

Guidelines on Minimum Tax

KPMG Tax Alert

Background

The Finance Act, 2020 introduced Minimum Tax through a new Section 12D to the Income Tax Act (CAP 470) of the Laws of Kenya (ITA) with effect from 1 January 2021. The new section provides that where a person's Instalment Tax payable is lower than the Minimum Tax, Minimum Tax shall be payable. Paragraph 11 of the Third Schedule to the ITA sets the rate of minimum tax at one percent (1%) of gross turnover.

Following the above change, there were numerous questions on the tax including what income would be subject to tax, how the tax would be computed especially for companies with non-December year-ends, and the treatment of post-year adjustments to income among others. In response to the queries, the KRA has issued guidelines which seek to provide clarity to some of these issues.

Below is a summary of the guidelines together with our comments.

Key highlights on the Guidelines on Minimum Tax

	Provision	Definition under the Guidelines
a)	Gross Turnover	<ul style="list-style-type: none"> • Means gross receipts, gross earnings, revenue, takings, yield, proceeds, sales or other income chargeable to tax excluding the following: <ul style="list-style-type: none"> a) Income that is exempt from tax under the ITA b) Employment income – Section 5 c) Income subject to Residential Rental Income Tax – Section 6A d) Income that is subject to Turnover Tax – Section 12C e) Income subject to Capital Gains Tax – 8th Schedule f) Income of Extractive Sector – 9th Schedule g) Income of a person engaged in business whose retail price is controlled by Government h) Income of a person engaged in insurance business i) Income that is subject to withholding tax, including Digital Service Tax provided that at the end of the accounting period, the tax payable on taxable income exceeds Minimum Tax payable.
b)	Persons	<ul style="list-style-type: none"> ▪ Includes an individual, company, partnership, limited partnership, association of persons or a trust
c)	Transition for persons whose accounting period end on a date other than 31st December	<ul style="list-style-type: none"> ▪ The guidelines provide that where a taxpayer has an accounting period ending on a date other than 31st December, Minimum Tax shall become due and payable on the date when the first instalment is due after 1st January 2021.



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d)	Payment of Minimum Tax for ordinary entities	<ul style="list-style-type: none"> Minimum Tax shall be paid in instalments which shall be due on the 20th day of the 4th, 6th, 9th and 12th month of the accounting period as provided in the table below. <table border="1" data-bbox="558 265 1343 706"> <thead> <tr> <th>Payment</th> <th>Applicable Turnover</th> <th>Date Payable</th> </tr> </thead> <tbody> <tr> <td>1st payment</td> <td>1st, 2nd & 3rd month</td> <td>By 20th of the 4th month</td> </tr> <tr> <td>2nd payment</td> <td>4th & 5th month</td> <td>By 20th of the 6th month</td> </tr> <tr> <td>3rd payment</td> <td>6th, 7th & 8th month</td> <td>By 20th of the 9th month</td> </tr> <tr> <td>4th payment</td> <td>9th, 10th & 11th month</td> <td>By 20th of the 12th month</td> </tr> <tr> <td>Balance of Tax</td> <td>12th month</td> <td>By the last day of the 4th month after the accounting period</td> </tr> </tbody> </table> 	Payment	Applicable Turnover	Date Payable	1 st payment	1 st , 2 nd & 3 rd month	By 20 th of the 4 th month	2 nd payment	4 th & 5 th month	By 20 th of the 6 th month	3 rd payment	6 th , 7 th & 8 th month	By 20 th of the 9 th month	4 th payment	9 th , 10 th & 11 th month	By 20 th of the 12 th month	Balance of Tax	12 th month	By the last day of the 4 th month after the accounting period
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e)	Payment of Minimum Tax for agricultural, pastoral or horticultural activities	<ul style="list-style-type: none"> The Minimum Tax payable shall be computed as follows: <table border="1" data-bbox="569 783 1360 1073"> <thead> <tr> <th>Payment</th> <th>Applicable Turnover</th> <th>Date Payable</th> </tr> </thead> <tbody> <tr> <td>1st payment</td> <td>1st to 8th month</td> <td>By 20th of the 9th month</td> </tr> <tr> <td>2nd payment</td> <td>9th, 10th & 11th month</td> <td>By 20th of the 12th month</td> </tr> <tr> <td>Balance of Tax</td> <td>12th month</td> <td>By the last day of the 4th month after the accounting period</td> </tr> </tbody> </table> 	Payment	Applicable Turnover	Date Payable	1 st payment	1 st to 8 th month	By 20 th of the 9 th month	2 nd payment	9 th , 10 th & 11 th month	By 20 th of the 12 th month	Balance of Tax	12 th month	By the last day of the 4 th month after the accounting period						
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f)	Tax credit for overpayment	<ul style="list-style-type: none"> The guidelines provide that if a person establishes upon preparation of accounts that the sum of the Minimum Tax and Instalment Tax payable is higher than the Minimum Tax payable, the excess shall be considered a tax credit to be carried forward or offset against the final liability. 																		
g)	Underpayment of tax	<ul style="list-style-type: none"> The guidelines further provide that the where the tax payable from taxable income is greater than the Instalment and Minimum Tax paid, the balance shall be paid as a balance of tax on or before the last day of the 4th month following the end of the accounting period. 																		
h)	Entity in a loss position	<ul style="list-style-type: none"> Minimum Tax paid is final for an entity in a loss position. In addition, a person whose tax payable from income earned is less than Minimum Tax shall not be eligible for refund of the excess tax. 																		
i)	Minimum Tax applicable to individuals exempt from Instalment Tax	<ul style="list-style-type: none"> An individual who is not required to pay Instalment Tax under section 12(5) of the ITA because the total tax payable for that year of income is an amount not exceeding forty thousand shillings shall still be subject to Minimum Tax. 																		
j)	Filing of end of year income tax returns	<ul style="list-style-type: none"> A person who has paid his taxes for the year of income through Minimum Tax shall be required to file annual tax returns not later than the last day of the sixth month following the end of his year of income. 																		
k)	Application of losses	<ul style="list-style-type: none"> Where a person is liable to pay Minimum Tax and is in a loss position, the loss shall be carried forward, subject to limitations under the ITA 																		

Our Opinion

The guidelines provide much needed clarity on the implementation of Minimum Tax, whose introduction appears to have been made in haste resulting in a number of gaps. The guidelines will go a long way in helping entities comply with the Minimum Tax requirements, notwithstanding the fact that in some instances the guidelines appear to be making legislative provisions to cure defects in the law.

One important point to note is the clarification in the guidelines that income from insurance business and income from businesses whose retail price is controlled by government is exempt from tax even though the Tax Laws (Amendment) (No.2), Act, 2020 had a drafting error which effectively subjected these businesses to minimum tax.

Other interesting items under the guidelines include the introduction of a minimum tax balance of tax and the requirement to file a minimum tax declaration by the 20th of the month following the end of the accounting period.

The confirmation that where the sum of the Minimum Tax and Instalment Tax exceeds the Minimum Tax payable, the excess may be carried forward is a welcome especially in light of recent Kenya Revenue Authority (KRA) moves to force taxpayers to apply for refunds for overpaid tax rather than carry forward the overpayments for set-off against future tax liability.

We expect that the guidelines are a stopgap measure to allow taxpayers to comply with the minimum tax requirements prior to the finalisation of the Finance Act 2021 which will hopefully introduce legislative provisions to address the concerns raised regarding the introduction and implementation of Minimum Tax.

If you have specific questions on the implications of Minimum Tax to your business, please reach out to us.



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