

# Tax Alert

## The Affordable Housing Act, 2024



### Introduction

This alert brings to your attention the Affordable Housing Act (the Act), which the President assented to on 19th March 2024.

The new legislation overhauls the legislative provisions previously ruled unconstitutional by the Court of Appeal in January 2024. The current Act seeks to give effect to Article 43(1)(b) of the Constitution which stipulates that every person has a right to accessible and adequate housing, and to reasonable standards of sanitation.

Below, we outline and comment on the key provisions covered under the Act:

### Definition of key terms

The Act defines “affordable housing” as housing which is adequate and costs not more than thirty percent (30%) of the monthly income of a person to rent or to acquire.

It further defines “institutional housing” as housing that is adequate for public institutions such as universities, colleges, police, defence forces, government pool housing and prisons.

### Imposition of the Levy

Section 4 of the Act states that the Affordable Housing Levy (“The Levy”) shall be charged at the rate of 1.5% of the gross salary of an employee or the gross income of a person received or accrued which is not subject to the levy under gross salary.



Notably, Section 5 states that employers who have contributed and remitted matching amounts to the employees’ deductions will not be subjected to the levy imposed on gross income outlined in Section 4.

Employers are required to remit the Levy amounts by the 9th day of the subsequent month.

Where the Levy is unpaid after the due date, a penalty of 3% of the unpaid amount shall be due and payable for each month that the amount remains unpaid and shall be summarily recovered as a civil debt from the employer.

The above notwithstanding, the Act states that the Cabinet Secretary (National Treasury) may exempt, by way of gazette, persons or income from the Levy upon recommendation from the Cabinet Secretary of Lands, Public Works, Housing and Urban Development.

### Allowable deductions and personal reliefs

The Act further provides that the employer’s contribution, shall be an allowable deduction under Section 15 of the Income Tax Act.

Additionally, resident individuals who pay the Levy shall be entitled to an affordable housing relief of 15% of their contributions subject to a cap of KES. 108,000 per annum (KES 9,000 per month).

### Procedure for payment of Affordable Housing Levy

The Act has appointed the Kenya Revenue Authority (KRA) as the collecting agent for the Levy.

KRA have directed that employers declare the Levy under sheet ‘**M**’ of the Pay as You Earn (PAYE) return on iTax, and generate a payment slip under the tax head ‘agency revenue’ and sub-head ‘**Housing Levy**.’

The payments will be made at KRA agent banks or through mobile money using the eCitizen Paybill number 222222.

### Categories of Affordable Housing

The Act has provided for four (4) categories of affordable housing as follows:

- i. Social housing unit: A house targeted at a person whose monthly income is below KES 20,000;
- ii. Affordable housing unit: A house targeted at a person whose monthly income is between KES 20,000 and KES 149,000;

- iii. Affordable middle class housing unit: A house targeted at a person whose monthly income is over KES 149,000;
- iv. Rural affordable housing unit: A house targeted at a person living in any area which is not an urban area.

### **Establishment of the Affordable Housing Fund (the Fund) and the Affordable Housing Board (the Board)**

The Act also establishes a Fund which is managed by the Board. The Board shall develop a five-year affordable housing investment programme every five years.

The programme will be submitted to the Cabinet for approval and presented to Parliament. The Board will further prepare an annual investment programme drawn from the 5-year investment plan.

The Fund will receive the Levy amounts, voluntary contributions, monies received from the Fund's investments and other sources prescribed in the Act.

The Fund shall facilitate provision of funds for the design, development and maintenance of affordable housing, institutional housing and associated social and physical infrastructure.

There are further provisions on allocation of monies out of the Fund to KRA (the Levy's collecting agency), and the County Committees for administration purposes.

The Board may also invest income (Housing levy collections) that is not immediately required and can also borrow funds to realize the objectives of the Act.

### **Eligibility criteria and application procedure for Affordable Housing Unit**

A natural person is eligible for allocation of one housing unit if they provide proof of the requisite deposit and meet the criteria set in the Regulations, which are yet to be published.

Thereafter, the individual will make an application to the Board with the relevant documents attached.

In allocating the affordable housing units, the Board will give preference to marginalized persons, vulnerable groups, youth, women and persons with disabilities.

### **Voluntary savings**

The Act provides that eligible persons may make voluntary savings to raise a deposit for an affordable housing unit.

The Fund's administrator will open separate bank accounts for depositing of the voluntary amounts and issue an account number to individuals contributing voluntary funds.

Any interest accrued will be credited to the same account.

Anyone who makes voluntary contributions but is not allocated an affordable housing unit may opt to withdraw their savings with accrued interest after giving a 90-day written notice.

Alternatively, they may apply to the Board for issuance of an affordable mortgage to develop a rural affordable housing unit.

The savings and the land to be built on, will however be considered as collateral to secure the mortgage.

### **Ownership of Affordable Housing Units**

Upon approval by the Cabinet Secretary (Housing), the Board shall transfer ownership to a qualified applicant upon payment of the full purchase price and issuance of a certificate proving consent from the Board.

Owners are however restricted from the onward sale of the affordable housing units without prior consent of the Board.

### **Implementation of Affordable Housing scheme**

The Board shall appoint a national government agency for the development of affordable housing units and the associated social and physical infrastructure.

The Act also provides for the Board to enter into an agreement with public institutions for development of institutional housing units.

The Board may also contract private institutions for the development of affordable housing units and supply of goods and materials for the construction.

### **Role of County Governments in Affordable Housing Scheme**

Under the Act, land held by a County government shall not be allocated for affordable housing unless the Board has carried out public participation and stakeholder engagement with the county's affected community.

The Act also prescribes that every county shall establish a County Rural and Urban Affordable Housing Committee (The Committee).

The Committee, with the help of the Board, is required to establish a framework for attainment of affordable housing in the county, provide advice on affordable housing programmes, develop a five (5) year affordable housing investment programme among other key functions.

There are measures to promote gender balance, representation of ethnic minorities, and consideration of marginalized groups such as youth and persons with disabilities in the Committee's composition.

### **Accountability of the Fund**

The administrator of the Fund is required to keep proper records and submit the accounts of the Fund to the Auditor-General within 3 months from the end of each financial year for review.

Misappropriation of funds or assets is an offence for which persons shall be held liable to a fine not exceeding **KES 20 million** or imprisonment and an additional mandatory fine, equal to two times of the quantifiable gain/loss, if one irregularly benefited from the fund.

Failure to give accurate information on dealings with the Act will also attract a fine of **KES 10 million** or imprisonment or both.

## Our Comments

The Act provides the legal framework for development and access to affordable housing and institutional housing.

Section 4 and 5 of the Act, which govern the imposition and collection of the Levy came into effect on 19 March 2024.

Employers are required to deduct and remit the Levy beginning with the March 2024 payroll.

The rest of the Act's provisions will be operationalized on a date to be prescribed by the Cabinet Secretary (Housing) through a gazette notice.

While the Act has specified that employers who remit an equivalent contribution will not be subjected to further deductions on their gross income under Section 4, sole proprietorships and other entities that do not have employees will be exposed to higher tax on their gross income.

Further, unless subsequently clarified there is a possibility that incomes such as interest, dividends will be subject to tax as it will be difficult to know if the recipient have employees and have accounted for the levy on the employees. With the lack of the definition of a person in the Affordable Housing Act, reference may be made to the Interpretation and General Provisions Act, where a person is defined to include a corporate.

Section 6 of the Act has provisions for exemption of persons from payment of the levy. However, the qualification criteria for the exemptions has not been provided and will likely be included in Regulations that are to be issued.

Further, apart from Sections 4 and 5, the remainder of the Act is not yet in operation. This means that the affordable housing relief for employees cannot be applied in the monthly payroll until the Cabinet Secretary of Lands, Public Works, Housing and Urban Development gazettes the same.

We also note that the Act provides that owners of the affordable housing units cannot sell their houses upon final payment without approval of the Board. This provision may lead to disputes as it would possibly infringe on an individual's property rights.

The Act also provides that all contributions previously held by the National Housing Corporation are now vested in the Fund. This remains a contentious issue as the collection of the levy under Section 31B of the Employment Act was declared unconstitutional.

It is important to note that the Act also declared all previous regulations with regard to the affordable housing levy as revoked.

This may have a significant impact on the definition of 'gross pay' which was previously clarified by the KRA. It is therefore important for the government to provide a clarification on what this entails to allow for clarity on the treatment of non-cash and discretionary benefits.

## Conclusion

The introduction of the Affordable Housing Levy is a significant change in the country's social and fiscal regime and comes in the backdrop of the expected changes to the social health regime.

The coming months will be interesting as the government prepares to release the Finance Bill, 2024 at the end of April and continues with the ongoing implementation of e-Tims, whose primary focus is the informal sector.

KPMG is happy to assist on any issues arising from the Affordable Housing Act.

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