

Personal and Expatriate Taxes

Presentation by:

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Brief history



- Personal and Expatriate taxes came to effect on 1st January 1974 with enactment of The Income Tax Act, 1974 (CAP 470) assented on 21st December 1973.
- Replaced the Pre-colonial taxation of Graduated Personal Tax (GPT) introduced in 1958;



Charge of tax



S 3(1) of the ITA “..a tax known as income tax shall be charged...for each year of income **upon all the income of a person**, whether resident or non-resident, which **accrued in or was derived from Kenya.**”

“Employer” - any resident person responsible for the payment of, or on account of, emoluments to an employee, and an agent, manager or other representative so responsible in Kenya on behalf of a non-resident employer

Definitions



“contract of service” means an agreement, whether oral or in writing, whether expressed or implied, to employ or to serve as an employee for any period of time, and includes a contract of apprenticeship or indentured learnership under which the employer has the power of selection and dismissal of the employee, pays his wages or salary and exercises general or specific control over the work done by him; and for the purpose of this definition an officer in the public service shall be deemed to be employed under a contract of service

Definitions



“Resident” – anyone who has a **permanent home** in Kenya and was present in Kenya for any particular period for the year of income in consideration or: without a permanent home are in Kenya for:

- **183 days or more in aggregate** during the current tax year; or
- **average of more than 122 days** per year in the current tax year and the two preceding years

Income from employment,
etc

8 of 1978; 13 of 1979; 10 of
1987; 9 of 1989; 8 of 1996

5 (1) For the purposes of section 3 (2) (a) (ii), an amount paid to-

- (a) a person who is, or was at the time of the employment or when the services were rendered, a resident person in respect of any employment or services rendered by him in Kenya or outside Kenya; or
- (b) a non-resident person in respect of any employment with or services rendered to an employer who is resident in Kenya or the permanent establishment in Kenya of an employer who is not so resident,

shall be deemed to have accrued in or to have been derived from Kenya.

Permanent Establishment



Finance Act 2021

- ✓ Fixed place through which business is wholly or partly carried on and includes; a place of management, branch and physical presence of carrying business i.e factory, office, place of extraction of natural resources;
- ✓ A warehouse for storage facilities, a farm, plantation where agricultural facilities are carried on;
- ✓ Building site, construction, assembly or installation project exceeding 183 days;
- ✓ **Consultancy services** provided in Kenya exceeding 91 days in any twelve-month period;
- ✓ Installation structure used in exploration of natural resources exceeding 91 days

Income chargeable to tax;

- ✓ Cash benefits and allowances;
- ✓ Non-cash benefits of KES 3,000 p.m (KES 36,000 p.a) or more e.g. house, motor vehicle, furniture;
- ✓ Per diem – KES 2,000 treated as reimbursement of expenses; any amount above KES 2,000 should be accounted for or charged to tax. Employee must be outside his usual place of work and on official duties;
- ✓ **Fringe Benefit Tax (FBT)** – for loans provided to employees below the interest rate provided by the Commissioner. The benefit is the difference in rate and is chargeable to FBT

PAYE Calculations

Income	NSSF	Taxable income	Pre-Covid Analysis		Covid Analysis		Post-covid Analysis	
			Personal relief	PAYE	Personal relief	PAYE	Personal relief	PAYE
24,000	200	23,800	1,408	1,547	2,400	-	2,400	-
100,000	200	99,800	1,408	22,597	2,400	16,500	2,400	22,383
900,000	200	899,800	1,408	262,597	2,400	216,500	2,400	262,383

- Tax rate for the highest tax band from 30%, to 25% and back to 30%
- Minimum taxable income increased from KES 13,486.00 to KES 24,000 per month;
- Relief increased from KES 1,408 to KES 2,400 per month

Taxable benefits



- ✓ Cash benefits and allowances;
- ✓ Non-cash benefits of KES 3,000 p.m (KES 36,000 p.a) or more e.g. house, motor vehicle, furniture;
- ✓ Per diem – KES 2,000 treated as reimbursement of expenses; any amount above KES 2,000 should be accounted for or charged to tax. Employee must be outside his usual place of work and on official duties;
- ✓ **Fringe Benefit Tax (FBT)** – for loans provided to employees below the interest rate provided by the Commissioner. The benefit is the difference in rate and is chargeable to FBT
- ✓ Car allowance vs company car
- ✓ House allowance vs provision of house
- ✓ Home furniture at 1% of value of furniture
- ✓ Telephone allowance vs phone bills (30% of the bill)

Taxable benefits



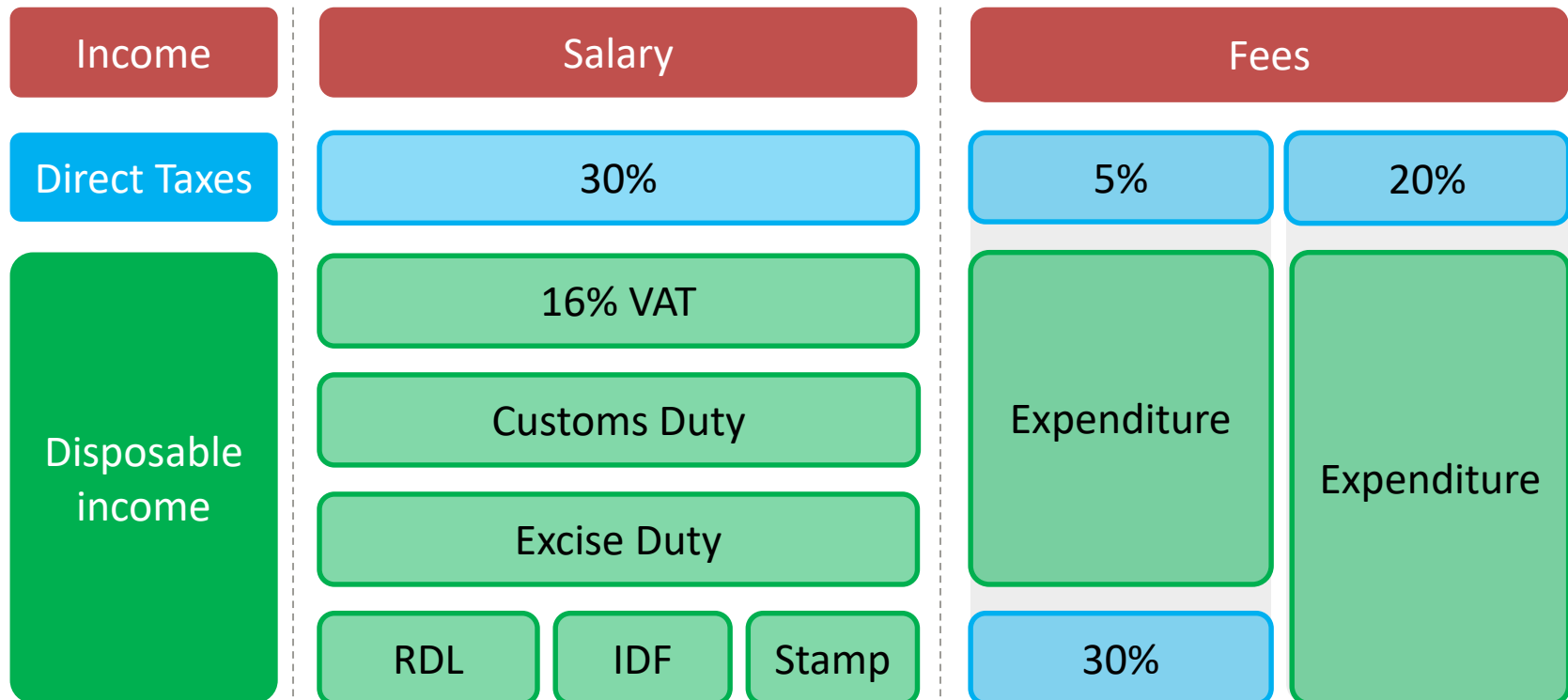
- ✓ Tax benefit factor 1.4 without housing, 1.5 with housing;
- ✓ Water (KES 500pm),
- ✓ Electricity (KES 1,500pm)

Non-Taxable benefits

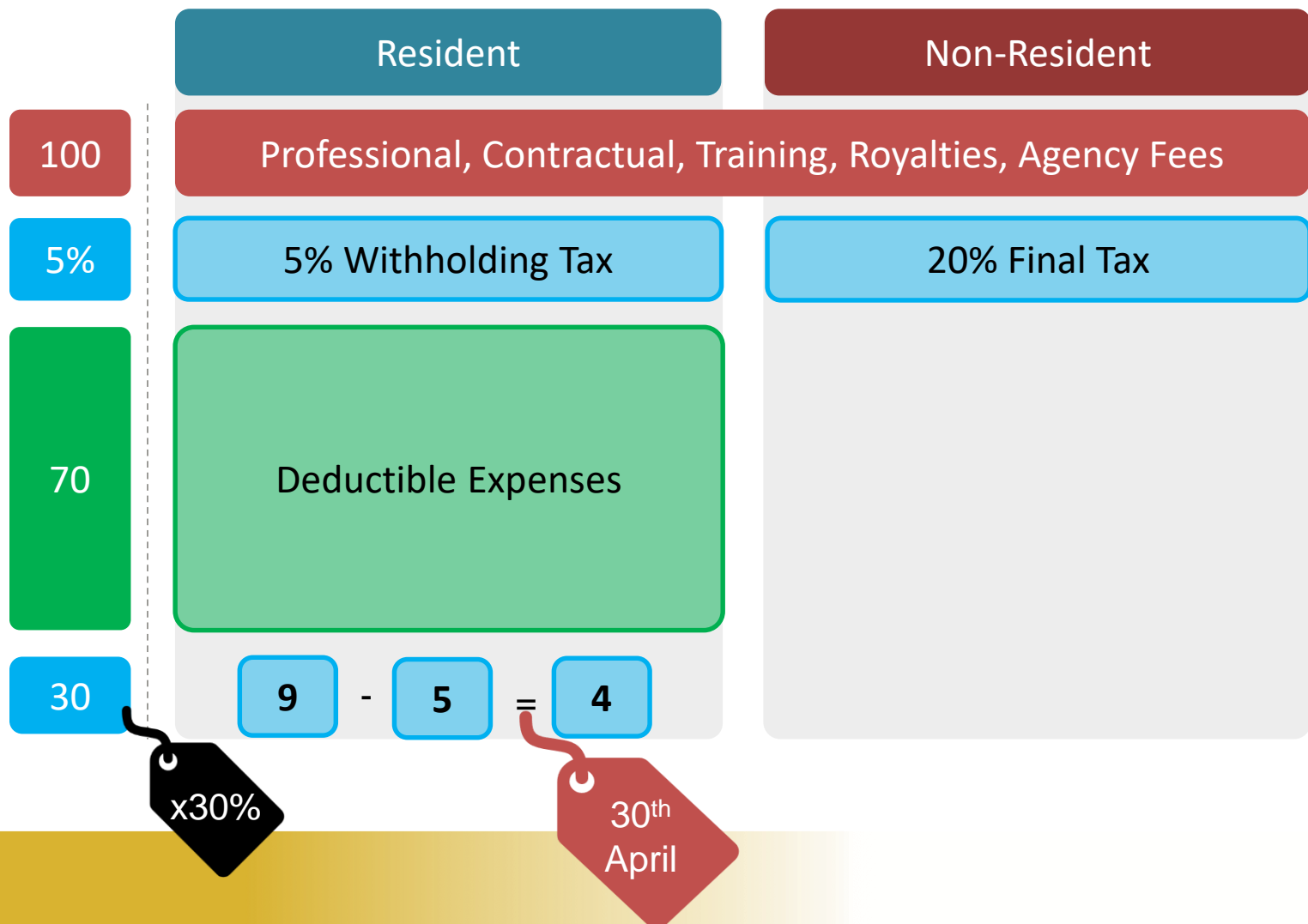


- ✓ Leave passages: expatriate employees
- ✓ Medical services
- ✓ Employer's contribution to pension funds
- ✓ Exception: Contributions by non taxable employers: to unregistered schemes, excess contribution to registered schemes
- ✓ Education fees taxed on the employer
- ✓ Reimbursement of expenses incurred by employee wholly and exclusively in production of income
- ✓ Lunch benefit subject to a maximum value of KES 4,000 per month

My taxes



Consultant and professional fees



S 39(2) ITA

- (2) If any citizen of Kenya chargeable to tax in Kenya for any year of income on employment income or income in respect of any activity under section 10 (e) of this Act accrued in or derived from another country proves to the satisfaction of the Commissioner that he paid tax in such other country for such year of income in respect of the same income, he shall be entitled to set-off by way of credit of the same tax against the tax charged in Kenya on such income.

S 41(1) ITA

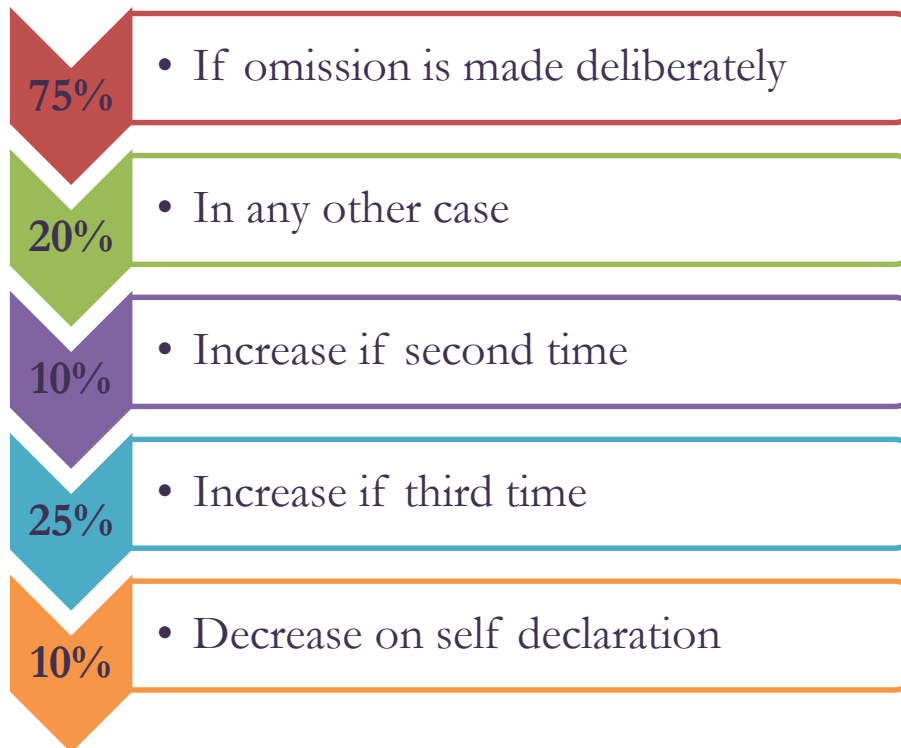
- 41(1) The Minister may from time to time by notice declare that arrangements, specified in the notice and being arrangements that have been made with the government of any country with a view to affording relief from double taxation in relation to income tax and other taxes of a similar character imposed by the laws of that country, shall, subject to subsection (5) but notwithstanding any other provision to the contrary in this Act or in any other written law, have effect in relation to income tax, and that notice shall, subject to the provisions of this section, have effect according to its tenor.

Obligations



Offense	Penalty
<ul style="list-style-type: none"> Person liable to tax failing to register for taxes 	<ul style="list-style-type: none"> KES 100,000 per month subject to a maximum of KES 1 million
<ul style="list-style-type: none"> Failure to keep documents 	<ul style="list-style-type: none"> KES 100,000 or 10% of the amount of tax payable to which the document relates to
<ul style="list-style-type: none"> Late submission of tax return on account of employment income 	<ul style="list-style-type: none"> The higher of 25% of the tax due or KES 10,000
<ul style="list-style-type: none"> Late submission of tax return 	<ul style="list-style-type: none"> The higher of 5% of the tax due or KES 2,000
<ul style="list-style-type: none"> Late submission of tax return on account of Turnover tax 	<ul style="list-style-type: none"> KES 5,000
<ul style="list-style-type: none"> Failure to comply with electronic tax systems 	<ul style="list-style-type: none"> KES 100,000
<ul style="list-style-type: none"> Tax Avoidance 	<ul style="list-style-type: none"> Double the amount of tax
<ul style="list-style-type: none"> General offence penalty 	<ul style="list-style-type: none"> KES 2million, or imprisonment not exceeding 2years or both

Obligations



- Not payable when one can prove that could not reasonably be expected to know that the statement was false;
- Commissioner must notify in writing of imposed penalty
- Taxpayer may apply for waiver of penalties
- Voluntary Tax Disclosure Program

Consultant vs Employee



Everret vs KRA

Helicopter charter services using freelance pilots



Facts

- Pilots not integrated to business
- Pilots would procure license independently
- Everret could not dismiss them or force them to fly
- Did not carry out management duties
- Hired for special skills
- Employed for a few hours or a few weeks

Ruling

- Contract of service not contract for service.
- No regard to duration of employment
- Income derived from Kenya
- Guided on how to work
- Liable to pay PAYE

Consultant vs Employee



MICE Test

Sufficient mutuality of obligations to justify a finding that there was a contract of employment;

Whether the person's duties are an integral part of the employer's business

The greater the direct control of the employee by the employer, the stronger the grounds for holding it to be an employment contract

Control i.e. In the contract for service the master can order or require what is to be done, while in the contract of service he cannot only order or require what is to be done but how it shall be done;

The equipment used in the job and who supplies it/ owns it

The way in which the parties themselves treat the contract and the way in which they describe and operate it;

R v KRA ex parte Civicon



Emergency contract to build roads in SSD by WFP



Facts

- Contract provided that SSD citizens.
- Money earned in a foreign land
- Paid in a foreign jurisdiction
- Taxes deducted at source

Ruling

- S 3(2) is silent and ambiguous as to the location of employee and payment
- Followed judge Nyamu persuaded to follow intl best practice on avoidance of double taxation

- (2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of -
- (a) gains or profits from –
- (i) a business for whatever period of time carried on;
 - (ii) employment or services rendered;
 - (iii) a right granted to another person for use or occupation of property;

Foreign employees



ISK vs KRA

Diplomatic status



Facts

- Audit carried out covering FY 2012 to 2015
- WHT KES 398M
- PAYE KES1.4B
- Claimed to have diplomatic immunity
- Legitimate expectation
- Para 27 -

27. The emoluments payable out of foreign sources in respect of duties performed in Kenya in connection with a technical assistance or other agreement for development services or purpose to which the Government is a party to a non-resident person or to a person who is resident solely for the purposes of performing those duties, in any case where the agreement provides for the exemption of those emoluments.

Ruling

- The school did not have diplomatic immunity
- Incorporated under Companies Act
- PAYE payable



Thank You

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