

INCOME TAX BILL, 2018

ARRANGEMENT OF CLAUSES

PART I - PRELIMINARY

Clause

1. Short title and commencement
2. Interpretation

PART II - ADMINISTRATION

3. Application of Tax Procedures Act
4. Act to prevail

PART III - IMPOSITION OF INCOME TAX

5. Charge of tax
6. Income from businesses
7. Income from businesses where foreign exchange gain or loss is realized
8. Income from Employment, etc
9. Income from the use of property.
10. Imposition of residential rental Income Tax
11. Dividend Income
12. Dividend distributed out of untaxed gains or profits
13. Repatriated income
14. Income from retirement benefits funds., etc.
15. Income of certain non- resident persons deemed derived from Kenya
16. Income from management or professional fees, royalties, interest and rents.
17. Trust income, etc. deemed income of trustee, beneficiary, etc.
18. Income under a settlement
19. Payment of tax by installment
20. Imposition of advance tax
21. Imposition of Fringe benefit tax
22. Presumptive tax

PART IV - EXEMPTION FROM TAX

23. Certain income exempt from tax

PART V - ASCERTAINMENT OF TOTAL INCOME

24. Deductions allowed
25. Ascertainment of income of farming business
26. Ascertainment of gains or profits of business in relation to certain non-resident persons
27. Ascertainment of income of insurance business
28. Co-operative societies
29. Collective investment schemes
30. Members' Clubs and trade associations
31. Purchased annuities, other than retirement annuities, etc
32. Deduction in respect of contributions to registered pension or provident funds
33. Deductions in respect of a registered individual retirement funds
34. Transactions designed to avoid liability to tax
35. Avoidance of tax liability by non- distribution of dividends
36. Accounting periods not coinciding with year of income etc
37. Income and Expenditure after Cessation of Business

PART VI - INDIVIDUAL TAX RELIEFS

38. Individual Relief
39. Insurance Relief

PART VII - RATES, DEDUCTIONS AND SET-OFF OF TAX AND DOUBLE TAXATION RELIEF

A - Rates of tax

40. Rates of tax

B - Deduction of Tax

41. Deduction of tax from certain income
42. Deduction of tax from annuities etc, paid under a will etc
43. Deductions of tax from emoluments
44. Application to Government

C - Set-off of Tax

45. Set-off of tax

D - Double Taxation Relief

46. Special arrangements for relief from double taxation
47. Agreements for exchange of information
48. Computation of credits under special arrangements

PART VIII - PERSONS ASSESSABLE

49. Income of a person assessed on him
50. Income of incapacitated person
51. Income of non- resident person
52. Income of deceased person, etc
53. Liability of joint trustees
54. Liability of person in whose name income of another person assessed

PART IX- RETURNS AND NOTICES

55. Final Return with Self-assessment
56. Documents to be included in return of income
57. Keeping of records of receipts expenses, etc.

PART X - COLLECTION, RECOVERY AND REPAYMENT OF TAX

58. Time within which payment to be made
59. Due date for payment of tax under self –assessment
60. Deceased persons
61. Collection of tax from shipowner, etc
62. Repayment of tax in respect of income accumulated under trusts
63. General penalty

PART XI - MISCELLANEOUS PROVISIONS

64. Regulations
65. Repeal and transitional provisions

SCHEDULES

FIRST SCHEDULE

INCOME EXEMPT FROM TAX

SECOND SCHEDULE

INVESTMENT ALLOWANCE

THIRD SCHEDULE

RESIDENT INDIVIDUAL TAX RELIEFS AND RATES OF TAX

FOURTH SCHEDULE

FINANCIAL INSTITUTIONS

FIFTH SCHEDULE

COMPUTATION OF GAINS FROM TRANSFER OF PROPERTY

SIXTH SCHEDULE

TAXATION OF EXTRACTIVE INDUSTRIES

SEVENTH SCHEDULE

TAXATION OF EXPORT PROCESSING AND SPECIAL ECONOMIC ZONES
ENTERPRISES

EIGHTH SCHEDULE

TAXATION OF CROSS-BORDER TRANSACTIONS

THE INCOME TAX BILL, 2018

An Act of Parliament to review and update the law relating to income tax; to provide for the charge, ascertainment, and collection of income tax; and for connected purposes.

PART I – PRELIMINARY

Short title and commencement

1. This Act may be cited as the Income Tax Act, 2018 and shall come into operation on such date as the Cabinet Secretary may, by notice in the Gazette appoint.

Interpretation

2. (1) In this Act, unless the context otherwise requires -

"accounting period" in relation to a person, means the period for which that person makes up the accounts of his business;

"actuary" has the meaning assigned to it in the Insurance Act;

"agency fees" means payments made to a person for acting on behalf of a person or group of persons and excludes any payments made by an agent on behalf of a principal when such payments are recoverable;

"all loans" means loans, overdrafts, ordinary trade debts, overdrawn current accounts or any other form of indebtedness advanced to the company by a non-resident person whether directly or indirectly for which the company is paying a financial charge, interest, discount, premium or a similar charge;

"annuity contract" means a contract providing for the payment of an individual of a life annuity;

"registered annuity contract" means an annuity contract which has been registered with the Commissioner in such manner as may be prescribed;

"assessment" has the meaning assigned to it under the Tax Procedures Act;

"associated" in relation to one person to another means -

- a) either person participates directly or indirectly in the management, control, or capital of the business of the other; or
- b) a third person participates directly or indirectly in the management, control, or capital of the business of both; or
- c) an individual, who participates in the management, control, or capital of the business of one, is associated by marriage, consanguinity or affinity

to an individual who participates in the management, control, or capital of the business of the other.

Cap.488

"bank" means a bank or financial institution licensed under the Banking Act;

"bearer" means the person in possession of a bearer instrument;

"bearer instrument" includes a certificate of deposit, bond, note or any similar instrument payable to the bearer;

"business" includes any trade, profession or vocation, and every manufacture, adventure and concern in the nature of trade, but does not include employment;

"Cabinet Secretary" means the Cabinet Secretary for the time being responsible for matters relating to finance;

"collective investment scheme" has the meaning assigned to it under the Capital Markets Act;

Cap.403

"commercial vehicle" means a road vehicle which is -

- (a) manufactured for the carriage of goods and so used in connection with a trade or business; or
- (b) a motor omnibus within the meaning of that term in the Traffic Act; or
- (c) used for the carriage of members of the public for hire or reward;

Cap.469

"Commissioner" means the Commissioner-General appointed under the Kenya Revenue Authority Act;

"company" has the meaning assigned to it under the Tax Procedures Act;

"consultancy fees" means payments made to any person for acting in an advisory capacity but does not include payment made under contract of service;

"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;

"control" shall be deemed to arise at any time during the year of income where

-

- (a) one person holds, directly or indirectly, shares carrying not less than twenty per cent of the voting power in the other person; or

- (b) any person holds, directly or indirectly, shares carrying not less than twenty per cent of the voting power in each of such persons; or
- (c) a loan advanced by one person to the other person constitutes not less than seventy per cent of the book value of the total assets of the other person excluding loans from financial institutions where the person and the financial institution are not associated; or
- (d) a guarantee for any form of indebtedness by one person to the other person constitutes not less than seventy per cent of the total indebtedness of the other person excluding guarantee from financial institutions where the person and the financial institution are not associated; or
- (e) more than half of the board of directors or members of the governing board, or one or more executive directors or executive members of the governing board of one person, are appointed by the other person; or
- (f) more than half of the directors or members of the governing board, or one or more of the executive directors or members of the governing board, of each of the two persons are appointed by the same person or persons; or
- (g) the manufacture or processing of goods or articles or business carried out by one person is wholly dependent on the use of know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, of which the other person is the owner or in respect of which the other person has exclusive rights; or
- (h) ninety per cent or more of the purchases by one person are supplied by the other person, or by persons specified by the other person, and the prices and other conditions relating to the supply are influenced by such other person; or
- (i) ninety per cent or more of the sales by a person to the other person or to persons specified by the other person, and the prices and other conditions relating thereto are influenced by such other person; or
- (j) any other form of control that the Commissioner may establish.

“current year of income”, in relation to income charged to instalment tax, means the year of income for which the instalment tax is payable;

“debenture” includes debenture stock, a mortgage, mortgage stock, or any similar instrument acknowledging indebtedness, secured on the assets of the person issuing the debenture;

"deemed interest" means the amount by which the interest payable at market interest rate in the country of non-resident of such a loan exceeds that which is paid by a resident person in respect of any outstanding loan provided or secured by a non-resident who exercises control on the resident company, where such a loan has been provided at interest rate that is lower than the market interest rate in the country of non-resident;

“demurrage charges” means penalty paid for exceeding period allowed for taking delivery of goods, or returning of any equipment used for transportation of goods;

"discount" means interest measured by the difference between the amount received on the sale, final satisfaction or redemption of any debt, bond, loan, claim, obligation or evidence of indebtedness, and the price paid on purchase or original issuance of the bond or evidence of indebtedness or the sum originally loaned upon the creation of the loan, claim or other obligation;

"dividend" includes any amount distributed or deemed distributed under section 11;

"due date" means the date by which taxes are due and payable or such other date as the Commissioner may specify in a notice;

"employer" includes any resident person responsible for the payment of, or accounting for, emoluments to an employee, or an agent, manager or any other representative so responsible in Kenya on behalf of a non-resident employer;

Cap.517

"export processing zone enterprise" has the meaning assigned to it by the Export Processing Zones Act;

"foreign tax", in relation to income charged to tax in Kenya, means income tax or tax of a similar nature charged under any law in force in another jurisdiction where a special arrangement has been made by the Government of Kenya and which is the subject of that arrangement;

"incapacitated person" means a minor, or a person adjudged under any law, whether in Kenya or elsewhere, to be in a state of unsoundness of mind (however described);

"individual" means a natural person;

"individual retirement fund" means a fund held in trust for a resident individual for the purpose of receiving and investing funds in order to provide

pension benefits for such an individual or the surviving dependants of such an individual;

"registered individual retirement fund" means an individual retirement fund where the trust deed for such a fund has been registered with the Commissioner;

"interest" (other than interest charged on tax) means a charge payable in any manner in respect of a loan, deposit, debt, claim or other right or obligation, and includes a premium or discount by way of interest and commitment or service fee paid in respect of any loan or credit or an Islamic finance return;

Cap 487.

"insurance business" has the meaning assigned to it in the Insurance Act;

"Islamic finance arrangement" means all financial arrangements, including transactions, instruments, products or related activities that are structured in accordance with Islamic law;

"Islamic finance return" means any amount received or paid in relation to Sukuk or an Islamic finance arrangement;

Cap.371

"Kenya" includes exclusive economic zone as defined in the Maritime Zones Act;

"management or professional fee" means all payments made to a person, other than to an employee by his employer, as consideration for managerial, technical, agency, contractual, professional or consultancy services and includes any other payments incidental to the provision of such services;

"market interest rate" means the average 91-day treasury bill rate of interest for the previous quarter.

Act No. 45 of
2013

"National Social Security Fund" means the National Social Security Fund established under the National Social Security Fund Act;

"natural resource income" means –

- (i) an amount including a premium or such other like amount paid as consideration for the right to take minerals or a living or non-living resource from land or sea; or
- (ii) an amount calculated in whole or in part by reference to the quantity or value of minerals or a living or non-living resource taken from land or sea.

"paid" means any payment made or amount accrued and includes distributed, credited, transferred or deemed to have been paid in the interest or on behalf of a person;

“payment” includes any amount paid or payable in cash or kind, or any other means of conferring value or benefit on a person;

“pension fund” means a fund for payment of pensions or other similar benefits to employees on retirement, or to the dependants of employees on the death of those employees;

“permanent establishment” means a fixed place of business through which the business of an enterprise is wholly or partly carried on and includes -

- (a) a place of management;
- (b) a branch;
- (c) an office;
- (d) a factory;
- (e) a workshop;
- (f) a mine, an oil or gas well, a quarry or any other place of extraction or exploitation of natural resources;
- (g) a warehouse, in relation to a person providing storage facilities to others;
- (h) a farm, plantation or other place where agricultural, forestry plantation or related activities are carried on; and
- (i) a sales outlet;

and shall also be deemed to include -

- (i) building site, a construction, assembly or installation project or any supervisory activity in connection with such site or project, but only where such site, project or activity continues for a period of more than 183 days;
- (ii) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by an enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project) within Kenya for a period or periods exceeding in the aggregate 91 days in any twelve-month period commencing or ending in the fiscal year concerned; and
- (iii) an installation or structure used in the exploration for natural resources where that installation or structure continues for a period of not less than 183 days.

“permanent home” means a place where a person lives in or is available to him for purposes of residing while in Kenya or the place where personal and economic interests are closest;

"permanent or semi-permanent crops" means those crops which the Cabinet Secretary may, by notice in the Gazette, declare to be permanent or semi-permanent crops for the purposes of this Act;

Act No. 29 of
2015.

“person” has the meaning assigned to it under the Tax Procedures Act;

"premises" means a building together with the land and any improvement thereon, or, where part of that building is occupied as a separate dwelling-house, that part;

"provident fund" includes a fund or scheme for the payment of lump sums and other similar benefits, to employees when they leave employment or to the dependants of employees on the death of those employees but does not include a National Social Security Fund;

“registered pension fund” means a pension fund which has been registered with the Commissioner in accordance with the regulations;

"registered provident fund" means a fund which has been registered with the Commissioner in accordance with regulations;

"public pension scheme" means a pension scheme that pays pensions or lump sums out of the Consolidated Fund;

Cap. 485A

“real estate investment trust” shall have the meaning assigned to it in the Capital Markets Act;

"registered fund" means a registered pension fund or a registered provident fund;

"registered trust scheme" means a trust scheme for the provision of retirement annuities which has been registered with the Commissioner in accordance with regulations;

"registered unit trust" means a unit trust registered by the Commissioner in accordance with the regulations;

"registered venture capital company" means a venture capital company registered by the Commissioner in accordance with regulations;

“related” in relation to one person to another has the same meaning as “associated”

"resident", when applied in relation -

(a) to an individual means -

- (i) that he has a permanent home in Kenya and was present in Kenya for any period in a particular year of income under consideration; or
- (ii) that he has no permanent home in Kenya but -
 - (A) was present in Kenya for a period or periods amounting in the aggregate to 183 days or more in that year of income; or
 - (B) was present in Kenya in that year of income and in each of the two preceding years of income for periods averaging more than 122 days in each year of income;

(b) to a body of persons, means -

- (i) that the body is a company incorporated under a law of Kenya; or
- (ii) that the management and control of the affairs of the body was exercised in Kenya in a particular year of income under consideration;

"return of income" means a return of income as specified under section 56;

"retirement annuity" means a retirement annuity payable under a registered annuity contract;

"royalty" means -

- (i) a payment made as a consideration for the use of or the right to use -
 - (a) the copyright of a literary, artistic or scientific work; or
 - (b) a cinematograph film, including film or tape for radio or television broadcasting; or
 - (c) a patent, trade mark, design or model, plan, formula or process; or
 - (d) any industrial, commercial or scientific equipment; or
 - (e) information concerning industrial, commercial or scientific equipment or experience; or
 - (f) any other intellectual property;

(ii) gains derived from the sale or exchange of any right or property giving rise to that royalty;

Cap.485A. "securities exchange" has the meaning assigned to it in the Capital Markets Act;

Act No. 16 of 2015. "Special Economic Zone" has the meaning assigned to it in the Special Economic Zones Act;

Act No. 18 of 2012. "Sukuk" has the meaning assigned to it in the Public Finance Management Act;

"tax" means the income tax charged under this Act;

"total income" means, in relation to a person, the aggregate amount of his income, other than income exempt from tax;

"trade association" means a body of persons which is an association of persons separately engaged in any business with the main object of safeguarding or promoting the business interests of those persons;

"training fee" means a payment made in respect of a business or user training services designed to improve the work practices and efficiency of an organization, and includes any payment in respect of incidental costs associated with provision of such services.

Provided that training fees shall not include fees paid for educational services provided by –

- (a) A pre-primary, primary, or secondary school;
- (b) A technical college or university;
- (c) An institution established for the promotion of adult education, vocational training or technical education.

"unit holder", in relation to a unit trust, means a shareholder in the unit trust;

Cap. 485A. "unit trust" has the meaning assigned to it in the Capital Markets Act;

"registered venture capital company" has the meaning assigned to it in the Capital Markets Act;

"full time service director" means a director of a company who is required to devote all of his time to the service of that company in a managerial or technical capacity and is not the beneficial owner of, or able, either directly or through the medium of other companies or by any other means, to control more than five per cent of the share capital or voting power of that company;

"year of income" means the period of twelve months commencing on 1st January in any year and ending on 31st December in that year.

PART II – ADMINISTRATION

Application of
Tax Procedures
Act.

3. The Tax Procedures Act, 2015 shall apply for the purposes of the administration of this Act.

Act to prevail.

4. This Act shall prevail in the case of any inconsistency between this Act and any other legislation in regard to tax on income of a person.

PART III - IMPOSITION OF INCOME TAX

Charge of tax

5. (1) Subject to, and in accordance with, this Act, a tax to be 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.

(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;
- (b) dividends or interest;
- (c) pension or annuity schemes -
 - (i) a pension, charge or annuity; and
 - (ii) any withdrawal from, or payments out of, a registered pension fund, or a registered provident fund or a registered individual retirement fund.
- (d) an amount deemed to be the income of a person under this Act or by regulations made under this Act;
- (e) gains on transfer of property as specified in the Fifth Schedule;
- (f) subject to section 24(8), the net gain derived on the disposal of an interest in a person, if the interest derives twenty per cent or

more of its value, directly or indirectly, from immovable property in Kenya; and

(g) a natural resource income;

(3) For the purposes of this section –

(a) "person" does not include any form of partnership;

(b) a bonus or interest paid by a designated co-operative society, as defined under section 28, shall be deemed to be a dividend.

(4) For the purposes of subsection (2)(f) and section 24(8) -

(i) “immovable property” means a mining right, an interest in a petroleum agreement, mining information or petroleum information;

(ii) “net gain”, in relation to the disposal of an interest in a person, means the consideration for the disposal reduced by the cost of the interest; and

(iii) the terms “consideration”, “cost”, “disposal”, “interest in a person”, “mining information”, “mining right”, “person”, “petroleum agreement”, and “petroleum information” have the meaning assigned to them in the Sixth Schedule.

Income from
businesses

6. For the purposes of section 5(2)(a)(i) -

(a) where a business is carried on or exercised partly within and partly outside Kenya by a resident person, the whole of the gains or profits from that business shall be deemed to have accrued in or to have been derived from Kenya;

(b) the gains or profits of a partner shall be the sum of -

(i) remuneration payable to him by the partnership together with interest on capital so payable, less interest on capital payable by him to the partnership; and

(ii) his share of profits from the partnership.

Provided that in computing the total income of a partnership, there shall be deducted the cost of medical expenses or medical insurance cover paid by the partnership for the benefit of any partner, subject to a limit of one million shillings per year.

- (c) a sum received under an insurance against loss of profits, or received by way of damages or compensation for loss of profits, shall be deemed to be gains or profits of the year of income in which it is received;
- (d) where any expenditure, provision or loss has been deducted, and in a later year of income the whole or part of that expenditure, provision or loss is recovered, then any sum so recovered shall be deemed to be gains or profits of the year of income in which it is recovered;
- (e) a balancing charge or a trading receipt as computed under the Second Schedule shall be deemed to be gains or profits of that year of income.
- (f) the gains or profits of a “licensee”, “contractor” or “subcontractor” shall be as provided for in the Sixth Schedule.
- (g) the gains or profits of an export processing and special economic zones enterprise, shall be as provided for in the Seventh Schedule.

Income from businesses where foreign exchange gain or loss is realized

7. (1) A foreign exchange gain or loss realized in a business carried on in Kenya shall be taken into account as a trading receipt or deductible expenses in computing the gains and profits of that business for the year of income in which that gain or loss was realized.

(2) Despite subsection (1), the foreign exchange loss shall not be allowed as a deduction where the foreign exchange loss is realized by a company with respect to a loan from a person who is in control of that company and the highest amount of all loans by that company outstanding at any time during the year of income is more than two times the sum of revenue reserves and the issued and paid up capital of all classes of shares of the company.

(3) For purposes of subsection (2), accumulated losses shall be taken into account in computing the amount of revenue reserves.

(4) The amount of foreign exchange gain or loss shall be the difference between (A times r_2) and (A times r_1)

Where –

- A is the amount of foreign currency received or paid with respect to a foreign currency asset or liability in the transaction in which the foreign exchange gain or loss is realized;
- r_1 is the applicable rate of exchange for that foreign currency ("A") at the date on which the foreign currency asset or liability was obtained or incurred .

r₂ is the applicable rate of exchange for that foreign currency ("A") at the date of the transaction in which the foreign exchange gain or loss is realized.

(5) Foreign exchange loss shall be deemed not to have been realized where a foreign currency asset or liability is disposed off or settled and within a period of sixty days a substantially similar foreign currency asset or liability is obtained or established.

(6) For the purposes of this section -

"foreign currency asset or liability" means an asset or liability denominated in a currency other than the Kenya Shilling;

"company" does not include a bank or a financial institution licensed under the Banking Act.

Income from
Employment,
etc.

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

- (a) 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.

(2) For the purposes of section 5(2)(a)(ii), income from employment or services rendered includes -

- (a) wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling, entertainment or other allowance received and any amount so received in a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year of income:

Provided that -

- (i) where such an amount received relates to a period of more than five years prior to that year of income, it shall be deemed to be income of the year of income which expired five years prior to the year of income in which it was received; and

- (ii) where the Commissioner is satisfied that subsistence, travelling, entertainment or other allowance represents solely the reimbursement to the recipient of an amount expended by him wholly and exclusively in the production of his income from the employment or services rendered then the calculation of the gains or profits of the recipient shall exclude that allowance or expenditure;
 - (iii) notwithstanding the provisions of sub-paragraph (ii), where such amount is received by an employee as payment of subsistence, travelling, entertainment or other allowance, in respect of a period spent outside his usual place of work while on official duties, the amount not exceeding the public service prescribed rates for the duration of that period shall be deemed to be reimbursement of the amount so expended and shall be excluded in the calculation of his gains or profits.
- (b) an amount received as compensation for the termination of a contract of employment or service, whether or not provision is made in the contract for the payment of that compensation, shall be deemed to have accrued evenly over the unexpired period of the contract:

Provided that this provision shall not apply to a director who is not a full time service director.

- (c) any balancing charge under Second Schedule;
- (d) the value of premises provided by an employer for occupation by his employee for residential purposes;
- (e) an amount paid by an employer as a premium for an insurance on the life of his employee and for the benefit of that employee or any of his dependants:

Provided that this paragraph shall not apply where such an amount is paid -

- (i) to a registered or unregistered pension scheme, pension fund, or individual retirement fund; or
- (ii) for a group life policy cover, unless such a cover confers a benefit to the employee or any of his dependants.

(3) Where an employee is provided with a motor vehicle by the employer, he shall be deemed to have received a benefit in that year of income equal to two per cent of the initial expenditure on the vehicle by the employer:

Provided that where -

- (i) such vehicle is hired or leased from a third party, the employee shall be deemed to have received a benefit in that year of income equal to the cost of hiring or leasing; or
- (ii) an employee has restricted use of such motor vehicle, the Commissioner shall upon proof by the employee, determine a lower rate of benefit depending on the usage of the motor vehicle.

(4) For the purposes of subsection (2)(d), the value of premises, excluding the value of any furniture or other contents so provided, shall be deemed to be –

- (a) in the case of a director of a company, other than a full time service director, an amount equal to the higher of fifteen per cent of his total income excluding the value of those premises and any capital gains income, the market rental value or the rent paid by the employer;
- (b) in the case of a full time service director, an amount equal to the higher of fifteen per cent of the income from his employment, excluding the value of those premises and any capital gains income, the market rental value or the rent paid by the employer;
- (c) in the case of an agricultural employee required by the terms of employment to reside on a plantation or farm, an amount equal to ten per cent of the income from his employment:

Provided that for the purposes of this paragraph-

- (i) "plantation" shall not include a forest or timber plantation; and
 - (ii) "agricultural employee" shall not include a director other than a full time service director.
- (d) in the case of any other employee, an amount equal to higher of fifteen per cent of the income from his employment, excluding the value of those premises or the rent paid by the employer or the market rental value.
- (e) where the premises are provided under an agreement with a third party which is not at arm's length, then the value of the premises shall be

the fair market rental value of the premises in that year, or the rent paid by the employer, whichever is the higher.

- (f) where the premises are owned by the employer, the value of the premises shall be the fair market rental value.

Provided that –

- (i) where a person occupies premises for part only of a year of income, the value shall be determined on the basis of the period occupied.
- (ii) where the employee pays rent to his employer for premises, the value ascertained under the foregoing provisions shall be reduced by the amount of the rent.
- (iii) where part only of any premises is so provided, the Commissioner may reduce the value ascertained under the foregoing provisions to the amount which he considers just and reasonable.
- (iv) where the income from a person's employment, excluding the value of the premises provided by the employer, exceed six hundred thousand shillings in the year, the amount of rent determined under this subsection shall be -
 - (a) the rent paid by the employer or the fair market rental value of the premises in that year where the premises are provided under an agreement with a third party which is not at arm's length, whichever is the higher; or
 - (b) the fair market rental value of the premises in that year where the premises are owned by the employer.

(5) In the case of an employee share ownership plan, the value of the benefit shall be the difference between the market value, per share, and the offer price, per share, at the date the option is granted by the employer.

(6) For the purposes of subsection (5)-

- (a) the benefits chargeable shall accrue where such plan is registered with the Commissioner as a collective investment scheme within the meaning of the Capital Markets Act and shall accrue to the employee at the date of exercising the option;
- (b) "offer price" means the price at which an employer's shares are initially offered to an employee under an employee share ownership plan;

(c) “market value”, in relation to a share, means-

- (i) where the shares are fully listed on any securities exchange operating in Kenya, the average market value on the date the shares were granted by the employer; or
 - (ii) where the shares are not fully listed, the price which the shares might reasonably be expected to fetch on sale in the open market, which shall be agreed upon with the Commissioner before the grant of the options;
- (d) “share option” means the offer made by an employer to an employee to purchase a fixed number of shares at a fixed price, which may be paid for after the end of the vesting period;
- (e) “vesting period” means a fixed period of time between the date of offer by the employer and the date after which the option to purchase can be exercised by the employee.

(7) For the purpose of this section, the value of the benefit (excluding the value of premises as determined under subsection (4), the value of benefit determined under subsection (3) and employee share ownership plan) shall be the higher of the cost to the employer or the fair market value of the benefit:

Provided that where the cost or the fair market value of a benefit cannot be determined, the Commissioner may, from time to time, prescribe the value.

(8) Notwithstanding anything to the contrary in subsection (2) income from employment or services rendered shall not include-

- (a) the expenditure incurred on passages of a non-citizen employee between Kenya and any place outside Kenya;
- (b) in the case of a full-time employee or his beneficiaries, the value of any medical services paid for by the employer:

Provided that in the case of a director other than a full time service director, the value of the services shall be subject to such limit as the Cabinet Secretary may, from time to time, prescribe.

- (c) an amount paid by the employer as a contribution to a registered or unregistered pension fund, provident fund, individual retirement fund or scheme:

Provided that this paragraph shall not apply to any contributions paid by an employer who is not a person chargeable to tax to -

- (i) a unregistered pension scheme, unregistered provident fund or unregistered individual retirement fund; or
 - (ii) a registered pension scheme, a registered provident fund or a registered individual retirement fund in excess of the amount specified in section 32 or 33.
- (d) education fees of employee's dependants or relatives which have been taxed in the hands of the employer;
- (e) fringe benefits subject to tax under Section 21;
- (f) the value of meals served to employees by the employer where the value of the meal does not exceed the sum of forty-eight thousand shillings per year per employee;
- (g) an amount paid by an employer as gratuity or similar payment in respect of employment or services rendered, which is paid into a registered pension scheme, provident fund or individual retirement fund:

Provided that -

- (i) this paragraph shall only apply in respect of amounts not exceeding two hundred and forty thousand shillings for each year of service.
- (ii) This paragraph shall not apply to any person who is eligible for deductions under section 32.

(h) For purposes of this subsection –

“beneficiaries” means the full time employee’s spouse and not more than four children whose age shall not exceed twenty-four years.

Income from the use of property.

9. For the purposes of section 5(2)(a)(iii), “income” includes a royalty, rent, premium or similar consideration received and as determined in accordance with such regulations as may be prescribed under this Act .

Imposition of residential rental Income Tax

10. (1) Notwithstanding any other provision of this Act, a tax to be known as residential rental income tax shall be payable by any resident person from income received for the use or occupation of residential property.

(2) Subsection (1) shall –

- (a) apply to income in excess of the lowest tax band provided under the Third Schedule but does not exceed ten million shillings during any year of income;
- (b) not apply to a person who by notice in writing addressed to the Commissioner, elects not to be subject to residential rental income tax.

Dividend
Income.

11. (1) For the purposes of section 5(2)(b) -

- (i) a dividend paid by a resident company shall be deemed to be income of the year of income in which it was payable.
- (ii) an amount shall be deemed to be a dividend distributed by a company to a shareholder, where -
 - (a) any cash or asset is distributed or transferred by that company to or for the benefit of that shareholder or any related person to that shareholder;
 - (b) in relation to a company that is being wound up voluntarily, profits (including profits realized on the disposal of assets of the company) whether earned before or during the winding up are distributed (whether in cash or otherwise);
 - (c) a company issues ordinary shares, debentures or redeemable preference shares to any of its shareholders for a sum less than their nominal value or redeemable value, or market value whichever is the greater, the issue of those ordinary shares, debentures or redeemable preference shares shall be deemed to include a payment of a dividend on the shares held by the shareholders of an amount equal to the difference;
 - (d) any debt owed by the shareholder or any related person to that shareholder to any third party is paid or settled by that company;
 - (e) the shareholder or any related person to that shareholder is discharged from any obligation measurable in money which is owed to that company by that shareholder or related person;
 - (f) any amount is used by that company in any other manner for the benefit of the shareholder or any related person to that shareholder;

(g) any amount represents additional taxable income or reduced assessed loss of that company by virtue of any transaction with the shareholder or related person to such a shareholder, resulting from an adjustment.

(2) Notwithstanding section 5(2)(b), a dividend received by a resident company that holds directly or indirectly more than twenty five per cent of the shares, shall be deemed not to be income chargeable to tax.

Dividend distributed out of untaxed gains or profits.

12. Where a dividend is distributed out of gains or profits on which no tax is paid, the person distributing the dividend shall be charged to tax in the year of income in which the dividends are distributed at the resident corporate rate of tax on the gains or profits from which such dividends are distributed.

Provided that this section shall not apply to registered collective investment schemes.

Repatriated income.

13. (1) A non-resident person who carries on business in Kenya through a permanent establishment shall pay tax on repatriated income earned for the year of income.

(2) The repatriated income (R) under subsection (1) shall be calculated as follows -

$$R=A_1 + (P - T) - A_2$$

Where -

A₁ is the net assets at the beginning of the year;

P is the net profit for the year of income calculated in accordance with generally accepted accounting principles;

T is the tax payable on the chargeable income; and

A₂ is the net assets at the end of the year.

(3) The tax imposed under this section is in addition to any tax imposed by this Act on the chargeable income of the a permanent establishment under section 4.

(4) For purposes of this section, “net assets” means the total book value of assets less total liabilities for the year of income; but shall not include revaluation of assets.

Income from
retirement
benefits funds.

14. (1) For the purposes of section 5(2)(c) -

- (a) a pension received by a resident individual from a pension fund or pension scheme established outside Kenya shall be deemed to have accrued in or to have been derived from Kenya but in proportion to which it relates to employment or services rendered by the individual, or the spouse or parent of the individual, in Kenya.
- (b) a pension or retirement annuity received by a non-resident individual from a pension fund or pension scheme established in Kenya or under an annuity contract made in Kenya shall be deemed to have accrued in or to have been derived from Kenya.

(2) Notwithstanding subsection (1), the following sums shall be deemed to be income not chargeable to tax –

- (a) a lump sum received upon retirement or withdrawal from a registered pension, provident fund or individual retirement fund, the first sixty thousand shillings per full year of pensionable service or six hundred thousand shillings whichever is lower; or
- (b) a lump sum benefit paid out of the National Social Security Fund, the first six hundred thousand shillings;
- (c) the first three hundred thousand shillings of the total pensions and retirement annuities received by a resident individual from a registered fund or the National Social Security Fund in a year of income;
- (d) the total pensions or individual retirement and retirement annuities received by a resident individual from an unregistered pension or individual retirement fund or scheme-
 - (i) the contributions to which have not been allowed as a deduction under any other provisions of this Act; and
 - (ii) the income thereof has been taxed.

(3) Upon the death of a member or beneficiary of a registered fund–

- (a) the widow, widower or dependants shall qualify for the tax exempt amount out of pension income and lump sums as are available under subsection (2) respectively as if such amounts had been received by the employee; and
- (b) where the registered fund provides for no payment of retirement benefits other than the payment of a lump sum to an estate, the first

one million four hundred thousand shillings of such a lump sum payment shall be deemed to be income not chargeable to tax as income of the estate or its direct beneficiaries.

(4) Upon the death of the beneficiary of a registered individual retirement fund, the balance of funds shall be deemed to have been withdrawn immediately preceding the time of his death and shall be included in his income for that year, except -

- (a) where such funds have been bequeathed to the spouse, the ownership of the fund shall be transferred to the spouse; or
- (b) where funds are bequeathed to his children under the age of eighteen years at the time of his death, such funds shall be included in the income of such children;

(5) Upon dissolution of the marriage of the beneficiary of a registered individual retirement fund, as part of a written agreement, all or part of the balance of funds of that beneficiary may be transferred to a registered individual retirement fund in the name of the former spouse of that beneficiary.

(6) Where the Commissioner determines that pension fund or an individual retirement fund no longer complies with the registration rules, the fund shall be deemed to be no longer a pension fund or an individual retirement fund and the balance of the fund shall be included in the income of the beneficiary in the year of income in which the fund ceased to comply with the rules.

(7) For the purpose of this section:-

- (a) pension and lump sums paid from a public pension scheme, shall be deemed to be received from a registered pension fund or registered provident fund, as the case may be;
- (b) income drawdown paid from a pension fund shall be deemed to be a pension;
- (c) any surplus funds in respect of a registered pension fund or a registered provident fund withdrawn by or refunded to an employer shall be deemed to be the income of that employer.

(8) In subsection (7) the expression -

“surplus funds” means surplus funds identified through an actuarial valuation carried out in accordance with the rules made under this Act.

Income of
certain non-
resident
persons
deemed

15. (1). Where a non-resident person carries on the business of –

- (a) ship-operator or charterer;

derived from
Kenya.

(b) air transport operator or charterer; or

(c) a ship or aircraft owned or chartered;

the gross amount received from the carriage of passengers who embark, or cargo or mail which is embarked in Kenya, and shall be deemed to be income derived from Kenya;

(2) Subsection (1) shall not apply to gains or profits from the carriage of passengers who embark, or cargo or mail which is embarked, in Kenya solely as a result of transshipment.

(3) Where a non-resident person carries on, in Kenya, the business of transmitting messages by cable, radio, optical fibre, television broadcasting, Very Small Aperture Terminal (VSAT), internet, satellite or by any other similar method of communication, the gross amount received for the transmission whether or not those messages originate from Kenya, shall be deemed to be income derived from Kenya.

Income from
management
or professional
fees, royalties,
interest and
rents.

16. (1) For the purposes of this Act, where a resident person or a person having a permanent establishment in Kenya makes a payment to any other person in respect of -

(a) a management or professional fee or training fee;

(b) a royalty or natural resource income;

(c) interest or deemed interest;

(d) the use of property;

(e) demurrage charges;

(f) an appearance at, or performance in, a public or private place for the purpose of entertaining, instructing, taking part in any sporting event or otherwise attracting attention of an audience; or

(g) an activity by way of supporting, assisting or arranging an appearance or performance referred to in paragraph (f);

the amount thereof shall be deemed to be income which accrued in or was derived from Kenya:

Provided that this subsection shall not apply -

(i) unless the payment is incurred in the production of income accrued in or derived from Kenya or in connection with a

business carried on or to be carried on, in whole or part, in Kenya;

- (ii) to any payment made by a permanent establishment in Kenya of a non-resident person to that non-resident person that is disallowed under section 26 of this Act.

(2) A net gain referred to in section 5(2)(f) is deemed to be income that accrued in or was derived from Kenya.

Trust income, etc. deemed income of trustee, beneficiary, etc.

17. (1) Any income chargeable to tax under this Act and received by a person in his capacity as a trustee, executor or administrator, shall be deemed to be income of that trustee, executor or administrator.

(2) Dividend or interest on which the tax is final which is included in the income of the trustee, executor or administrator under subsection (1), shall not be subject to further tax.

(3) Where a trustee, executor or administrator has paid tax on the chargeable income of the trust, that income shall not be taxed again in the hands of the beneficiary.

Income under a settlement.

18. (1) Where income is vested by a settlor under a settlement arrangement, whether directly or indirectly, to another person without a transfer of assets that generate such income, the income shall be taxable on the settlor.

(2) For the purpose of this section -

- (a) "settlement" means an arrangement where income is conferred to a person as directed by the settlor through any disposition, trust, covenant or agreement; and
- (b) "settlor" means a person who has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement.

Payment of tax by instalment.

19. (1) Notwithstanding any other provisions of this Act, a person shall be required to pay tax for that year of income in instalments, except -

- (a) in the case of emoluments where the tax has been recovered under section 43;
- (b) where the total tax payable for that year of income is an amount not exceeding forty thousand shillings.

(2) The amount of tax payable by instalment by any person for any current year of income shall be the lesser of -

(a) the amount equal to the tax that would be payable by that person if his total income for the current year was an amount equal to his instalment income; or

(b) the amount specified in the preceding year assessment multiplied by one hundred and ten percent.

(3) The amount of tax determined under either subsection (2)(a) or (b) shall be reduced by the aggregate of the tax that has been or will be paid in the current year under sections 20, 41, or 43.

(4) Where the instalment tax is payable in accordance to subsection 2(b) and

(a) the company's immediate preceding year of income consists of less or more than twelve months, the tax payable shall be calculated by multiplying the instalment tax in the preceding year of income by the ratio of the twelve months period to the number of months in the preceding year of income;

(b) the company that is making payment was formed as a result of amalgamation of two or more companies, the tax assessed and payable for the immediately preceding year shall be the aggregate of the tax that would have been payable by all the predecessor companies;

(c) where under this Act, a person has been permitted to make up the accounts of his business for a period greater than twelve months, the instalment tax payable for such period shall be calculated by multiplying the instalment tax in the preceding year by the ratio of the number of months in the current year of income to twelve months.

Imposition of
advance tax.

20. (1) Notwithstanding any other provision of this Act, a tax to be known as advance tax shall be payable in respect of every commercial vehicle at the rates specified in the Third Schedule.

(2) The Commissioner shall prescribe the conditions and procedures governing the payment of advance tax.

Imposition of
Fringe benefit
tax.

21. (1) Notwithstanding any other provision of this Act, a tax to be known as fringe benefit tax shall be payable by every employer in respect of a loan provided at an interest rate lower than the market interest rate, to an individual who is a director or an employee or is a relative of a director or an employee, by virtue of his position as director or his employment or the employment of the person to whom he is related.

(2) For the purpose of this section, the taxable value of a fringe benefit shall be, the greater of-

- (i) the difference between the interest that would have been payable on the loan if calculated at the market interest rate and the actual interest paid on the loan; and
- (ii) zero:

(3) Where the term of the loan extends for a period beyond the date of termination of employment, the provisions of this section shall continue to apply for as long as the loan remains unpaid.

(4) Fringe benefit tax shall be charged on the total taxable value of a fringe benefit provided by an employer in a month and shall be due and payable on or before the ninth day of the following month.

(5) The Commissioner shall prescribe the form and manner in which the fringe benefit tax shall be payable and any other period for which the market rate of interest may be applicable.

(6) For the purpose of this section –

"employee" means any person who is not a beneficial owner of or able either directly or indirectly or through the medium of other companies or by any other means to control more than five per cent of the share capital or voting power of that company.

"loan" includes a loan from an unregistered pension or provident funds;

"market interest rate" means the average 91-day treasury bill rate of interest for the previous quarter;

"relative of a director or an employee" means -

- (i) his spouse;
- (ii) his son, daughter, brother, sister, uncle, aunt, nephew, niece, step-father, step-mother, step-child, or in the case of an adopted child his adopter or adopters; or
- (iii) the spouse of any such relative as is mentioned in subparagraph (ii).

Presumptive tax.

22. (1) Notwithstanding any other provision of this Act, a tax to be known as presumptive tax shall be payable by a resident person whose turnover from business does not exceed five million shillings during a year of income.

Provided that a person liable to pay tax under this section may, by notice in writing addressed to the Commissioner, elect not to be subject to the provisions of this section in which case the other provisions of this Act shall apply to such person.

(2) Subject to subsection (1), the presumptive tax shall only apply to all persons who are issued a single business permit by the County Governments.

(3) The due date for payment of tax under subsection (1) shall be at the time of payment for the single business permit or renewal of the same.

(4) Notwithstanding subsection (1), presumptive tax shall not apply to -

- (a) management and professional services; or
- (b) rental business; or
- (c) incorporated companies.

PART IV - EXEMPTION FROM TAX

Certain
income
exempt from
tax.

23. (1) Notwithstanding anything in Part III, the income specified in the First Schedule shall be exempt from tax to the extent so specified.

(2) The Cabinet Secretary may if it is in the public interest to do so, by notice in the Gazette, provide that -

- (a) income or a class of income which accrued in or was derived from Kenya shall be exempt from tax to the extent specified in the notice;
- (b) an exemption under subsection (2)(a) shall cease to have effect either generally or to the extent specified in the notice.

(3) A notice under subsection (2) shall be laid before the National Assembly without unreasonable delay, and if a resolution is not passed by the assembly within twenty days on which it next sits after the notice is so laid that the notice be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the issuing of a new notice.

(4) Despite the provisions of any other law, the income of a person shall not be exempt from tax unless provided under this Act.

PART V - ASCERTAINMENT OF TOTAL INCOME

Deductions
allowed

24. (1) For the purpose of ascertaining the total income of a person for a year of income there shall, subject to subsection (11), be deducted all expenditure

incurred in that year of income which is expenditure wholly and exclusively incurred by him in the production of that income.

(2) Where the accounting period has been adjusted in accordance with section 36, the allowable expenditure shall be confined to the period so adjusted in ascertaining total income for that year of income.

(3) Without prejudice to subsection (1), in computing for a year of income the gains or profits chargeable to tax under section 5(2)(a), the following amounts shall be deducted -

(a) bad and doubtful debts incurred in the production of those gains or profits:

Provided that the Commissioner shall prescribe guidelines for the purposes of determining bad and doubtful debts.

(b) amounts to be deducted under the Second Schedule in respect of that year of income;

(c) amounts to be deducted under the Sixth Schedule in respect of that year of income;

(d) expenditure incurred in connection with a business before the date of commencement of that business where the expenditure would have been deductible under this section if incurred after that date;

(e) twenty five percent of the amount representing diminution in value of any implement, utensil or similar article, not being machinery or plant in respect of which a deduction may be made under the Second Schedule, employed in the production of gains or profits;

(f) expenditure of a capital nature incurred in that year of income by the owner or tenant of agricultural land, as defined in the Second Schedule, on clearing that land, or on clearing and planting thereon permanent or semi-permanent crops;

(g) expenditure incurred by a person for the purposes of a business carried on by him being -

(i) expenditure of a capital or revenue nature on scientific research; or

(ii) a sum paid to a recognized university, college, research institute, association or other similar institution;

- (h) subject to section 32, any sum contributed in that year of income by an employer to a registered retirement benefits scheme;
- (i) expenditure of a capital nature incurred in that year of income by a person on legal costs and other incidental expenses relating to –
 - (i) the authorization and issue of shares, debentures or similar securities offered for purchase by the general public or;
 - (ii) listing on any securities exchange operating in Kenya, without raising additional capital; or
 - (iii) rating for the purposes of listing on any securities exchange operating in Kenya.
- (j) club subscriptions paid by an employer on behalf of an employee;
- (k) meals or accommodation expenses incurred on business trips or during training courses or work related conventions or conferences, or meals provided to employees on the employer's premises;
- (l) expenditure of a capital nature incurred in that year of income, with the prior approval of the Cabinet Secretary, by a person on the construction of a public school or hospital;
- (m) expenditure incurred in that year of income by a person sponsoring sports, with the prior approval of the Cabinet Secretary upon recommendation by Cabinet Secretary responsible for sports;
- (n) expenditure incurred in that year of income on donations to the Kenya Red Cross, county governments or any other institution responsible for the management of national disasters to alleviate the effects of a national disaster declared by the President;
- (o) expenditure incurred on passages of a non-citizen employee between Kenya and any place outside Kenya;
- (p) one hundred and fifty per centum of emoluments paid to university graduate apprentices where an employer has engaged at least ten such graduates for a period of six to twelve months during that year of income;

For purpose of this paragraph –

- (i) “university graduate apprentice” means a graduate who has at least bachelor's degree from a university recognized in Kenya and is bound by written contract of apprenticeship;

(ii) the Cabinet Secretary shall make regulations for the better carrying out of this provisions.

(q) income tax paid in a foreign country on income deemed to have accrued or derived from Kenya.

Provided that no deduction shall be allowed in this paragraph where a set-off has been granted under sections 45 or 46.

(4) Without prejudice to subsection (1), in ascertaining the total income of a person for a year of income the following amounts shall be deducted -

(a) the amount of interest not exceeding three hundred thousand shillings paid by an individual in respect of that year of income upon money borrowed from one of the first four financial institutions specified in the Fourth Schedule and applied to the purchase or improvement of premises occupied by the individual during that year of income for residential purposes:

Provided that -

- (i) if the individual occupies the premises for residential purposes for part only of a year of income the deduction under this subsection shall be reduced accordingly;
- (ii) in determining the period of occupancy, any period of temporary absence from the residence shall be ignored; and
- (iii) no individual may claim a deduction under this subsection in respect of more than one residence.

(b) the amount of any loss realized from transfer of property as provided under Fifth Schedule shall be deducted only from gains under section 5(2)(e) in that year of income and, in so far as it has not already been deducted, from gains in subsequent years of income;

(c) in the case of a business which is a sole proprietorship, the cost of medical expenses or medical insurance cover incurred for the benefit of the proprietor, subject to a limit of one million shillings per year.

(5) Where the ascertainment of the total income of a person results in a deficit for a year of income, the amount of that deficit shall be an allowable deduction in ascertaining the total income of that person for that year and the next nine succeeding years of income.

Provided that-

(a) the remaining period to carry forward deficit under the repealed Income Tax Act shall be the remaining period under this Act;

(b) this subsection shall not apply where the -

(i) ownership, direct or indirect control of the person has changed by more than fifty per cent from the period the deficit was incurred;

(ii) business activity of the person at the time the deficit occurred has changed wholly or in part in the subsequent years of income.

(6) Notwithstanding subsection (5), the Cabinet Secretary may, on the recommendation of the Commissioner, extend the period of deduction beyond ten years where a person applies for such extension, giving evidence of inability to extinguish the deficit within that period.

Provided that such extension shall not exceed a period of two years.

(7) A person to whom this subsection applies who has succeeded to a business of a deceased person, as a beneficiary, shall be entitled to a deduction of losses incurred by the deceased in the business in that year of income or in earlier years of income.

Provided that where there are two or more beneficiaries, each shall be entitled to a deduction of so much of the whole amount deductible for his share in the business as the will or on the intestacy bears to the sum of the shares of all of them.

(8) For the purpose of section 5(2)(f), the amount of the net gain to be included in income chargeable to tax shall be computed according to the following formula -

$$A \times B/C$$

Where -

A is the amount of the net gain;

B is the value of the interest derived, directly or indirectly, from immovable property in Kenya; and

C is the total value of the interest.

(9) For the purposes of this section -

(a) "scientific research" means activities in the fields of natural or applied science for the extension of human knowledge, and when applied to any particular business includes -

(i) scientific research which may lead to, or facilitate, an extension of that business or of businesses in that class;

(ii) scientific research of a medical nature which has a special relation to the welfare of workers employed in that business, or in businesses of that class;

(b) expenditure of a capital nature on scientific research does not include expenditure incurred in the acquisition of rights in, or arising out of, scientific research but, subject thereto, does include all expenditure incurred for the execution of, or the provision of facilities for the execution of, scientific research.

(10) Notwithstanding any provision in this Act -

(a) the gains or profits of a person derived from one of the sources of income respectively specified in paragraph (d) of this subsection (and in this subsection called "specified sources") shall be computed separately from the gains or profits of that person derived from any other of the specified sources and separately from any other income of that person;

(b) where the computation of gains or profits of a person in a year of income derived from a specified source results in a loss, that loss may only be deducted from gains or profits of that person derived from the same specified source in the following year and, in so far as the loss has not already been so deducted, in subsequent years of income;

(c) gains chargeable to tax under section 5(2)(e) and losses referred to in subsection 4(b) of this section shall not be deemed income or losses derived or resulting from specified sources for the purposes of this subsection;

(d) the specified sources of income are –

(i) rights granted to other persons for the use or occupation of immovable property;

(ii) employment (including former employment) of personal services for wages, salary, commissions or similar rewards

(not under an independent contract of service), and a self-employed professional vocation;

- (iii) agricultural, pastoral, horticultural, forestry or similar activities, not falling within subparagraphs (i) and (ii), of this paragraph;
- (iv) surplus funds withdrawn or refunded to an employer in respect of registered pension or registered provident funds which are deemed to be the income of the employer under section 14(7); and
- (v) income of a licensee from one license area or a contractor from one contract area as determined in accordance with the Sixth Schedule;
- (vi) other sources of income chargeable to tax under section 5(2)(a), not falling within subparagraph (i), (ii), or (iii) of this paragraph.

(e) the specified sources under paragraph (d) shall be construed to be mutually exclusive and none shall be treated as incidental to any other source.

(11) Save as otherwise expressly provided in this section, no deduction shall be allowed in respect of -

- (a) capital expenditure, or any loss, diminution or exhaustion of capital;
- (b) expenditure incurred by a person in the maintenance of himself, his family or establishment or for any other personal or domestic purpose;
- (c) expenditure or loss which is recoverable under any insurance, contract, or indemnity;
- (d) income tax or tax of a similar nature;
- (e) a premium paid under an annuity contract;
- (f) amount of deemed interest;
- (g) fines, penalties or similar charges imposed for non-compliance on any obligations;

- (h) payments made by a taxpayer subject to withholding tax, if the business failed to withhold tax as required;
- (i) consideration made to a person to the extent that equivalent amounts are not included in the income of the beneficiary;
- (j) an amount of interest paid in proportion to the extent that the highest amount of all loans held by the company at any time during the year of income exceeds two times the sum of the revenue reserves and the issued and paid up capital of all classes of shares of the company where a non-resident person is in control of the company -

For the purpose of this subsection, the expression “revenue reserves” includes accumulated losses;

Provided that this paragraph shall -

- (i) also apply to loans advanced to the company by a non-resident associate of the non-resident company controlling the resident company; and
- (ii) not apply where the company is a bank or a financial institution licensed under the Banking Act or Microfinance Act;

Ascertainment
of income of
farming
business.

25. (1) For purposes of ascertaining the income of a farming business, the provisions of this section shall apply.

(2) Where any person has been granted in previous years farming deductions allowable, any amount accrued to such person during any year of income in respect of such allowances or deductions on disposal of the property in relation to which they were allowed shall be included in the gross income of that person for that year of income derived from the farming business.

(3) Where any person makes a donation of any livestock or produce during a year of income to any other person, there shall be included in the gross income of the person making the donation an amount equal to the current market price of such livestock or produce at the date of making the donation.

(4) Where any person ceases to carry on a farming business during any year of income but does not dispose of the whole of his or her livestock or produce, the value of such livestock or produce held or donated shall be included in his or her gross income for that year of income.

(5) Every person shall include in his or her tax return for each year of income the value of all livestock or produce held and not disposed of by him or

her (hereinafter referred to as "the value of stock held") at the beginning and end of each year of income:

Provided that livestock used as working animals or held for purposes other than for the farming business shall not be included in the value of stock held.

Ascertainment of gains or profits of business in relation to certain non-resident persons.

26. (1) Where a non-resident person carries on a business in Kenya which consists of manufacturing, growing, mining, or producing, or harvesting, for sale or for delivery outside Kenya, then the gains or profits from that business carried on in Kenya shall be deemed to be income derived from Kenya. The gains shall be deemed to be such amount as would have accrued if the product or produce had been sold wholesale to the best advantage.

(2) Where a bank which is a permanent establishment of a non-resident person holds outside Kenya any deposits, assets or property acquired from its operations in Kenya, the gains or profits accruing from such deposits, assets or other property held outside Kenya shall be deemed to be income accrued in or derived from Kenya.

(3) For the purpose of ascertaining the gains or profits of a business carried on in Kenya no deductions shall be allowed in respect of expenditure incurred outside Kenya by a non-resident person save for the expenditure attributable to the income of the Kenyan entity.

(4) Notwithstanding any other provision of this Act, when a non-resident person carries on a business in Kenya through a permanent establishment, the gains or profits shall be ascertained without any deduction of-

- (a) interest, royalties or management or professional fees paid or purported to be paid by the permanent establishment to the non-resident person;
- (b) foreign exchange loss or gain with respect to net assets or liabilities purportedly established between the permanent establishment and the non-resident person.

Provided that the expression "non-resident person" shall include both the head office and other offices of the non-resident person.

(5) In computing the gains or profits of associated persons, the provisions of the Eighth Schedule shall apply.

Ascertainment of income of insurance business.

27. (1) Notwithstanding any provision in this Act, this section shall apply for the purpose of computing the gains or profits from insurance business which is chargeable to tax.

(2) Where an insurance company carries on life insurance business in conjunction with any general insurance business, the life insurance business of the company shall be treated as a separate business.

(3) The gains or profits for a year of income from the insurance business, other than life insurance business, of a resident insurance company, shall be the amount arrived at after-

(a) taking, for that year of income, the sum of -

- (i) the amount of the gross premiums from that business (less such premiums returned to the insured and such premiums paid on reinsurances as relate to that business); and
- (ii) the amount of other income from that business, including commission and any expense allowance received or receivable from reinsurers and any income derived from investments held in connection with that business; and

(b) deducting from the sum arrived at under paragraph (a) the lower of-

- (i) a reserve for unexpired risks relating to that business at the percentage adopted by the company at the end of that year of income and adding thereto the reserve deducted for unexpired risks at the end of the previous year of income; and
- (ii) the reserve for unexpired risks estimated on the basis of actuarial principles, including discounting of ultimate costs.

(c) deducting from the figure arrived at under paragraph (b)

- (i) the amount of the claims admitted in that year of income in connection with that business (provided that claims incurred but not paid or not reported before the end of the accounting period are estimated on the basis of actuarial principles including the discounting of ultimate costs); less any amount recovered in respect thereof under reinsurance; and
- (ii) the amount of agency expenses incurred in that year of income relating to that business; and
- (iii) the amount of any other expenses wholly and exclusively incurred in the production of that income.

Provided that costs and expenses attributable to earning investment income shall be determined by the ratio of investment income to the total income.

(4) The gains or profits for a year of income from the life insurance business of a resident insurance company, shall be the sum of the following-

- (a) the amount of actuarial surplus recommended to be transferred from the life fund for the benefit of shareholders and policy holders.
- (b) any other amounts transferred from the life fund for the benefit of the shareholders; and
- (c) thirty per centum of management expenses and commissions that are in excess of the maximum amounts allowed by the Insurance Act.

(5) Where actuarial valuation of a life fund results in a deficit for a year of income and the shareholders are required to inject money into the life fund, the amount of money so transferred shall be treated as a negative transfer for the purposes of subsection (4)(a):

Provided that the amount of negative transfer shall be limited to the actuarial surplus recommended by the actuary to be transferred from the life fund for the benefit of shareholders in preceding five years of income.

(6) For the avoidance of doubt, the gains arising from transfer of property by an insurance company other than property connected to life insurance business shall be taxed in accordance with the provisions of the Fifth Schedule.

(7) In this section-

“annuity fund” means, where an annuity fund is not kept separately from the life insurance fund of the company, that part of the life insurance fund which represents the liability of the company under its annuity contracts;

“investment income” does not include-

- (a) dividends chargeable to tax under section 5(2)(a)(i); and
- (b) income from the disposal of investment shares traded in any securities exchange operating in Kenya;

“life insurance fund” does not include the annuity fund, if any, nor that part of the life insurance fund as represents the liability of the company under a registered annuity contract, registered trust scheme, registered pension scheme or registered pension fund;

“Life insurance premiums” means premiums referable to the life insurance business other than annuity business;

“life insurance expenses” means expenses referable to the life insurance business other than annuity business;

Co-operative societies.
Cap 490

28. (1) This section shall apply to a co-operative society other than a society which has been exempted from all the provisions of the Co-operative Societies Act.

(2) In the case of a co-operative society, other than a savings and credit co-operative society, the income on which tax shall be charged shall be its total income for the year of income deducting therefrom an amount equal to the aggregate of bonuses and dividends distributed to its members; but the deduction shall in no case exceed the total income of the society for that year of income.

(3) In the case of a co-operative society which carries on business as a savings and credit co-operative society, its total income for any year of income shall be the aggregate of all income except interest from its members.

(4) In this section -

"bonus" and "dividend" shall, for the purposes of subsection (2), have the same meaning as in the Co-operative Societies Act;

"co-operative society" means a co-operative society registered under the Co-operative Societies Act;

Collective investment schemes.

29. (1) Subject to conditions specified by the Cabinet Secretary -

(a) a unit trust; or

(b) a collective investment scheme set up by an employer for purposes of receiving contributions from emoluments of his employees and investing them primarily in shares traded on any securities exchange operating in Kenya; or

(c) a real estate investment trust;

registered with the Commissioner, shall be exempt from income tax.

(2) Distribution of investment income to unit holders or shareholders shall be subject to tax in accordance with section 41.

Members' Clubs and trade associations.

30. (1) A members' club or a trade association is deemed to be carrying on business for the purposes of this Act subject to tax.

(2) The business income to which subsection (1) applies includes entrance fees and subscriptions paid by members.

(3) For the purpose of this section -

“members’ club” means a club or similar institution all the assets of which are owned by or are held in trust for the members of the club or institution.

“member” means –

- (a) in relation to a members’ club, a person who, while he is a member, is entitled to an interest in all the assets of that club in the event of its liquidation;
- (b) in relation to a trade association, a person who is entitled to vote at a general meeting of that trade association.

Purchased annuities, other than retirement annuities, etc.

31. (1) Notwithstanding section 5(2)(c), where payment of an annuity is made, that portion of the payment which represents the capital element thereof, as ascertained, shall not be chargeable to tax.

(2) The capital element referred to in subsection (1) shall be that proportion of each payment which the consideration or purchase price for the contract bears to the total payments.

(3) For the purpose of this section, an annuity includes an amount payable on a periodic basis, whether payable at intervals longer or shorter than a year.

(4) This section shall not apply to an annuity –

- (a) payable under a registered annuity contract or a registered trust scheme; or
- (b) purchased under a direction in a will, or purchased to provide for an annuity payable under a will or settlement out of income of property disposed of by that will or settlement; or
- (c) purchased under a pension scheme or pension fund; or
- (d) purchased by a person in recognition of the services or past services of another person.

Deduction in respect of contributions to registered pension or provident funds.

32. (1) The deduction in respect of contributions of an employee in a year shall be the actual amount of contributions or two hundred and forty thousand shillings, whichever is lower.

(2) The deduction in respect of the contributions made by an employer in a year shall be limited to the balance of the deductible amount, after employee’s contribution, as provided in subsection (1).

(3) Pension fund or provident fund in respect of an employee may be transferred from a registered fund to another registered fund or registered individual retirement fund and shall not be treated as a withdrawal under section 5(2)(c):

Provided that the Commissioner is notified in writing within thirty days prior to that transfer.

(4) Where a registered fund is wound up, any surplus funds therein shall be deemed to be the funds of the employer and shall be deemed to have been withdrawn by the employer unless the trust deed in respect of such registered fund specifies the contrary.

Deductions in respect of registered individual retirement funds.

33. An individual who is not a member of a registered fund or a public pension scheme at any time in a year of income shall be eligible to contribute to a registered individual retirement fund up to two hundred and forty thousand shillings.

Transactions designed to avoid liability to tax.

34. (1) Where a transaction was effected with intent to avoid or reduce liability to tax for a year of income, the Commissioner may, if he determines, direct that such adjustments be made as respects liability to tax as he considers appropriate.

(2) A direction of the Commissioner under this section shall specify the transaction giving rise to the direction and the adjustments as respects liability to tax.

Avoidance of tax liability by non- distribution of dividends.

35. (1) Where a company has not distributed to its shareholders as dividends within a period, not exceeding twelve months, after the end of its accounting period the whole or part of its accounting profits for that period which could be so distributed without prejudice to the requirements of the company's business, the Commissioner may direct that an amount not less than sixty per cent of that accounting profits shall be deemed as having been distributed as a dividend to the shareholders in accordance with their respective interests on a date twelve months after the end of that accounting period.

(2) Where subsection (1) applies, such dividend deemed received by another company shall be treated as income for that company available for distribution to its shareholders as dividends.

Accounting periods not coinciding with year of income etc.

36. (1) Where a person, other than an individual, makes up the accounts of his business for a period of twelve months ending on a day other than 31st December, the income of an accounting period ending on that other date shall be taken to be income of the year of income in which the accounting period ends.

(2) A person carrying on an incorporated business may subject to the prior written approval of the Commissioner alter the date to which the accounts of the business are made up.

(3) A person seeking the approval under subsection (2) shall apply in writing at least six months before the date to which the accounts are intended to be made up.

(4) The Commissioner shall within three months from the date of receipt of the application under subsection (3) communicate his decision in writing to the applicant.

Provided that where the Commissioner fails to respond within the three months, it shall be deemed that the application is granted.

(5) Where a person makes up the accounts of his business for a period greater or less than twelve months, the Commissioner may treat the income of that accounting period as income of the year of income in which the accounting period ends, and tax shall be charged accordingly.

Income and
Expenditure
after Cessation
of Business.

37. (1) Where a sum is received by a person after the cessation of his business, to the extent to which that sum has not been included in those gains or profits, that sum shall be income of that person for the year of income in which the business ceased.

(2) Where an expenditure or a loss is established by a person after the cessation of his business which, if it had been incurred prior to the cessation, would have been deductible in computing his gains or profits from that business, it shall be deducted in ascertaining his total income for the year of income in which the business ceased.

Provided that no deduction for expenditure or losses shall be allowed twelve months after establishment of such expenditure or loss.

(3) Notwithstanding the provisions under Tax Procedures Act, no penalty or interest shall be charged on the additional tax arising under subsection (1).

PART VI - INDIVIDUAL TAX RELIEFS

Individual
Relief

38. A resident individual in receipt of taxable income shall be entitled to a tax relief in this Act referred to as the individual relief as specified in Part A of the Third Schedule.

Insurance Relief

39. (1) A resident individual who proves that in a year of income he or his employer has paid a premium to an insurance company registered in Kenya for -

- (a) an insurance on his life, or on the life of the spouse or of his child;
or
- (b) an education policy with a maturity period of at least ten years;
or
- (c) a health policy;

shall, for that year of income, be entitled to a personal relief in this Act referred to as the insurance relief:

Provided that where a policy is surrendered before its maturity, all the relief granted to the policyholder shall be recovered from the surrender value of the policy and remitted to the Commissioner by the insurer.

(2) In this section “child”, means any child of the resident individual who was under the age of eighteen years on the date the premium was paid.

PART VII - RATES, DEDUCTIONS AND SET-OFF OF TAX AND DOUBLE TAXATION RELIEF

A - Rates of tax

Rates of tax

40. (1) Rates of tax applicable to the following chargeable income shall be as specified in the Third Schedule -

- (a) Resident or a non-resident person having a permanent establishment in Kenya -
 - (i) the total income of an individual, other than fringe benefits, dividend and interest, shall be charged for a year of income at the individual rates for that year of income;
 - (ii) that part of the total income of an individual that comprises interest shall be charged for a year of income at the interest rate of tax for that year of income;
 - (iii) the total income of a person other than an individual shall be charged at the corporate rate for that year of income;
 - (iv) dividends shall be charged at the resident withholding rate for the year it is paid; ;

- (v) the total fringe benefits provided by an employer shall be charged at the resident rate for that year of income;
 - (vi) the presumptive income chargeable to tax under section 22 shall be charged at the resident rate for that year of income;
 - (vii) the capital gains of a person shall be charged at the rate for that year of income and shall not be subject to further tax; residential rental income of a person chargeable to tax under section 10 shall be charged at the resident rate for that year of income.
 - (viii) a commission or fee paid by an insurance company to any person for the provision, whether directly or indirectly, of an insurance cover to any person or group of persons shall be charged at a resident rate for that year of income.
 - (ix) distribution of investment income to unit holders or shareholders of a collective investment scheme shall be charged at a resident rate for that year of income.
 - (x) repatriated income shall be charged at the rate for that year of income.
 - (xi) presumptive tax shall be charged at a rate specified in that year of income.
- (b) Non-resident person not having a permanent establishment in Kenya
- - (i) a management or professional fee;
 - (ii) a royalty or natural resource income;
 - (iii) a rent, premium or similar consideration for the use or occupation of property;
 - (iv) demurrage charges, however described, paid to a ship operator;
 - (v) a dividend;
 - (vi) interest;

- (vii) an insurance premium;
- (viii) a pension or retirement annuity;
- (ix) a payment in respect of an appearance at, or performance in, any place (whether public or private) for the purpose of entertaining, instructing, taking part in a sporting event or otherwise diverting an audience;
- (x) a payment in respect of an activity by way of supporting, assisting or arranging an appearance or performance referred to in paragraph (viii);
- (xi) a payment in respect of gains or profits from business of a ship owner which is chargeable to tax under section 15;
- (xii) a payment in respect of gains or profits from the business of transmitting messages which is chargeable to tax under section 15(3);
- (xiii) a commission or fee paid by an insurance company to any person for the provision, whether directly or indirectly, of an insurance cover to any person or group of persons;
- (xiv) distribution of investment income to unit holders or shareholders of a collective investment scheme;

shall be charged at the appropriate non-resident rate in force at the date of payment of that income.

(2) The transfer of interest in a person shall be charged as per provisions of the Sixth Schedule.

(3) In this section "person" does not include a partnership or a limited liability partnership.

B - Deduction of Tax

Deduction of tax from certain income.

41. (1) A person shall, upon payment to a non-resident person not having a permanent establishment in Kenya, deduct tax at the appropriate non-resident rate, in respect of the following -

- (a) a management or professional fee or training fee;
- (b) a royalty or natural resource income;
- (c) a rent, premium or similar consideration for the use or occupation of property, except aircraft or aircraft engines;
- (d) demurrage charges;
- (e) a dividend;
- (f) interest or deemed interest;

For the purpose of deemed interest, the Commissioner shall specify the rate and period for which it shall apply;

- (g) an insurance premium.
- (h) a pension or retirement annuity;
- (i) an appearance at, or performance in, a place (whether public or private) for the purpose of entertaining, instructing, taking part in a sporting event or otherwise attracting attention of an audience;
- (j) an activity by way of supporting, assisting or arranging an appearance or performance referred to in paragraph (i);
- (k) gains or profits from the business of transmitting messages which is chargeable to tax under section 15(3); or
- (l) a commission or fee paid by an insurance company to any person for the provision, whether directly or indirectly, of an insurance cover to any person or group of persons.
- (m) distribution of investment income to unit holders or shareholders.

(2) Subsections (1) (i) and (j) shall not apply to payments made by filming agents and filming producers approved by the Kenya Film Commission to actors and crew members.

(3) A person shall, upon payment of an amount to a person resident or having a permanent establishment in Kenya, unless such person is tax exempt, deduct tax at the appropriate resident rate, in respect of the following -

- (a) a dividend; or

- (b) interest, other than interest paid to a financial institution specified in the Fourth Schedule which is resident or which has a permanent establishment in Kenya; or
- (c) an annuity payment excluding that portion of the payment which represents the capital element; or
- (d) a commission or fee paid by an insurance company to any person for the provision, whether directly or indirectly, of an insurance cover to any person or group of persons; or
- (e) a pension or a lump sum commuted or withdrawn from a registered pension fund or a lump sum out of a registered provident fund in excess of the tax exempt amounts or any amount paid out of a registered individual retirement fund, or a benefit paid out of the National Social Security Fund in excess of the tax exempt amount specified in section 14(2); or
- (f) surplus funds withdrawn from or paid out of registered pension or provident funds;
- (g) management or professional fee or training fees.

Provided that for the purposes of this paragraph, contractual fee within the meaning of “management or professional fee” shall mean payment in respect of building, civil or engineering works;

- (h) a royalty or natural resource income; or
- (i) rent, premium or similar consideration for the use or occupation of immovable property;

(4) Notwithstanding the provisions of subsection (3), only a person appointed for that purpose by the commissioner, in writing, shall deduct tax under paragraph (i) of that subsection.

(5) No deduction shall be made under subsection (1) or (3) from a Payment which is income exempt from tax under this Act.

(6) Where a person deducts tax under this section he shall, on or before the twentieth day of the month following the month in which the deduction was made,

- (a) remit the amount so deducted to the Commissioner; and

- (b) furnish the person to whom the payment is made with a certificate stating the amount of the payment and the amount of the tax deducted.

Deduction of tax from annuities etc, paid under a will etc.

42. (1) The trustees of a will or settlement shall, upon payment of an annuity under the will or settlement, deduct therefrom tax at the rate paid or payable on the income out of which the annuity is payable.

(2) Where section 17 applies the trustee shall furnish each person to whom or on whose behalf amounts are paid in a year of income with a certificate setting out the gross amount of the payments, the amount of tax appropriate thereto, and the net amount so paid in that year of income.

Deductions of tax from emoluments.

43. (1) An employer paying emoluments to an employee shall deduct therefrom, and account for tax thereon, to such extent and in such manner as may be prescribed.

(2) Where an employer deducts tax under this section he shall, on or before the ninth day of the month following the month in which the deduction was made remit the amount so deducted to the Commissioner.

Application to Government.

44. For avoidance of doubt, the provisions of this Part relating to deduction of tax shall bind the National Government, County Governments and Public Institutions.

C - Set-off of Tax

Set-off of tax.

45. (1) An amount of tax which -

- (a) has been deducted under sections 41(3), 42 or 43; or
- (b) has been borne by a trustee, executor or administrator in his capacity as such on an amount paid as income to a beneficiary;
- (c) has been paid by person under section 20;

shall be deemed to have been paid by the person chargeable with that tax and shall be set off for the purposes of collection against the tax charged on that person for the year of income in respect of which it was deducted.

(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 (16)(1)(f) of this Act accrued in or derived from another country proves to the satisfaction of the Commissioner that he has paid tax in such other country for such year of income,

he shall be allowed set-off of the same tax against the tax charged in Kenya on such income.

(3) Set-off under this section shall not exceed the amount of tax payable in Kenya on such employment income or income in respect of any activity under section (16)(1)(f).

D - Double Taxation Relief

Special arrangements for relief from double taxation.

46. (1) The Cabinet Secretary may 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 the country, shall, subject to subsection (4) 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.

(2) A notice under this section may be amended or revoked by a subsequent notice.

(3) The Cabinet Secretary shall cause a copy of notice made under subsection (1) and of any subsequent notice made under subsection (2) to be laid, without delay, before the National Assembly.

(4) Subject to subsection (5), for the purposes of the arrangement specified in subsection (1), a benefit shall only be available to a resident of the other contracting state if -

- (a) fifty per cent or more of the underlying ownership of that person is held by an individual or individuals who are residents of that other contracting state for the purposes of the arrangement; and
- (b) such underlying ownership obtained for a period of at least 183 days in that year; and
- (c) the person is engaged in the active conduct of business in the other contracting state, other than -
 - (i) operating as a holding company;
 - (ii) providing overall supervision or administration of a group of companies;
 - (iii) providing group financing (including cash pooling); or

(iv) making or managing investments.

(5) Subsection (4) shall not apply if the resident of the other contracting state is a company listed in a stock exchange in that other contracting state.

(6) In this section, the term “underlying ownership” has the meaning assigned to it in the Sixth Schedule.

Arrangements for exchange of information.

47. The Cabinet Secretary may, by notice in the Gazette, declare that arrangements specified in the notice, made with the government of any country for exchange of information relating to income tax or other taxes of a similar character imposed by the laws of that country, shall, notwithstanding anything to the contrary in this Act or any other written law, have effect accordingly.

Computation of credits under special arrangements.

48. (1) This section shall have effect where, under a special arrangement, foreign tax payable in respect of income derived by a person resident in Kenya is to be allowed as a credit against tax chargeable in respect of that income.

(2) A credit shall not exceed the lesser of the tax computed in accordance with this Act or the foreign tax chargeable upon the income in respect of which the credit is to be allowed.

(3) A claim for an allowance by way of credit under this section shall be made to the Commissioner within five years from the end of the year of income to which it relates.

PART VIII - PERSONS ASSESSABLE

Income of a person assessed on him.

49. Where income of a person is chargeable to tax, that income shall, subject to this Act, be assessed on, and the tax thereon charged on, that person.

Income of incapacitated person.

50. The income of an incapacitated person shall be assessed on, and the tax thereon charged on, that person in the name of his trustee, guardian, curator, committee or receiver appointed by a court, in the same manner and to the same amount as that incapacitated person would have been assessed and charged if he were not an incapacitated person.

Income of non-resident person.

51. (1) The income of a non-resident person shall be assessed on, and the tax thereon charged on, that person either in his name or in the name of his trustee, guardian, curator or committee, or of any attorney, factor, agent, receiver or manager.

(2) The master of a ship, or the captain of an aircraft, owned or chartered by a non-resident person who is chargeable to tax under section 15 shall (though not to

the exclusion of any other agent) be deemed the agent of that non- resident person for the purposes of this section.

(3) Nothing in this section shall render a non-resident person assessable or chargeable in the name of a broker, general commission agent or other agent where that broker, general commission agent or other agent is not the normal agent of the non-resident person.

Income of deceased person, etc.

52. (1) The income accrued to, or received prior to the date of the death of a deceased person which would, but for his death, have been assessed and charged to tax on him for a year of income shall be assessed on, and the tax charged on, his executors or administrators for that year of income.

(2) An amount received by the executors or administrators of a deceased person which would, but for his death, have been his income for a year of income shall be deemed to be income of his executors or administrators and shall be assessed on, and the tax charged on them for that year of income.

(3) Where executors or administrators distribute the estate of a deceased person before a change in the rate of tax at which they are liable in respect of a year of income, they shall not be liable in respect of any increased tax resultant from that change.

Liability of joint trustees.

53. Where two or more persons are trustees, an assessment made on the trustees in that capacity may be made on any one or more of them but each trustee shall be jointly and severally liable for the payment of tax charged in the assessment.

Liability of person in whose name income of another person assessed.

54. A person in whose name the income of another person is assessable under this Act shall be responsible, in relation to the assessment of that income, for doing all things that are under this Act required to be done by a person whose income is chargeable to tax, and shall be responsible for the payment of tax so charged on him to the extent of any assets of that other person which are in his possession on, or may come into his possession after, the date of the service of a notice of assessment on him.

PART IX- RETURNS AND NOTICES

Final return with self-assessment.

55. (1) Notwithstanding any other provision of this Act –

- (a) every individual chargeable to tax under this Act shall for any year of income furnish to the Commissioner a return of income, including a self-assessment of his tax from all sources of income, not later than

the last day of the sixth month following the end of his year of income; and

- (b) every person, other than an individual chargeable to tax under the Act, shall for any accounting period furnish to the Commissioner a return of income, including a self-assessment of his tax on such income, not later than the last day of the sixth month following the end of his accounting period.

(2) The declared self-assessment shall be calculated by reference to the appropriate relief and rates of tax in force for the year of income.

(3) Every company liable to tax under this Act, shall also include in the return of income, an assessment and return of any tax on dividends distributed out of untaxed gains or profits and shall be payable at the due date for the self-assessment.

Documents to be included in return of income.

56. (1) Where a person who carries on a business makes a return for a year of income, and accounts of his business for an accounting period relating to that year of income have been prepared or examined by a professional person, then he shall furnish with that return of income, a copy of the accounts signed by himself and by that other person, together with a certificate signed by that other person stating his opinion on the accounts.

(2) Subject to sections 711 and 712 of the Companies Act, 2015, where a person who carries on a business makes a return of income for a year of income and accounts of his business for an accounting period relating to that year of income have not been prepared or examined by another person in a professional person, he shall furnish with the return of income such accounts of his business for the accounting period relating to that year of income as are necessary to support the information contained in the return together with a copy of statement signed by himself -

- (i) specifying the nature of the books of account and documents from which the accounts were prepared;
- (ii) stating whether the accounts reflect all the transactions of his business and present a true and fair view of the gains or profits from the business for that accounting period.

(3) For the purposes of this section –

"accounts" means a statement of financial position or statement of assets and liabilities, and statement of income, receipts and payments accounts, or other similar statement however named;

Act No. 15 of 2008.

“professional person” means a holder of a practicing certificate or a written authority to practice issued in accordance with the provisions of the Accountants Act.

Keeping of records.

57. (1) A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which are adequate for the purpose of computing tax.

(2) For the purpose of this section, the carrying on of business includes any activity giving rise to income other than employment income.

PART X - COLLECTION, RECOVERY AND REPAYMENT OF TAX

Time within which payment to be made.

58. Save as otherwise provided by this Act and any regulations made thereunder, tax charged in any assessment shall be due and payable in accordance with this section.

Due date for payment of tax under self-assessment.

59. (1) Where any person required to furnish a return under section 55, the tax chargeable thereunder shall be due and payable on the last day of the fourth month following end of his year of income or accounting period.

(2) Instalment tax payable by a person under section 19 shall be payable on or before the twentieth day of the fourth, sixth, ninth and twelfth month in the accounting period of the current year of income.

(3) Notwithstanding subsection (2), where more than two-thirds of a person's income is derived from agricultural, pastoral, horticultural or similar activities, the instalment tax payable shall be paid in proportions of 75% and 25% on or before the twentieth day of the ninth and twelfth month respectively in the current year of income.

(4) In the case of a company which is being wound up, the due dates for payment of tax on any income charged for the year of income in which the winding-up commences and for the preceding year of income shall be deemed for the purpose of priority of debts but for that purpose only, to be the date next before the date of the winding-up order or the resolution, special resolution or extraordinary resolution, as the case may be, passed for the winding-up of the company, and whether or not assessments have been made before that date.

Deceased persons.

60. Where a person dies, then to the extent to which -

- (a) tax charged in an assessment made upon him has not been paid; or
- (b) his executors are charged to tax in an assessment made under section 52,

the amount of tax unpaid or charged, shall be a debt due and payable out of his estate.

Collection of tax from shipowner, etc

61. (1) In addition to any other powers of collection of tax provided in this Act, the Commissioner may, in a case where tax recoverable in the manner provided under the Tax Procedures Act has been charged on the income of a person who carries on the business of ship-owner, charterer or air transport operator, issue to the proper officer of Customs by whom clearance may be granted a certificate containing the name of that person and the amount of the tax due and payable and on receipt of that certificate the proper officer of Customs shall refuse clearance from any port or airport in Kenya to any ship or aircraft owned by that person until the tax has been paid.

(2) No civil or criminal proceedings shall be instituted or maintained against the proper officer of Customs or any other authority in respect of a refusal of clearance under this section, nor shall the fact that a ship or aircraft is detained under this section affect the liability of the owner, charterer or agent to pay harbour or airport dues and charges for the period of detention.

Repayment of tax in respect of income accumulated under trusts.

62. (1) Where under a will or settlement, other than a settlement to which section 19 applies, a beneficiary shall upon maturity of the contingency and upon making a claim, be entitled to a refund.

Provided that the refund shall be the excess of, the tax -

- (a) borne by the trust during the period of accumulation; and
- (b) which would have been borne by him during that period.

(2) A claim for refund under this section shall be made in writing to the Commissioner within five years after the expiry of the year of income in which the contingency matured.

General penalty.

63. (1) A person who contravenes any of the provisions of this Act is guilty of an offence.

(2) A person convicted of an offence under this Act for which no other penalty is provided shall be liable to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding three years, or to both.

PART XI - MISCELLANEOUS PROVISIONS

Regulations.

64. (1) The Cabinet Secretary may make regulations prescribing anything, which is to be prescribed under, and generally for carrying out the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the Cabinet Secretary may make the regulations for the following –

- (a) taxation of business income arising from transactions carried out on a digital platform;
- (b) transfer pricing;
- (c) farming business;
- (d) exemption of income in respect of persons with disability; and
- (e) residential rental income.

(3) Regulations made under this Act may provide that any person contravening the Regulations commits an offence and shall be liable on conviction to a fine as specified in the Regulations.

Repeal and
transitional
provisions.

65. (1) The Income Tax Act (Cap. 470) is repealed.

(2) Notwithstanding subsection (1), the provisions of the repealed Act shall remain in force and effect for the purposes of assessment and collection of any tax and the recovery of any penalty or interest, payable under that Act and outstanding at the date of the commencement of this Act.

(3) Despite subsection (5), unless provided for in this Act, any exemption granted under the repealed Act shall remain in force for a period not exceeding three years from commencement of this Act.

(4) Where, immediately prior to the commencement of this Act, there is for the purpose of the Second Schedule to the repealed Act, a residue of expenditure in relation to a person, such residue of expenditure shall in relation to that person, be the residue of expenditure for the purposes of the Second Schedule to this Act.

(5) Any subsidiary legislation made under the repealed Act in force at the commencement of this Act shall remain in force, in so far as it is not inconsistent with this Act, until subsidiary legislation with respect to the same matter is made under this Act.

(6) Arrangements specified in notices issued under section 46 of the repealed Act shall continue to have effect as if they had been made under this Act.

(7) Where a tax was due to be paid or refunded under the repealed Act but was not so paid or refunded, it shall be paid or refunded as though it were a sum due under this Act.

(8) Unless a contrary intention appears, the commencement of this Act shall not -

- (a) revive anything not in force or existing at the time at which the commencement take effect;
- (b) affect a penalty, interest or punishment incurred in respect of an offence committed under the repealed Act in force at the commencement of this Act;
- (c) affect an investigation, legal proceedings or remedy in respect of a right, privilege, obligations, liability, penalty, interest or punishment, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and such penalty, interest or punishment may be imposed as if this Act has not been passed; or
- (d) affect the employment or appointment of any person to the services of the Kenya Revenue Authority subsisting at the commencement of this Act.

FIRST SCHEDULE
(Section 23)

INCOME EXEMPT FROM TAX

Cap 179.

1. The income of a person expressly exempted from tax under the provisions of the Privileges and Immunities Act.

2. The income of a person with disability to the extent specified in the regulations.

3. The income, other than income from investments, of an amateur sporting association-

- (a) whose sole or main object is to foster and control any outdoor sport; and
- (b) whose members consist only of amateurs or affiliated associations, the members of which consist only of amateurs; and
- (c) whose memorandum of association or by-laws have provisions defining an amateur or a professional and providing that no person may be or continue to be a member of that association if that person is not an amateur.

4. The income of a County Government.

5. (1) Subject to section 17, the income of an institution, body of persons, or irrevocable trust, of a public character established solely for the purposes of the relief of the poverty or distress of the public, or for the advancement of religion or education:-

- (a) established in Kenya; or
- (b) whose regional headquarters is situated in Kenya,

in so far as the Commissioner is satisfied that the income is to be expended either in Kenya or in circumstances in which the expenditure of that income is for purposes which result in the benefit of the residents of Kenya:

Provided that any such income which consists of gains or profits from a business shall not be exempt from tax unless those gains or profits are applied solely to those purposes and either -

- (i) the business is carried on in the course of the actual execution of those purposes; or
- (ii) the work in connection with the business is mainly carried on by beneficiaries under those purposes; or
- (iii) the gains or profits consist of rents (including premiums or similar consideration in the nature of rent) received from the leasing or letting of land and chattels leased or let therewith.

(2) Upon complying with all the requirements of this paragraph, an applicant shall be issued with an exemption certificate within sixty days.

(3) The exemption granted under sub-paragraph (1) shall be valid for a period of five years and renewable upon application.

(4) Despite sub-paragraph (2), the exemption may be revoked by the Commissioner for non-compliance with the conditions under this paragraph. any just cause.

6. The income of a person from a management or professional fee, royalty or interest when the Cabinet Secretary certifies that it is required to be paid free of tax by the terms of an agreement to which the Government is a party either as principal or guarantor and that it is in the public interest that the income shall be exempt from tax.

7. The income of a registered pension scheme, registered trust scheme, registered pension fund, registered provident fund and registered individual retirement fund:

Provided that this paragraph shall apply only to that income in respect of contribution into the scheme as specified under section 32.

8. The income from the investment of an annuity fund, as defined in section 27.

9. Compensation granted in respect of wounds or disabilities caused in war and suffered by the recipient of that compensation.

10. The income of the institutions established under the Treaty for East African Community together with the income of subsidiary companies wholly owned by any of those institutions.

11. The emoluments of a person in the public service of the government of a foreign country in respect of his office under that government where that person is resident in Kenya solely for the purpose of performing the duties of his office, where those emoluments are payable from the public funds of that country.

12. 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, where the agreement provides for the exemption of those emoluments.

13. Interest earned on contributions paid into the Deposit Insurance Fund established under the Kenya Deposit Insurance Act.

14. The income of a non-resident person who carries on the business of aircraft owner, charterer or air transport operator, from such business where the country in which such non-resident person is resident extends a similar exemption to aircraft owners, charterers or air transport operators who are not resident in such country but who are resident in Kenya.

15. Income of the National Social Security Fund.

16. The income of the National Hospital Insurance Fund established under the National Hospital Insurance Fund Act, 1998.

17. (1) Investment income of a pooled fund or other kind of investment consisting of retirement schemes, provided that all the constituent schemes of the pooled fund are registered with the Commissioner;

(2) For the purposes of this paragraph, “pooled fund” has the meaning assigned to it under the Retirement Benefits Act, 1997.

18. Interest income accruing from all listed bonds, notes or other similar securities used to raise funds for infrastructure and other social services, provided that such bonds, notes or securities shall have a maturity of at least three years.

19. Monthly or lump sum pension granted to a person who is sixty five years of age or more.

20. Income from employment paid in the form of bonuses or overtime:

Provided that this paragraph shall only apply to -

- (i) employees whose taxable employment income before bonuses and overtime allowances does not exceed the lowest tax band provided under Part B of the Third Schedule; and
- (ii) aggregate of bonuses and overtime allowance not exceeding the taxable income of the employee before bonuses and overtime allowance.

21. Interest income on a bond issued by the East African Development Bank.

SECOND SCHEDULE
(Sections 6, 8 and 24)

INVESTMENT ALLOWANCE

1. Where a person incurs capital expenditure in respect of items listed in the table below, there shall be deducted an investment allowance in computing gains or profits of the person at the rate specified in the second column for each year of income

Capital expenditure incurred on -	Rate of Investment Allowance
(i) Buildings -	
(a) Commercial building.	10% per annum in equal instalments
(b) Hotel building - in the first year of use.	60%
(c) Building used for manufacture - in the first year of use.	100%
(d) Petroleum gas storage facilities – in the first year of use	60%
(e) Residual value in (b) and (d) above.	25% per annum in subsequent years in equal instalments
(f) Educational buildings.	10% per annum in equal instalments
(g) Hospital buildings.	100%
(ii) Machinery –	
(a) Machinery used for manufacture.	100%
(b) Hospital equipment.	100%
(c) Ships or aircrafts – in the first year of use.	60%
(d) Residual value in (c) above.	50% per annum in subsequent years in equal instalments
(e) Motor vehicles and earth moving equipment.	25% per annum in equal instalments
(f) Computer and peripheral computer hardware and software, calculators, copiers and duplicating machines.	25% per annum in equal instalments
(g) Furniture and fittings.	10% per annum in equal instalments
(h) Telecommunications equipment.	10% per annum in equal instalments
(i) Filming equipment by a local film producer licensed by the minister responsible for communication.	50% per annum in equal instalments
(j) Other machinery.	10% per annum in equal instalments
(iii) Purchase or an acquisition of an indefeasible right to use fibre optic cable by telecommunication operator.	10% per annum in equal instalments
(iv) Farmworks.	100%

Provided that –

- (a) in the case of change of use of a building, the deduction shall be restricted to the residual value or unclaimed amount at a relevant rate.
- (b) in respect of (i) (b), (f) and (g) contained in the table above, the building shall be licensed as such by responsible authority for matters thereto.

2. The written down or residue value of each category of item referred to in the table above, shall be calculated separately and shall be the balance of capital expenditure taking into account sale of the item after deducting investment allowance.

3. Where the amount realized from an item of a category sold in a year of income exceeds the written down or residual value, the excess shall be treated as a trading receipt or, conversely, as a trading loss.

4. (1) Where investment allowances have been made in computing the gains or profits of a person under paragraph 1 and that person ceases to carry on the business for the purposes of which the items were used and the items cease to be owned by him, there shall be made a balancing deduction or balancing charge for that year of income, when cessation occurred:

Provided that –

- (a) a partnership shall be deemed not to have ceased to carry on a business unless all the partners cease to carry it on;
- (b) where the items are sold by the liquidator of a company, the balancing deduction or balancing charge shall be made in the year of income in which the winding up commenced;

(2) Subject to this schedule, where on cessation of a trade a balancing deduction or a balancing charge is to be made under this paragraph and –

- (a) no consideration is received by the person owning the items, or the residual value at the time of the cessation exceeds the consideration, the balancing deduction shall be the residual value at the time of cessation, or the excess thereof over the consideration, as the case may be;
- (b) the consideration exceed residual value, if any, at the time of cessation, the balancing charge shall be the amount of the excess or, where the residual value is nil, the amount of the consideration, as the case may be.

5. (1) For the purposes of this schedule, where an item is brought into use for the purposes of a business without being purchased or ceases permanently to be so

used without being sold it shall be deemed to have been purchased or sold and the cost or amount realized shall be deemed to be the market value.

(2) For purpose of this paragraph –

“market value” means the value of the item when sold or purchased at arm’s length.

An item is sold or purchased at arm’s length only if the consideration is determined as between an independent willing buyer and an independent willing seller.

6. For the purposes of this Schedule, where –

- (a) capital expenditure in excess of three million shillings is incurred in respect of a road vehicle other than a commercial vehicle, that capital expenditure shall be restricted to three million shillings;
- (b) the road vehicle is sold, the sale price shall be deemed to be such proportion of the proceeds of sale having regard to the original purchase price and the proportion thereof deemed under this paragraph to be capital expenditure.

7. For purposes of this schedule, capital expenditure incurred on the construction of a building does not include capital expenditure on the acquisition of, or of rights in or over any land.

8. For the purposes of this schedule –

- (a) where, a building is used partly for purposes other than those specified under paragraph 1 of this schedule, the capital expenditure on which the deduction in respect of the building is calculated shall be the expenditure attributable to that portion of the building which is used for the purposes specified; but where the expenditure so attributable exceeds ninety percent of the total expenditure incurred on the construction of the building the whole building shall be treated as used for purposes specified;
- (b) where an existing building is extended by further construction, the extension shall be treated as a separate building;
- (c) where capital expenditure is incurred on the construction of a building and before that building is used, it is sold –

- (i) the seller shall not be allowed a deduction under this schedule; but
- (ii) the person who purchases the building shall be deemed to have incurred capital expenditure on the construction thereof equal to the capital expenditure actually incurred on the construction of the building or to the amount paid by him, whichever is the less; but
- (iii) where the building is sold more than once before it is used, item (ii) shall have effect only in relation to the last sale.
- (iv) where a building is sold by a person carrying on a business which consists of construction of buildings with a view to sell, the qualifying capital expenditure shall be the price paid on the sale.

9. Where in computing gains or profits for a year of income any expenditure has been deducted under this Schedule and in a later year of income the whole or part of that expenditure is recovered through sale or any compensation then the whole proceeds so received shall be deemed to be gains or profits chargeable to tax in the year of income in which they are received.

Provided that where such compensation are used for restoration of the asset lost in the same or similar form and within two years of receipt the said sum shall not be deemed to be gain or profit chargeable to tax.

10. Any expenditure incurred on behalf of a person by a national or a county government or by any other person, shall not qualify for deduction under this Schedule.

11. For purposes of this Schedule –

“building used for manufacture” includes any structure or civil works deemed to be part of the building where they relate or contribute to the use of the building.

“civil works” includes the following –

- (i) roads and parking areas;
- (ii) railway lines and related structures;
- (iii) industrial effluent and sewerage works;
- (iv) communications and electrical posts and pylons and other electricity supply works; and

(v) security walls and fencing.

“commercial building” includes a building for –

- (a) use as an office, shop, showroom, godown, storehouse or warehouse used for storage of raw materials for manufacture or finished or semi-finished goods; or
- (b) water or electric power undertaking, but does not include an undertaking not carried on by way of trade.

“farmworks” means farmhouses, labour quarters, any other immovable buildings, fences, daps, drains, windbreaks, water and electricity supply works (other than machinery), and other works, necessary for the proper operation of the farm.

“machinery” includes pipeline, plant and equipment.

“machinery used for manufacture” means machinery used directly in the process of manufacture, and includes machinery used for the following ancillary purposes –

- (i) generation, transformation and distribution of electricity;
- (ii) clean-up and disposal of effluents and other waste products;
- (iii) reduction of environmental damage;
- (iv) water supply or disposal;
- (v) maintenance of the machinery; or
- (vi) scientific research and development.

“manufacture” means the making (including packaging) of goods from raw or semi-finished goods, or the generation of electrical energy for supply to the national grid or the transformation and distribution of electricity through the national grid but does not extend to any activities which are ancillary to manufacture, such as design, storage, transport or administration;

THIRD SCHEDULE
(Sections 38, 39, 40, 41, 42 & 43)

RESIDENT INDIVIDUAL TAX RELIEFS AND RATES OF TAX

PART A – RESIDENT INDIVIDUAL TAX RELIEFS

Resident individual tax reliefs.

1. The amount of a resident individual tax relief shall be, in the case of -
 - (a) personal relief, sixteen thousand eight hundred and ninety six per annum.
 - (b) insurance relief, fifteen percent of the amount of premiums paid but shall not exceed sixty thousand shillings per annum.

PART B – RATES OF TAX

2. The individual rates of tax shall be –

	Rate in each shilling
On the first Shs. 147,580	10%
On the next Shs. 139,043	15%
On the next Shs. 139,043	20%
On the next Shs. 139,043	25%
Over Shs.564,709 up to Shs. 9,000,000	30%
On all income over Shs. 9,000,000	35%

3. The corporate rate of tax shall be, in the case of –
 - (a) a resident company, thirty per cent.
 - (b) a non-resident company having a permanent establishment in Kenya, thirty per cent.

Provided that taxable income in excess of five hundred million shillings, thirty-five per cent shall apply.

- (c) a company newly listed on any securities exchange approved under the Capital Markets Act which has at least forty percent of its issued share capital listed, twenty five percent for the period of five years commencing immediately after the year of income following the date of such listing.

- (d) an export processing zone enterprise which does not engage in any commercial activities shall be subject to corporate rate of tax of ten percent for the first ten years from date of first operation and thereafter fifteen percent for another ten years, after which paragraph 3(a) shall apply.

Provided that this provision shall not apply to export processing zone enterprise licensed before the commencement of this Act.

For the purposes of this subparagraph, “commercial activities” include trading-in, breaking bulk, grading, repacking, or relabeling of goods and industrial raw materials.

- (e) a special economic zone enterprise whether the enterprise sells its products to markets within or outside Kenya, developer or operator, ten percent for the first ten years from date of first operation and thereafter fifteen percent for another ten years, after which paragraph 3(a) shall apply.
- (f) a company that develops at least one hundred low cost residential units annually with prior approval by the Cabinet Secretary responsible for housing, fifteen per cent for that year of income in respect of gains or profits from the development of such units.
- (g) company whose business is local assembling of motor vehicles, fifteen per cent for the first five years from the year of commencement of its operations.

Provided that the rate of fifteen per cent shall be extended for a further period of five years if the company achieves a local content equivalent to fifty per cent of the ex-factory value of the motor vehicles.

- 4. The rate of tax for repatriated income of a non-resident company having a permanent establishment in Kenya shall be ten per cent.
- 5. The non-resident tax rates shall be, in respect of -
 - (a) management or professional fees or training fee, twenty per cent of the gross sum payable;

Provided that the rate applicable to any payments made by-

- (i) Special Economic Zone Enterprise, Developer or Operator, or export processing zone enterprise to a non-resident persons shall be five per cent of the gross amount payable.

- (ii) Licensee or contractor to a subcontractor under Sixth Schedule shall be ten percent of the gross amount payable.
- (b) services fee payable by a licensee or contractor to a subcontractor under Sixth Schedule, ten percent of the gross amount payable;
- (c) a royalty or natural resource income, twenty per cent of the gross amount payable;

Provided that the rate applicable to any royalty paid by any Special Economic Zone Enterprise, Developer or Operator, or export processing zone enterprise to a non-resident person shall be five per cent of the gross amount payable.

- (d) a rent, premium or similar consideration for the use or occupation of property, twenty per cent of the gross amount payable.
- (e) demurrage charges, paid to ship operator, twenty per cent of the gross amount payable.
- (f) a dividend, ten per cent of the amount payable;

Provided that the rate applicable for dividend paid by Special Economic Zone Enterprise, Developer or Operator, or export processing zone enterprise, shall be five per cent of the gross amount payable.

- (g) in respect of interest, deemed interest or discount, fifteen percent of the gross sum payable;
- (h) interest paid by a Special Economic Zone Enterprise, Developer or Operator, export processing zone enterprise to a non-resident persons, five per cent of the gross amount payable.
- (i) an insurance premium, five per cent of the gross amount payable;
- (j) a pension or retirement annuity, ten per cent of the gross amount payable;
- (k) an appearance at, or performance in, a place (whether public or private) for the purpose of entertaining, instructing, taking part in a sporting event or otherwise attracting attention of an audience, twenty per cent of the gross amount payable;
- (l) an activity by way of supporting, assisting or arranging an appearance or performance mentioned in subparagraph (i), twenty per cent of the gross amount payable;

- (m) income from the business which is chargeable to tax under section 15(1) of the Act, three per cent of the gross amount received.
- (n) income which is chargeable to tax under section 15(3), ten per cent of the gross amount received.
- (o) a commission or fee, paid by an insurance company to any person for the provision, whether directly or indirectly, of an insurance business, twenty per cent of the gross amount payable.
- (p) a distribution of investment income to unit holders or shareholders of a collective investment scheme, ten per cent of gross amount payable.

6. The resident withholding tax rates, shall be, in respect of –

(a) a dividend-

- (i) paid by a cooperative society under section 28(2) or 28(3) ten per cent of the amount payable;
- (ii) any other, five percent.

Provided that the tax payable shall be final.

- (b) interest or discount arising from bearer instrument or other sources, fifteen percent of the gross amount payable.

Provided that tax on interest paid to an individual by the institutions listed below, shall be final –

- (i) a bank or any other financial institution licensed under the Banking Act;
- (ii) microfinance institution licensed under the Microfinance Act;
- (iii) the Central Bank of Kenya.

- (c) a fringe benefit, thirty per cent of the amount payable.

- (d) a commission or fee, paid by an insurance company to any person for the provision, whether directly or indirectly, of an insurance business, five per cent of the gross amount payable.

- (e) a payment of a pension or any withdrawal made –

- (i) after the expiry of fifteen years from the date of joining the fund, or;
- (ii) on the attainment of the age of fifty years; or
- (iii) upon earlier retirement on the grounds of ill health or infirmity of body and mind;

from a registered pension fund, registered provident fund, the National Social Security Fund or a registered individual retirement fund, in excess of the tax-free amounts specified under section 14(2) in any one year,

10% on the first Shs.400,000
 15% on the next Shs.400,000
 20% on the next Shs.400,000
 25% on the next Shs.400,000
 30% on any amount over Shs.1,600,000 of the amount in excess of the tax-free amount;

Provided that the tax so deducted shall be final.

- (f) a withdrawal before the expiry of fifteen years from the date of joining the fund, made from a registered pension fund, registered provident fund, the National Social Security fund or a registered individual retirement fund in excess of the tax-free amounts specified under section 14(2) in any one year,

On the first	Shs.147,580	10%
On the next	Shs.139,043	15%
On the next	Shs. 139,043	20%
On the next	Shs. 139,043	25%
On all income over	Shs.564,709	30%

- (g) surplus funds withdrawn by or refunded to an employer in respect of registered pension or registered provident funds, thirty per cent of the gross sum payable.
- (h) (i) management or professional fee or training fee, other than contractual fee,; five per cent of the gross amount payable;
- (ii) contractual fee, three per cent of the gross amount payable.
- (i) a royalty or natural resource income, five per cent of the gross amount payable;

- (j) a rent, premium or similar consideration for the use or occupation of immovable property, ten per cent of the gross amount payable.
 - (k) a distribution of investment income to unit holders or shareholders, five per cent of gross amount payable.
7. The rate of capital gains tax shall be twenty per cent.
8. The rate of advance tax under section 20 shall be –
- (i) for vans, pick-ups, trucks, prime movers, trailers and lorries; one thousand five hundred shillings per ton of load capacity subject to a minimum of two thousand four hundred shillings per year of income;
 - (ii) for saloons, station-wagons, mini-buses, buses and coaches; sixty shillings per passenger capacity per month subject to a minimum of two thousand four hundred shillings per year of income.
9. The rate of presumptive tax shall be an amount equal to fifteen percent of the single business permit fee issued by a County Government.

Provided that the tax charged shall be final.

10. The rate of tax in respect of residential rental income shall be ten percent of the gross rental receipts of a taxable resident person under section 10.

FOURTH SCHEDULE
(Sections 24 and 41)

FINANCIAL INSTITUTIONS

- Cap.488 A bank or a financial institution licensed under the Banking Act or Microfinance Act.
- Cap.487 An insurance company licensed under the Insurance Act.
- Cap 117 The National Housing Corporation established under the Housing Act.
- Cap.490 A co-operative society registered under the Co-operative Societies Act.
- Cap.493B The Kenya Post Office Savings Bank established by the Kenya Post Office Savings Bank Act.
- Cap.323 The Agricultural Finance Corporation established by the Agricultural Finance Corporation Act.

DRAFT

FIFTH SCHEDULE
(Section 5(2)(e))

COMPUTATION OF GAINS FROM TRANSFER OF PROPERTY

Interpretation

1. (1) In this Schedule, unless the context otherwise requires –

“adjusted cost” has the meaning assigned thereto in paragraph 8;

“company” includes a member’s club or a trade association;

“consideration” means consideration in money or money’s worth;

“investment securities” means shares, bonds and similar securities that are listed and traded on the securities exchange licensed under the Capital Markets Act;

“individual” includes an unincorporated association or body of individuals including trustees and partners;

“land” includes –

Cap 480.

(a) buildings on land and anything attached to land or permanently fastened to anything attached to land (whether on or below the surface);

(b) standing timber, trees, crops and other vegetation growing on land; and

Cap 2.

(c) land covered by water;

“marketable security” includes a security of such a description as to be capable of being sold on any security exchange approved by Capital Markets Authority but does not include investment securities;

“property” –

(a) in the case of a company, includes land, building, marketable securities, rights, scientific formulae and patents, acquired or held for investment purposes;

(b) in the case of an individual means –

(i) land situated in Kenya and any right or interest in or over that land, and

(ii) a marketable security situated in Kenya, other than an investment securities;

“shares” means a share in the share capital of a body corporate, a unit in a unit trust or an interest in any collective investment scheme;

“transfer” has the meaning assigned thereto in paragraph 5 and includes part transfer;

“transfer value” has the meaning assigned thereto in paragraph 6.

(2) For the purposes of this Schedule

- (a) shares or securities being marketable securities issued by a Government, or by a body created by that Government, are situated in the country of that authority; and
- (b) subject to paragraph (a), shares or securities (being marketable securities) are situated where they are registered and, if registered in more than one register, where the principal register is situated.

Taxation of gains.

2. Subject to this Schedule, income in respect of which tax is chargeable under section 5(2) is the whole of gain which accrues to a company or an individual on the transfer of property situated in Kenya.

Income not chargeable

3. Income is not chargeable to tax under section 5(2) where it is –

- (a) chargeable to tax under any other provision of this Act.
- (b) a gain accruing to a company on a transfer of machinery classified in paragraph 1 of the Second Schedule The income is exempt from tax under paragraph 13 of the this Schedule.

Computation of gains.

4. (1) The gain which accrues to a person on the transfer of property is the amount by which the transfer value of the property exceeds the adjusted cost of the property.

(2) Where the adjusted cost of the property exceeds the transfer value of the property, the excess is the loss realized by the person on the transfer of the property.

(3) A gain or loss realized by a person on the transfer of property shall be deemed to be realized by the person at the time of the transfer, whether or not the consideration is paid by installments.

(4) Any interest on a part of the consideration shall not be treated as part of the transfer value of the property.

(5) Debts incurred on the transfer of property which the Commissioner considers to have become bad shall be deemed to be a loss for the purposes of section 24(4)(b) .

(6) Section 24(3)(d) shall not apply in relation to transfer of property.

Dealings by nominees, trustees and liquidators, and for the enforcement of securities.

5. (1) In relation to property held by a person-

- (a) as nominee; or
- (b) as trustee ; or
- (c) as liquidator;

this Schedule shall apply as if the property were vested in, and the acts of the nominee, trustee or liquidator in relation to the property were the acts of the person or persons for whom the person is nominee, trustee or liquidator.

(2) Where a person entitled to property by way of security or to the benefit of a charge or encumbrance on property, deals with the property for the purpose of enforcing or giving effect to the security, charge or encumbrance, his dealings with it shall be treated as if they were done through him as nominee by the person entitled to the property.

Meaning of transfer.

6. (1) Subject to this Schedule there is a transfer of property for the purposes of this Schedule –

- (a) where property is sold, exchanged, conveyed or otherwise disposed of in any manner whatever (including by way of gift), whether or not for consideration; or
- (b) on the occasion of the loss, destruction or extinction of property whether or not a sum by way of compensation or otherwise received, unless that sum is utilized to reinstate the property in essentially the same form and in the same place within one year of compensation or a longer period as may be approved by the Commissioner or
- (c) on the abandonment, surrender, cancellation or forfeiture of, or the expiration of substantially all rights to, property, including the surrender of shares or debentures on the dissolution of a company.

(2) There is no transfer of property for the purposes of this Schedule –

- (a) in the case of the transfer of property for the purpose only of securing a debt or a loan, or on a transfer by a creditor for the purpose only of returning property used as a security for a debt or a loan;

- (b) in the case of the issuance by a company of its own shares or debentures;
- (c) by the vesting in the personal representative of a deceased person by operation of law of the property of that deceased person;
- (d) by the transfer by a personal representative of property to a person as legatee in the course of the administration of the estate of a deceased person; and “legatee” includes a person taking under a devise or other testamentary disposition or an intestacy or partial intestacy whether he takes beneficially or as a trustee;
- (e) by the vesting in the liquidator by an order of a court of the property of a company under the Companies Act;
- (f) by the vesting in the official receiver or other trustee in bankruptcy of the property of a bankrupt under the Bankruptcy Act;
- (g) by the transfer by a trustee of property to a beneficiary on his becoming absolutely entitled thereto;
- (h) by the transfer between a person and a nominee; or
- (i) by the transfer of assets-
 - (i) between spouses;
 - (ii) between former spouses as part of a divorce settlement or a *bona fide* separation agreement;
 - (iii) to immediate family;
 - (iv) to immediate family as part of a divorce or *bona fide* separation agreement; or
 - (v) to a company where spouses or a spouse and immediate family hold 100% shareholding.

(3) For the purposes of this paragraph, “immediate family” means children of the spouses or former spouses.

Transfer value.

7. (1) Subject to this Schedule, the transfer value of property shall be computed by reference to the following amounts (if any) –

- (a) the amount of or the value of the consideration for the transfer of the property;

- (b) sums received in return for the abandonment, forfeiture or surrender of the property;
- (c) sums received as consideration for the use or exploitation of the property;
- (d) sums received by way of compensation for damage or injury to the property or for the loss of the property;
- (e) an amount by which the liability of a person to another person entitled to property by way of security or to the benefit of a charge or encumbrance is reduced as a result of dealings with the property for the purposes of enforcing or giving effect to the security, charge or encumbrance, together with an amount received by the person out of the proceeds of those dealings.

(2) Subject to this Schedule, for the purpose of computing the transfer value of property there shall be deducted the incidental costs to the transferor of making the transfer.

(3) In the case where no amount is ascertainable under this Schedule as the transfer value of property, the transfer value of the property shall be the market value as determined by the Commissioner.

Adjusted cost

8. (1) Subject to this Schedule, the adjusted cost of property shall be determined as follows –

(a) Where a property was acquired before 1st January, 2015 -

$$\text{adjusted cost} = (\text{MP} * \text{CPIA}) / \text{CPIT}$$

Where –

MP is the Transfer Value.

CPIA is the published Consumer Price Index for the month prior to acquisition.

CPIT is the published Consumer Price Index for the month prior to the transfer.

(b) Where a property was acquired on or after 1st January, 2015, the higher of -

(i) the cost as determined using the formula in (a) above; and

(ii) actual expenditure incurred adjusted for inflation.

Provided that –

- A. “published consumer price index” means the consumer price index as published by Kenya National Bureau of Statistics;
- B. for property acquired before 1st January, 2015 the CPIA shall be for December, 2014;
- C. for property acquired on or after 1st January, 2015, the CPIA shall not be for a year of income exceeding five years from the time of transfer of property;
- D. the amount computed shall be reduced by such amounts as have been allowed under section 24(3).

(2) Where a company issues to its shareholders, shares –

(a) the cost of the shares –

(i) shall be the sum paid for the shares; or

(ii) if no sum is paid for the shares, shall be deemed to be nil,

(iii) if it constitutes a dividend, the amount which constitutes a dividend shall be treated as part of the cost of the shares;

and the shareholder shall be deemed to have transferred the shares on a first-in-first-out basis.

Market value.

9. (1) Where property is transferred –

(a) in a transaction not made at arms length; or

(b) by way of a gift in whole or in part; or

(c) for a consideration that cannot be valued; or

(d) as the result of a transaction between persons who are related,

then, for the purposes of paragraph 6, the amount of the consideration shall be adjusted to the market value at the time of the transfer. –.

(2) Property is transferred at arms length only if the consideration is determined as between an independent willing buyer and an independent willing seller.

(3) For the purpose of this paragraph, the market value of the property is the price which the property would fetch if sold in the open market.

Incidental costs.

10. For the purposes of paragraph 6(2) the incidental costs shall consist of expenditure wholly and exclusively incurred by the person transferring the property, being –

- (a) fees, commission or remuneration paid for the professional services of a surveyor, valuer, accountant, agent or legal adviser;
- (b) the cost of advertising; and
- (c) any other costs that is just and reasonable.

Amounts not allowable in computing transfer value.

11. No amount shall be allowed under paragraph 6(2) as part of the incidental costs of making a transfer if that amount has been or is otherwise allowed as a deduction in computing gains or profits chargeable to tax under section 5(2)(a).

12. The due date for tax payable in respect of property transferred under this schedule shall be on or before the date of the transfer is effected at the Lands Office.

Transfer of property with other property.

13. Where property is transferred together with other property, the transfer value shall be the value that is reasonably attributable to each of the property involved.

Exemption

14. No gain or loss shall be included in the computation of income under section 5(2)(e) in the case of –

- (i) a transfer of property that is necessitated by a transaction involving the incorporation, recapitalization, acquisition, amalgamation, separation, dissolution or similar restructuring of corporate entity, where such transfer is –
 - (a) a legal or regulatory requirement;
 - (b) as a result of directive or compulsory acquisition by the government; or
 - (c) in public interest and approved by the Cabinet Secretary.
- (ii) transfer of securities traded on any securities exchange licensed under the Capital Markets Act;
- (iii) transfer of marketable securities issued by a Government, or by a body created by that Government traded in any stock exchange;
- (iv) the transfer of –

- (a) a private residence if the individual owner has occupied the residence continuously for three years or more immediately prior to the transfer concerned;

Provided that –

- (i) in determining the period of occupancy, any period of temporary absence from the residence shall be ignored;
 - (ii) references to a private residence include the immediately surrounding land utilized exclusively for personal purposes as an adjunct to the residence and not for the production of income;
 - (iii) no individual shall claim or be taken to have used a residence as a residence at any time when he was dependent of either or both of his parents;
 - (iv) where a residence is used in part for business purposes, or is transferred in a single transaction together with land and other property used for the production of income, the taxable value of that property used for residential purposes shall be separately determined from that used for business purposes or for the production of income;
- (b) property (being land) transferred by an individual where –
 - (i) the transfer value is not more than three million shillings;
 - (ii) agricultural property having an area of less than fifty acres where that property is situated outside an area that is declared by the Cabinet Secretary responsible for urban areas and cities, by notice in the Gazette, to be an urban area.
 - (c) property which is transferred or sold for the purpose of administering the estate of a deceased person.
 - (d) property transferred to a real estate investment trust.

SIXTH SCHEDULE
(Section 6(f))

TAXATION OF EXTRACTIVE INDUSTRIES

PART I – INTERPRETATION

Interpretation

1. In this Schedule, unless the context otherwise requires –

“consideration”, in relation to the disposal of an interest in a person, a mining or petroleum right, or mining or petroleum information, means the total amount received or receivable for the disposal, including the fair market value of any amount in kind determined at the time of the disposal;

“contract area” means the area that is the subject of a petroleum agreement and, if any part of that area is relinquished pursuant to the agreement, contract area means the contract area that was originally granted;

“contractor” means a person with whom the Government has concluded a petroleum agreement and includes any successor or assignee of the person;

“cost”, in relation to an interest in a person, a mining or petroleum right, or mining or petroleum information, means the total consideration given for the acquisition of the interest, right, or information, including the fair market value of any amount given in kind determined at the time the amount is given;

“de-commissioning plan” means a plan for the de-commissioning, abandonment, relocating or removal and, if applicable, redeployment of wells, flowlines, pipelines, facilities, infrastructure and assets related to upstream petroleum operations;

“development expenditure” means capital expenditure incurred by a contractor when undertaking operations authorized under a development plan and includes expenditure whenever incurred in acquiring –

- (a) an interest in a petroleum agreement other than an interest referred to in paragraph (a) of the definition of “exploration expenditure”; or
- (b) petroleum information other than information referred to in paragraph (b) of the definition of “exploration expenditure”;

“development plan” means a development plan prepared and adopted under a petroleum agreement;

“disposal”, in –

- (a) relation to an interest in a person, a mining or petroleum right, or mining or petroleum information, means any change in the ownership of the interest, right, or information, including by way of sale, transfer, assignment, or exchange;
- (b) the case of an interest in a person, includes the cancellation or redemption of the interest;

“exploration expenditure” means expenditure incurred by a contractor in undertaking exploration operations authorized under a petroleum agreement and includes expenditure incurred in acquiring –

- (a) an interest in a petroleum agreement from the Government or under a farm-out agreement; or
- (b) petroleum information relating to exploration operations from the Government or under a farm-out agreement;

“exploration operations” means work authorised under a petroleum agreement in the search for petroleum prior to the approval of a development plan and includes –

- (a) geological, geophysical, and geochemical surveys and analyses;
- (b) aerial mapping;
- (c) investigations of subsurface geology;
- (d) stratigraphic tests;
- (e) the drilling of wells to test a geological feature that has not already been determined to contain producible petroleum sufficient for commercial production; or
- (f) any other work that is necessarily connected with activities described in paragraphs (a) to I;

“extraction expenditure” means capital expenditure incurred by a licensee when undertaking operations authorized under an extraction right and includes expenditure whenever incurred in acquiring –

- (a) an interest in a mining right other than an interest referred to in paragraph (a) of the definition of “prospecting expenditure”; or
- (b) mining information other than information referred to in paragraph (b) of the definition of “prospecting expenditure”;

Cap 308

(c) a right to extract minerals issued or granted under the Mining Act; or

Cap 314A

(d) a right to extract geothermal resources issued or granted under the Geothermal Resources Act;

farm-out agreement” means an agreement to which paragraph 13 applies;

“interest in a person” includes a share or other membership interest in a company, an interest in a partnership or trust, or any other ownership interest in a person;

“licence area” means the area that is the subject of a mining right;

“licensee” means a person who has been issued with, or granted, a mining right;

Act No. 12 of 2016

“minerals” has the meaning assigned to it in the Mining Act;

“mining information” means information relating to mining operations;

“mining operations” means authorized operations undertaken under a mining right;

mining right” means a prospecting or extraction right;

“person” includes an individual, company, partnership, trust, government, or similar body or association;

Cap 308

“petroleum agreement” has the meaning assigned to it in the Petroleum (Exploration and Production) Act;

“petroleum information” means information relating to petroleum operations;

“petroleum operations” means authorized operations undertaken under a petroleum agreement;

“prospecting expenditure” means expenditure incurred in undertaking operations authorised under a prospecting right and includes expenditure incurred in acquiring –

- (a) an interest in a prospecting right from the Government or under a farm-out agreement; or
- (b) prospecting information from the Government or under a farm-out agreement;

“prospecting information” means mining information relating to the search for minerals under a prospecting right;

“prospecting right” means any of the following –

- (a) a right to prospect for minerals issued or granted under the Mining Act;
- (b) an authority or right to search for geothermal resources issued or granted under the Geothermal Resources Act;

“subcontractor” means a person supplying services other than a person supplying services as an employee to –

- (a) a licensee in respect of mining operations undertaken by the licensee; or
- (b) contractor in respect of petroleum operations undertaken by the contractor;

“underlying ownership”, in relation to a person, means an interest in the person held directly, or indirectly through an interposed person or persons, by an individual or by a person not ultimately owned by the individuals.

(2) Unless the context otherwise requires, any term that is not defined in this Act but is defined in the Mining Act, Geothermal Resources Act or Petroleum (Exploration and Production) Act, has the meaning assigned in the Mining Act, Geothermal Resources Act or Petroleum (Exploration and Production) Act, as the case may be.

(3) Where more than one person has signed a petroleum agreement, each person shall be considered as a contractor for the purposes of this Schedule.

(4) In case of expenditure in respect of social infrastructure, section 24(3)(l) shall apply.

PART II – MINING OPERATIONS

Taxation of
licensees.

2. (1) A licensee is chargeable to tax in accordance with this Act but subject to the modifications in this Schedule.

(2) Where there is any inconsistency between this Schedule and any other provision of this Act regarding the taxation of a licensee, this Schedule shall prevail.

Limitation of
deductions
relating to
mining
operations

3. (1) Subject to subparagraph (4), a deduction for expenditure to the extent incurred by a licensee when undertaking mining operations in a licence area during a year of income shall only be allowed against the income derived by the licensee from the mining operations in the licence area during that year.

(2) If a licensee suffers a loss in respect of mining operations in a licence area for a year of income, the amount of the loss shall be carried forward and allowed as a deduction against the income of the licensee derived from mining operations in the licence area in the next following year of income of the licensee.

(3) The amount of a loss for a year of income that is not deducted under subparagraph (2) shall be carried forward by the licensee to the next following year of income and be deductible in that year in accordance with subparagraph (2), and so on for the next fourteen years.

(4) If –

- (a) a licensee has ceased mining operations under a mining right in a licence area; and
- (b) the licensee suffers a loss in relation to the mining operations under the mining right in the licence area for a year of income that has not been deducted under subparagraph (2).

Prospecting
expenditure.

4. (1) A licensee shall be allowed a deduction for prospecting expenditure in the year of income in which the licensee incurred the expenditure.

(2) Subject to paragraph 13, if a licensee –

- (a) disposes of an interest in a mining right or information the cost of which was deducted as prospecting expenditure under subparagraph (1); or
- (b) otherwise recovers or recoups an amount deducted as prospecting expenditure under subparagraph (1), the consideration for the disposal, or the amount recovered or recouped, is income of the licensee charged to tax under section 5(2)(a)(i) in the year of income in which the interest is disposed of or the amount is otherwise recovered or recouped.

(3) For the purposes of this Schedule, the rate of capital allowance for machinery first used to undertake operations under a prospecting right is one hundred per cent.

Extraction
expenditure

5. (1) Subject to subparagraphs (2) and (3), a licensee shall be allowed a deduction for extraction expenditure at a rate of twenty per cent per year from the year of income in which the licensee incurred the expenditure and in the following years in equal instalments.

(2) If a licensee incurs extraction expenditure before the commencement of commercial production, subparagraph (1) shall apply on the basis that the expenditure was incurred at the commencement of commercial production.

(3) Subject to paragraph 13, if a licensee disposes of an interest in a mining right or information the cost of which was deducted as extraction expenditure under subparagraph (1) during a year of income, no deduction shall be allowed for the extraction expenditure for that year and –

- (a) if the consideration for the disposal exceeds the written down value of the interest or information at the time of disposal, the amount of the excess is income of the licensee charged to tax under section 5(2)(a)(i) in the year of income in which the disposal occurred; or
- (b) if the written down value of the interest or information at the time of disposal exceeds the consideration for the disposal, the licensee shall be allowed a deduction for the amount of the excess in the year of income in which the disposal occurred

(4) Except where subparagraph (3) applies, if a licensee recovers or recoups an amount deducted as extraction expenditure under subparagraph (1), the amount recovered or recouped shall be income of the licensee charged to tax under section 5(2)(a)(i) in the year of income in which the amount is recovered or recouped.

(5) In this paragraph –

“commencement of commercial production” means the level of production as may be determined by the Cabinet Secretary responsible for mining; and

“written down value”, in relation to an interest in a mining right or information of a licensee, means the cost of the right or information reduced by the deductions allowed to the licensee in respect of the right or information under this paragraph.

Rehabilitation
expenditure.

6. (1) A contribution made by a licensee to a rehabilitation fund in accordance with an approved rehabilitation plan relating to the licensee’s mining operations shall be allowed as a deduction for the year of income in which the contribution was made.

(2) An expenditure incurred by a licensee in carrying out work required by an approved rehabilitation plan in respect of the licensee’s mining operations shall be allowed as a deduction for the year of income in which the expenditure is incurred:

Provided that the work is not paid for, directly or indirectly, from money made available out of the licensee’s rehabilitation fund for the licensee’s mining operations.

(3) Interest income and investment income in respect of a rehabilitation fund shall be exempt from tax.

(4) An amount withdrawn from a rehabilitation fund and not utilized for approved rehabilitation plan shall be considered as income of the licensee and shall be charged to tax under section 5(2)(a)(i) in the year of income in which the amount was withdrawn. (5) Any surplus in a rehabilitation fund of a licensee at the time of completion of rehabilitation shall be considered as income of the licensee and shall be charged to tax under section 5(2)(a)(i) in the year of income in which rehabilitation is completed

(6) In this paragraph –

“approved rehabilitation plan” means a plan for the rehabilitation of a mine site approved by the Cabinet Secretary responsible for mining; and

“rehabilitation fund” means a fund or account required to be established under a mining right to provide for the future payment of remedial work to the licence area covered by the mining right and is managed jointly by the Cabinet Secretary responsible for mining and the licensee.

PART III – PETROLEUM OPERATIONS

Taxation
of contractors

7. (1) A contractor is chargeable to tax in accordance with this Act but subject to the modifications in this Schedule.

(2) If there is any inconsistency between this Schedule and any other provision of the Act, in relation to the taxation of a contractor, this Schedule shall prevail.

Limitation of
deductions
relating to
petroleum
operations

8. (1) A deduction for expenditure to the extent incurred by a contractor in undertaking petroleum operations in a contract area during a year of income shall be allowed only against the income derived by the contractor from the petroleum operations in the contract area during the year.

(2) If a contractor suffers a loss in respect of petroleum operations in a contract area for a year of income, the amount of the loss shall be carried forward and allowed as a deduction against the income of the contractor derived from petroleum operations in the contract area in the next following year of income of the contractor.

(3) The amount of a loss for a year of income that is not deducted under subparagraph (2) shall be carried forward by the contractor to the next following year of income and be deductible in that year in accordance with subparagraph (2), and so on until the loss is fully deducted or the petroleum operations in the contract area cease.

Exploration
expenditure

9. (1) A contractor shall be allowed a deduction for exploration expenditure in the year of income in which the contractor incurred the expenditure.

(2) Subject to paragraph 13, if a contractor –

- (a) disposes of an interest in a petroleum agreement or information the cost of which was deducted as exploration expenditure under subparagraph (1); or
- (b) otherwise recovers or recoups an amount deducted as exploration expenditure under subparagraph (1),

the consideration for the disposal, or the amount recovered or recouped, shall be considered as income of the contractor and be charged to tax under section 5(2)(a)(i) in the year of income in which the interest is disposed of or the amount is otherwise recovered or recouped.

(3) For the purposes of this Schedule, the rate of capital allowance for machinery first used to undertake exploration operations shall be one hundred per cent.

Development
expenditure

10. (1) Subject to subparagraphs (2), a contractor shall be allowed a deduction for development expenditure at a rate of twenty per cent in the year of income in which the contractor incurred the expenditure and in the following years in equal instalments.

(2) If a contractor incurs development expenditure before the commencement of commercial production, subparagraph (1) shall apply on the basis that the expenditure was incurred at the time of commencement of commercial production.

(3) Subject to paragraph 16, if a contractor disposes of an interest in a petroleum agreement or information the cost of which was deducted as development expenditure under subparagraph (1) during a year of income, no deduction shall be allowed for the development expenditure for that year and –

- (a) the consideration for the disposal exceeds the written down value of the interest or information at the time of disposal, the amount of the excess shall be considered income of the contractor charged to tax under section 5(2)(a)(i) in the year of income in which the disposal occurred; or
- (b) the written down value of the interest or information at the time of disposal exceeds the consideration for the disposal, the contractor shall be allowed a deduction for the amount of the excess in the year of income in which the disposal occurred.

(4) Except where subparagraph (3) applies, if a contractor recovers or recoups an amount deducted as development expenditure under subparagraph (1), the amount recovered or recouped shall be considered income of the contractor

charged to tax under section 5(2)(a)(i) in the year of income in which the amount is recovered or recouped.

(5) In this paragraph –

“commencement of commercial production” means the first day of commercial production as determined under the petroleum agreement; and

“written down value”, in relation to an interest in a petroleum agreement or information of a contractor, means the acquisition cost of the interest or information reduced by the deductions allowed to the contractor in respect of the interest or information under this paragraph

Decommissioning
expenditure

11. (1) A contractor shall be allowed a deduction for the amount that the contractor transfers to a an escrow account during a year of income as required under an approved decommissioning plan for a contract area made under a petroleum agreement to finance expenditure expected to be incurred by the contractor in the abandonment and decommissioning of petroleum operations undertaken under the petroleum agreement.

(2) Subject to subparagraph (3), a contractor shall be allowed a deduction for expenditure incurred by the contractor under an approved decommissioning plan in the abandonment and decommissioning of petroleum operations in a contract area.

(3) A deduction shall not be allowed under subparagraph (2) for expenditure incurred in the abandonment and decommissioning of petroleum operations in a contract area if the expenditure is paid for, directly or indirectly, from money made available out of the escrow account established under the decommissioning plan for the contract area to finance such expenditure.

(4) An amount accumulated in an escrow account, or an amount withdrawn from an escrow account to meet expenditure incurred under an approved decommissioning plan for a contract area, shall be exempt from tax.

(5) An amount withdrawn from the escrow account and returned to the contractor shall be considered to be income of the contractor charged to tax under section 5(2)(a)(i) in the year of income in which the amount was returned to the contractor.

(6) Any surplus in an escrow account established under an approved decommissioning plan for a contract area by a contractor at the time of completion of decommissioning of the contract area to which the account relates is included in the income of the contractor for the year of income in which decommissioning is completed.

(7) In this section –

“approved decommissioning plan” has the meaning assigned to it under the Petroleum (Exploration and Production) Act.

Paid-on-behalf

12. (1) This paragraph shall apply where the portion of profit oil or gas that the Government is entitled to receive under a petroleum agreement is inclusive of taxes payable by the contractor under this Act.

(2) For the avoidance of doubt, where this paragraph applies, the portion of profit oil or gas that the Government is entitled to receive under a petroleum agreement with a contractor shall be inclusive only of the taxes payable by the contractor under this Act directly in relation to the petroleum operations undertaken by the contractor and shall exclude –

- (a) the tax payable on any gain made by the contractor or any other person on a disposal, directly or indirectly, of an interest in the petroleum agreement; or
- (b) any tax that the contractor is liable under the Act to deduct from a payment made by the contractor

PART IV – COMMON RULES APPLICABLE TO MINING AND PETROLEUM OPERATIONS

Farm-outs

13. (1) This paragraph shall apply where –

- (a) a licensee or contractor has entered into an agreement (referred to as a “farm-out agreement”) with a person (referred to as the “transferee”) for the transfer of an interest in a mining right or petroleum agreement; and
- (b) the consideration given by the transferee for the interest wholly or partly includes the transferee undertaking some or all of the work commitments of the licensee or contractor under the right or agreement.

(2) Where this paragraph applies, and the transfer of the interest occurs at the time the farm-out agreement is entered into, the consideration received by the licensee or contractor for the interest shall not include the value of any work undertaken by the transferee on behalf of the licensee or contractor to the extent the expenditure on such works have not been allowed for deduction by the licensee or contractor.

(3) Where this paragraph applies and the transfer of the interest is deferred until the transferee completes some or all of the work commitments of the licensee or contractor under the mining right or petroleum agreement –

- (a) any amount in money payable under the farm-out agreement before the transfer of the interest shall be included in the income of the licensee or contractor charged to tax under section 5(2)(a)(i) in the year of income in which the amount is payable; and
- (b) the value of any work undertaken by the transferee on behalf of the licensee or contractor shall be excluded in –
 - (i) the consideration received by the licensee or contractor for the transfer of the interest; or
 - (ii) the income of the contractor charged to tax under this Act;

to the extent the expenditure on such works shall not be allowed for deduction by the licensee or contractor.

(4) Where an interest referred to in subparagraph (3) is subsequently transferred, the consideration received by the licensee or contractor shall not include any amount included in the income of the licensee or contractor charged to tax under subparagraph (3)(a).

Indirect transfers of interest

14. (1) A licensee or a contractor shall immediately notify the Commissioner, in writing, if there is a ten per cent or more change in the underlying ownership of a licensee or contractor.

(2) If the person disposing of the interest to which the notice under subparagraph (1) relates is a non-resident person, the licensee or contractor shall be liable, as agent of the non-resident person, for any tax payable under this Act by the non-resident person in respect of the disposal.

Rate of tax.

15. The rates of tax specified under the Third Schedule shall be applicable to the gains or profits of a licensee or contractor.

Taxation of subcontractors

16. (1) Subject to subparagraph (2), a non-resident subcontractor who derives a fee for the provision of services (referred to in this paragraph as a “services fee”) to a licensee or contractor in respect of mining or petroleum operations shall be liable to pay tax at a non-resident rate.

(2) Subparagraph (1) shall not apply if the subcontractor provides the services giving rise to the fee through a permanent establishment in Kenya.

(3) A services fee to which subparagraph (2) applies shall be deemed to be income that accrued in or was derived from Kenya for the purposes of section 5 and be assessed to the subcontractor under section 49.

(4) A licensee or contractor paying a services fee to a non-resident subcontractor under subparagraph (1) shall deduct tax from the gross amount paid at the rate specified in the Third Schedule.

(5) A licensee or contractor to whom subparagraph (4) applies shall deduct tax in accordance with section 41 of this Act at the earlier of –

(a) the time the licensee or contractor credits the services fee to the account of the non-resident subcontractor; or

(b) the time the fee is actually paid.

(7) A tax deducted under subparagraph (1) shall be a final tax.

(8) In this paragraph, “non-resident subcontractor” means a subcontractor that is not a resident and includes a subcontractor that is a foreign government or foreign government body.

Deduction of withholding tax by contractor

17. A licensee or contractor making payment to a resident person or non-resident person or non-resident person having a permanent establishment in Kenya that is subject to tax in accordance with section 41 of this Act deduct tax from the gross amount payable at the rate specified in the Third Schedule.

Source of income

18. An amount that is by virtue of this Schedule charged to tax under section 5(2)(a)(i) shall be deemed to be income that accrued in or was derived from Kenya.

Deductibility of interest.

19. Section 24(11)(j) shall apply to a contractor or licensee.

Hedging transactions.

20. (1) Subject to subparagraph (2), income from hedging transactions entered into by a licensee or contractor shall be treated as a specified source of income for the purposes of section 24(10).

(2) Subparagraph (1) does not apply to hedging transaction entered into by a licensee or contractor that has an annual turnover of less than ten million shillings as required to obtain project finance.

(3) In this paragraph, “hedging transaction” means a transaction entered into by a licensee or contractor to manage commodity price risk.

SEVENTH SCHEDULE
(Section 6(g))

**TAXATION OF EXPORT PROCESSING AND SPECIAL ECONOMIC
ZONES ENTERPRISES**

PART A: TAXATION OF EXPORT PROCESSING ZONE ENTERPRISES

1. An export processing zone enterprise shall maintain its business accounts in a convertible foreign currency of its choice provided that the Commissioner's consent of that choice has been requested and obtained.

2. An export processing zone enterprise shall be deemed to be a non-resident subject to a non-resident rate of withholding tax on payments made to such an enterprise and, where such payments are made by a person who is not an export processing zone enterprise, the tax shall be final tax.

3. The employees and directors, other than non-residents, of an export processing zone enterprise shall be liable to personal income tax and the export processing zone enterprise shall be required to comply with section 43 of this Act.

4. Where an export processing zone enterprise contracts out manufacturing services to a related resident company that is not an export processing zone enterprise, all income derived from the sale by the export processing zone enterprise of the goods produced shall be treated as the income of the related resident company, unless the services provided to the export processing zone were paid for at a fair market price.

5. Where the related resident company that is not an export processing zone enterprise provides services other than manufacturing services to an export processing zone enterprise, the related resident company shall not deduct the cost of providing such services unless the services were provided at a fair market price.

6. For purposes of this Schedule, two companies are related when one company owns whether directly or indirectly twelve and one-half percent or more of the voting shares of the other company.

PART B: TAXATION OF SPECIAL ECONOMIC ZONE ENTERPRISES

7. Gains or profits of a special economic zone enterprise shall be subject to tax at the rate specified in the Third Schedule.

8. Payments by a special economic zone enterprise to any person shall be subject to tax at the rate specified in the Third Schedule except for dividends which shall be exempt from tax if paid to a non-resident person.

9. Where a special economic zone enterprise contracts out manufacturing services to a related resident company that is not a special economic zone enterprise, all income derived from the sale by the special economic zone enterprise of the goods produced shall be treated as the income of the related resident company, unless the services provided to the special economic zone were paid for at a fair market price.

10. Where the related resident company that is not a special economic zone enterprise provides services other than manufacturing services to a special economic zone enterprise, the related resident company shall not deduct the cost of providing such services unless the services were provided at a fair market price.

11. For purposes of this Part, two companies are related when one company owns whether directly or indirectly twelve and one-half percent or more of the voting shares of the other company.

DRAFT

EIGHT SCHEDULE
(Section 26(5))

TAXATION OF CROSS BORDER TRANSACTIONS

PART 1 – INTERPRETATION

Interpretation

1. In this Schedule, unless the context otherwise requires -

“arms length price” means the price payable in a transaction between independent persons;

“beneficial owner” means the person who ultimately owns or control a business and/or the person on whose behalf a transaction is being conducted or persons who exercise ultimate effective control over a legal person or arrangement;

“beneficial tax regime” means a regime anchored in any legislation, regulation or administrative practice which provides a preferential rate of taxation to any income or profit, including reductions in the tax rate or the tax base;

“capital rich and low function person” means a person that is capitalized with a relatively high amount of equity (or equity-equivalent) capital, but which have limited capacity to carry out risk-management functions;

“constituent entity” means –

- (i) any separate business unit of a multinational enterprise group that is included in the consolidated financial statements of the multinational enterprise group for financial reporting purposes, or would be so included if equity interests in such business unit of a multinational enterprise group were traded on a public securities exchange;
- (ii) any such business unit that is excluded from the multinational enterprise group’s consolidated financial statements solely on size or materiality grounds; and
- (iii) any permanent establishment of any separate business unit of the multinational enterprise group included in (i) or (ii) above provided the business unit prepares separate financial statement for such permanent establishment for financial reporting, regulatory, tax reporting, or internal management control purposes.

“controlled transaction” means a transaction entered into between associated enterprises or any other transaction deemed as controlled;

“comparable transactions” means transactions that are comparable in accordance with Paragraph 8;

“excluded multinational enterprise group” means, with respect to any financial year of the group, a group having total consolidated group revenue of less than one hundred billion shillings during the financial year immediately preceding the reporting financial year as reflected in its consolidated financial statements for such preceding financial year;

“financial indicator” means –

- (a) in relation to the comparable uncontrolled price method, the price; or
- (b) in relation to the cost plus method, the gross mark up on costs; or
- (c) in relation to the resale price method, the resale gross margin; or
- (d) in relation to the transaction net margin method, the net profit margin relative to an appropriate base such as costs, sales, assets, capital employed; or
- (e) in relation to the transactional profit split method, the division of net profit;

“financial year” means an annual accounting period with respect to which the ultimate parent entity of the multinational enterprise group prepares its financial statements;

“group” means a collection of enterprises related through ownership or control such that it is either required to prepare consolidated financial statements;

“preferential tax regime” means a jurisdiction that has one or more of the following features –

- (i) does not tax income or taxes income at a tax rate less than sixteen percent; or
- (ii) does not have an effective exchange of information arrangement; or
- (iii) does not allow access to banking information; or
- (iv) lacks transparency on the details of its application including details of; corporate structure, ownership of the legal entities located therein, beneficial owners of income or capital, financial disclosure.

“reporting entity” means the constituent entity that is required to file a country-by-country report in its jurisdiction of tax residence on behalf of the multinational enterprise group;

“surrogate parent entity” means one constituent entity of the multinational enterprise group that has been appointed by such group to file country-by-country report;

“systemic failure” with respect to a jurisdiction means that a jurisdiction has competent authority agreement with Kenya, but –

- (i) has suspended automatic exchange of information (for reasons other than those that are in accordance with the terms of that agreement); or
- (ii) has persistently failed to automatically provide to Kenya country-by-country reports in its possession of multinational enterprise groups that have constituent entities in Kenya.

“ultimate parent entity” means a constituent entity of a multinational enterprise group that has control in one or more constituent entities of such multinational enterprise group such that it is required to prepare consolidated financial statements;

PART II – TRANSFER PRICING ADJUSTMENT

Ascertainment of gains of profit of associated persons.

2. Where a non-resident person carries on business with an associated resident person or through its permanent establishment, the gains or profits shall be computed taking into account the provisions of this Schedule.

3. The gains or profits of an associated person whose dealings are not comparable to a transaction between independent persons dealing at arms’ length, shall be deemed to be the amount that might have been expected to accrue if the course of that business had been conducted by independent persons dealing at arm’s length.

Beneficial and preferential tax regimes.

4. Paragraph 2 shall also apply where –

- (i) a resident person operating in a beneficial tax regime carries on business with an associated resident person not operating in a beneficial tax regime;
- (ii) a person resident in Kenya engages in one or more transactions with a non-resident person located in a preferential tax regime whether or not such a person is associated person; or
- (iii) a permanent establishment of a non-resident person operating in Kenya engages in one or more transactions with the non-resident

person or its other associated person including other branches of the non-resident person located in a preferential tax regime whether or not such a person is an associated person; or

- (iv) a person resident in Kenya or a permanent establishment of a non-resident person operating in Kenya engages in one or more transactions with the non-resident person and the transaction or the non-resident person lacks economic substance.

Transactions subject to transfer pricing.

5. The transactions which are subject to transfer pricing adjustment shall include-

- (i) the purchase, sale, transfer, lease or use of tangible or intangible property;
- (ii) provision of services;
- (iii) financing transactions, including any type of borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance payments or deferred payment or receivable or any other debt arising during the course of business;
- (iv) insurance and re-insurance transactions;
- (v) a transaction of business restructuring or reorganization entered into by a person with an associated person,;
- (vi) cost contribution arrangements;
- (vii) any other transaction which may affect the profit or loss of the persons involved.

Transfer pricing methods.

6. A person shall apply any of the methods listed below in determining the arm's length price –

- (a) the comparable uncontrolled price method, in which the transfer price in a controlled transaction is compared with the prices in an uncontrolled transaction and accurate adjustments made to eliminate material price differences;
- (b) the resale price method, in which the transfer price of the produce is compared with the resale price at which the product is sold to an independent enterprise; provided that in the application of this method the resale price shall be reduced by the resale price margin (the price margin indicated by the reseller);
- (c) the cost plus method, in which costs are assessed using the costs incurred by the supplier of a product in a controlled transaction, with

a mark-up added to make an appropriate profit in light of the functions performed, and the assets used and risks assumed by the supplier;

- (d) the profit split method, in which the profits earned in very closely interrelated controlled transactions are split among the related enterprises depending on the functions performed by each enterprise in relation to the transaction, and compared with a profit split among independent enterprises in a joint venture;
- (e) the transactional net margin method, in which the net profit margin attained by a multinational enterprise in a controlled transaction is compared to the net profit margin that would have been earned in comparable transactions by an independent enterprise; and
- (f) such other method as may be approved by the Commissioner in writing.

Choice of tested party.

7. (1) When applying a cost plus, resale price or transactional net margin method, provided under Paragraph 5, a person shall select a “tested party to the transaction for which a financial indicator, is tested under the transfer pricing method in the circumstance.

(2) Where the tested party is a foreign entity, information shall be availed to the Commissioner upon request.

(3) For the purpose of this paragraph, “tested party” means a party to the controlled transaction for which a financial indicator is tested.

Determining the Arms-length price of Commodities.

8. Notwithstanding paragraph 6 –

- (a) where a resident person or a permanent establishment in Kenya engages directly or indirectly in a transaction with a non-resident associated persons in respect of commodities, where quoted or public price is obtained at the date of the transaction from –
 - (i) an international or domestic commodity exchange market; or
 - (ii) recognized price reporting statistical or governmental price-setting agencies; or
 - (iii) any other index that is used as a reference by unrelated parties to determine prices in transactions between them;

that price on the date on which the goods are shipped, shall be the sale price used for the purposes of computing the taxable income of that person unless the person proves that adjustments are appropriate.

- (b) where the prices are not available on the shipment date, the price shall be determined by taking an average of the prices five days before and after the shipping date.

Provided that in the case of goods exported from Kenya the price agreed upon between the group and un-associated person is higher than the price at the above-mentioned date, the agreed price in this case will be considered as the sale price for the purposes of computing the seller's taxable income in Kenya.

Arms length range.

9. (1) Where the application of the most appropriate method results in a number of financial indicators from comparable uncontrolled transactions, the interquartile range shall be considered to be the arm's length range and the median shall be used as the reference point.

(2) Where the relevant financial indicator derived from a controlled transaction is different from the median of the arm's length range, the taxable gains or profit of the person shall be computed in reference to the median of the arm's length range.

(3) Despite sub-paragraph (2), no adjustment on the controlled transaction shall be made to decrease the taxable profits or increase allowable losses.

Transfer pricing documentation.

10. (1) A person engaged in controlled transactions shall have in place contemporaneous documentation that verifies that the conditions of the transactions for the relevant year of income are consistent with the arm's length principle.

(2) Where a person fails to disclose the documentation as required in sub-paragraph (1), the person shall be liable to a penalty of two per cent of the value of the controlled transaction involved.

(3) For avoidance of doubt, the imposition of penalty under this paragraph shall not prevent the Commissioner from assessing and recovery of any taxes due under this Schedule.

Country- by-country reports.

11. Each ultimate parent entity or a constituent entity which is not the ultimate parent entity of a multinational enterprise group that is resident for tax purposes in Kenya shall file a country-by-country report with the Commissioner not later than twelve months after the last day of the reporting financial year of the multinational enterprise group.

Services between associated persons.

12. A service charge between a person and an associated person shall not be considered consistent with the arm's length principle unless –

- (a) it is charged for a service that is actually rendered; and

- (b) the service provides, or when rendered was expected to provide, the recipient with economic or commercial value to enhance its commercial position; and
- (c) it is charged for a service that an independent person in comparable circumstances would have been willing to pay for if performed for it by an independent person, or would have performed in-house for itself; and
- (d) its amount corresponds to that which would have been agreed between independent persons for comparable services in comparable circumstances.

Transactions involving intangible property.

13. The determination of arm's length conditions for controlled transactions involving the exploitation of an intangible must take into account the contractual arrangements in respect of the development, enhancement, maintenance, protection and exploitation of the asset.

Capital rich and low function person.

14. Where a capital rich and low function person is involved in a controlled transaction and does not control the financial risks associated with its funding activities, for tax purposes, it shall not be allocated the profits associated with those risks and shall be entitled to no more than a risk-free return.