



OVERVIEW OF THE PBO ACT, TAX INCENTIVES ARISING FROM THE PBO ACT VS PRE-EXISTING INCENTIVES

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PBO Act Kenya



- An Act of Parliament provided for the establishment and the operations of public benefit organizations.
- The main objective of the PBO Act 2013 is to advance a new legal, regulatory and institutional framework for Public Benefit Organisations (PBOs) in Kenya
- Was assented on 14 January 2013.
- Commencement Date is by notice- which has not been issued.

Operationalization of the PBO Act Kenya



- The High Court has ordered the Government on two occasions, October 31, 2016 and May 12, 2017, to operationalize the PBO Act.
- The first order was issued after Civil Society Organizations(CSOs) filed a suit seeking a declaration from the court that the Cabinet Secretary for the Ministry of Devolution and Planning contravened the Constitution by failing to appoint a date for the coming into force of the PBO Act.
- The second order followed contempt of court proceedings filed against the Cabinet Secretary or the Ministry of Devolution and Planning, the Ministry of Interior and National Coordination and the Attorney General for failing to obey court orders to commence the PBO Act.
- To date the orders have still not been complied with.
- NGO Board had proposed amendments but these were rejected by the civil society. Consultations are still ongoing , the last consultations being in February.

Definition S.5(1)



Public benefit organization

A voluntary membership or non-membership grouping of individuals or organizations, which is autonomous, non-partisan making, non-profit making and which is

- organised and operated locally, nationally or internationally
- engages in public benefit activities in any of the areas set out in the Sixth Schedule, and
- registered as such by the Authority. Membership PBOs are those that recruit members while non-membership PBOs only have a Board and a Secretariat.

A Public Benefit Activity(S.2)



- An activity that supports or promotes public benefit by enhancing or promoting economic, environmental, social or cultural development or protecting the environment or lobbying or advocating on issues of general public interest or the interest or well-being of the general public or a category of individuals or organizations.

PBO Activities(6th Schedule)



- The objectives include:

legal aid, agriculture, children, culture, disability, energy, education, environment and conservation, gender, governance, poverty eradication, health, housing and settlement, human rights, HIV/AIDS, information, informal sector, old age, peace building, population and reproductive health, refugees, disaster prevention, relief, pastoralism and marginalized communities, sports, water and sanitation, animal welfare and the youth

Registration(S6-13)



- The documents and information required include:
 - copy of the PBO's constitution,
 - names and addresses of its founders,
 - the public benefit purpose for which the PBO is organized, the postal and physical address of the PBO's principal place of business;
 - and the prescribed fee
- The PBO Authority may refuse to register an organization if :
 - the application does not comply with the requirements of the Act,
 - the objectives of the proposed PBO contravene any written law,
 - the applicant committed a serious violation of the Act
 - false or misleading information,
 - the name of the proposed PBO resembles that of another entity.

PBO Constitution(S.8)



- Should include the following:
 - Statement showing that the organization's membership shall be voluntary and that its income and property shall not be distributable to any person except as reimbursement for reasonable expenses or payment of reasonable compensation for services rendered.
 - That the organization id to be a body corporate with an identity and existence distinct from its members or governing body and must provide for a governing body consisting of not less than five (5) persons, three (3) of whom shall not be related to each other.
 - No member of the PBO's governing body to be held personally liable for any act done in good faith, on behalf of the organization or by virtue of the office held in the governing body
 - However, where the liability is incurred outside the duties of the individual as a member of the governing body, the member would be held personally liable to the extent of such liability.

Registration timelines(S 9)



- Authority shall consider applications within sixty (60) days after receiving the application.
- Where the Authority is not satisfied, the Authority shall immediately notify the applicant, giving reasons, and provide the applicant up to thirty (30) days to comply.
- If the applicant complies within the notice period, the Authority shall register the organization within fourteen (14) days from receipt of the requested requirements.
- However, if the applicant fails to satisfy the requirements after being given an opportunity to comply, the Authority shall refuse to register the organization concerned and shall notify the applicant of its refusal within the number of days remaining in the original period of sixty (60) days.

Registration timelines (S 9, 50)



- If the Authority fails to notify the application with 60 days, the applicant can proceed to the Public Benefit Organization Disputes Tribunal (the Tribunal) for a decision (acceptance or rejection)
- The application can also appeal a rejection for application to the Tribunal within 30 days of the receipt of the decision

Regulatory Oversight (S.34,43)



- S. 34 of the PBO Act establishes a Public Benefits Authority which will take over the roles and powers of the NGO Coordination Board.
- It shall deal with the registration and advisory matter and it shall be independent from persons.

Self Regulation



- The PBO Act establishes a self regulating mechanism - the National Federation of Public Benefit Organizations
- This will replace the Non-Governmental Organizations Council
- The main objectives are to provide leadership on matters of interest to the sector for the promotion of the sector generally and enhancement of self-regulation.

Dispute Resolution (S.50)



- The Tribunal is established under Section 50 of the PBO Act and will have jurisdiction to hear disputes between members of the National Federation and between the National Federation and the Authority.
- The Tribunal is also empowered to hear and determine complaints arising out of a breach of the provisions of the Act and appeals made to it, pursuant to the Act. However, this will not extend to criminal matters.
- A decision from the Tribunal can be appealed to the the High Court within 14 days of the decision.

Miscellaneous Provisions



- A PBO may deregister, wind itself up or dissolve itself by filing with the Authority a resolution passed by 2/3 of the members, signed by the chairperson, to that effect.
- Upon dissolution, any asset remaining after all the liabilities have been paid shall be transferred to another PBO having similar objectives which shall be identified through a resolution of the governing body of the PBO, failing which the Authority shall make the decision **Section 61**

- To forge or utter a false a document for purposes of procuring registration;
- Make a false statement in respect of an application for registration;
- Make any material false statement in any document submitted to the Authority;
- To fraudulently hold out any organisation as being registered under the Act;
- To fraudulently make use of a registration number, certificate or information contained in a certificate of registration;
- Penalty – Kshs. 300,000/= or imprisonment for a term not exceeding 2 years or both.

Statutory Benefits



- Outlined in the Second Schedule to the Act.
- Tax exemptions
- Indirect government financing e.g. budget subsidies, grants for specific purposes and contracts to perform certain work.
- Preferential treatment in public procurement procedures.
- Provision of information to PBOs.
- Access to training offered by Government institutions

International NGOs



- An international NGO can register as a PBO under the PBO Act by submitting an application form with proof that it is a legal entity in another country and by providing its address in Kenya and a written statement from a representative of its headquarters, stating the purposes of the NGO, a general description of the activities it is planning to carry out in Kenya and the name and contact details of its authorized agent in Kenya. However, the international organization must have at least one third of its directors as Kenyan citizens resident in Kenya and having an office in Kenya.
- The Authority may also exempt an organization registered outside the country from registration, particularly where the international organization does not intend to engage in direct implementation of any activity, program or fundraising activities in Kenya.



TAX INCENTIVES PBO ACT VS EXISTING INCENTIVES

TAX Incentives PBO Act vs Existing Laws- Income Tax



PBO EXEMPTION

- Income tax on income received from membership subscriptions and donations or grants;
- Income tax on business income if the income is wholly used to support the public benefit purposes for which the organization was established;
- Tax on interest and dividends on investments and gains earned on assets or the sale of assets;
- stamp duty; and
- court fees (PBO Act Second Schedule Para 1(a))

NB Even if the Act is operationalized , the tax exemptions provided by the ITA will remain in force until both laws are harmonized

OTHER NPOS

- Provision for exemption provided by Section 13 of the Income Tax Act(ITA) and Paragraph 10 of the 1st schedule to the ITA
- Application for exemption(valid for 5 years) has to be made to the CS National Treasury through the registering entity.
- **Key conditions**
 - Organisation has to be for the relief of poverty or distress to the public, advancement of religion and education
 - Should be established in Kenya or headquarters in Kenya
 - Business income not exempt unless it carried out in the course of the original purpose

TAX Incentives PBO Act vs Existing Laws- VAT



PBO EXEMPTION

- Preferential treatment under value added tax (VAT), and customs duties in relation to imported goods or services that are used to further their public benefit purposes;

NB The Act has not outlined whether the exemption has to be approved by the National Treasury.

If the Act is operationalized in its current state, the tax exemptions provided by the VAT Act will remain in force until both laws are harmonized

OTHER NPOS

- The supply of services by most PBOs are exempt. The exemptions are outlined in the following paragraphs of Part II of the 1st schedule to the VAT Act 2013
- Includes education, medical, health, religion official aid funded, social services but does not include business
- Certain goods and services are exempt from VAT – First schedule part 1(financial services, agricultural produce, most unprocessed foods, live animals, fertilizer etc.
- Official aid funded project exemption has to approved by the CS National Treasury

TAX Incentives PBO Act vs Existing Laws- Import duties



PBO EXEMPTION

Preferential treatment under value added tax (VAT), and customs duties in relation to imported goods or services that are used to further their public benefit purposes;

NB The Act has not outlined whether the exemption has to be approved by the National Treasury.

If the Act is operationalized in its current state , the tax exemptions provided by the VAT Act will remain in force until both laws are harmonized

OTHER NPOS

- NPOs not automatically entitled to the exemption on import duties
- The exemption can be attained upon application to the Cabinet Secretary National Treasury through the relevant registering organization e.g. the NGO Co-ordination Board.
- Exemptions are outlined in the 5th schedule to the East African Community Customs Management Act(EACCMA) 2004.
- Imports of certain goods don't attract import duties e.g. medical equipment and this is considered on a case to case basis.

TAX Incentives PBO Act vs Existing Laws- Deductibility of charitable contributions



PBO EXEMPTION

- Incentives for donations by legal and natural persons;
- Special tax incentives for donations to form endowments, prudent investment policies, etc.

NB The Act provides blanket exemptions but does not outline the special tax incentives. These provisions need to be harmonised with the IT

OTHER NPOS

Allowable deductions for income tax purposes include:

- Cash donations from their income tax to a charitable organization that is exempt from tax under the provisions of Para. 10 of the First Schedule
- Donations to any tax exempt projects approved by the CS National Treasury
- Capital expenditures (approved by the CS National Treasury) incurred on the construction of a public school, hospital, road, or any similar kind of social infrastructure
- Capital expenditure incurred scientific research to advance a business, including sums paid to approved scientific research institutes or universities

TAX Incentives PBO Act vs Existing Laws- Employment tax



PBO EXEMPTION

- Employment tax preferences

NB The ACT is not specific on which are these specific tax preferences.

NB This provision needs to be amended to align this with the tax laws and to avoid ambiguity.

OTHER NPOS

The employees are not exempt from PAYE unless there a specific exemption provided by a double tax agreement or special bodies.

The employees income has the following tax deductions

- Pensions to a max of KShs 20,000 in a month
- Insurance and mortgage relief
- Home ownership savings plan
- Per diem to a max of KShs 2,000 pm or more if the policy is approved by KRA
- Passages

Questions



Thank You

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