through amendments to the Income Tax Act. This opens another lacuna in the law that may result in tax disputes with KRA.

Finally, notwithstanding the lifting of the conservatory orders, taxpayers should keep in mind that the Courts have yet to issue their judgment on the substantive appeal seeking to stop implementation of the Finance Act, 2023. Pending the final ruling, we advise taxpayers to comply with the new AHL provisions to avoid incurring further tax liabilities in the form of penalties and interest.

KPMG is happy to assist on any issues arising from this alert. You can contact our tax and regulatory team on [cakora@kpmg.co.ke](mailto:cakora@kpmg.co.ke) or [taxandregulatory@kpmg.co.ke](mailto:taxandregulatory@kpmg.co.ke)

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