



The Affordable Housing Act, 2024

Tax Alert Issue No. 4 of 2024



Grant Thornton

Background

President. William Ruto on 19th March 2024 assented to the Affordable Housing Bill 2023 into law. Pursuantly, Sections 4 and 5 of the Affordable Housing Act, 2024 relating to imposition of the levy and deductions by employers, become effective on the date of assent, the rest of the sections of the Act will become operational via a notice in the Gazette.

This Act is tailored to give effect to Article 43(1) (b) of the Constitution; to provide a framework for development and access to affordable housing and institutional housing; and for connected purposes. Therefore, the Act establishes a framework for collection of housing Levy and implementation of the affordable housing projects and programs. The need for this ACT was necessitated by the High Court declaring the levy to be unconstitutional in the case of *Okiya Omtatah and six others v the Cabinet Secretary for the National Treasury and Planning and 3 others* (Petition No. E181 of 2023) on the basis that the levy lacked a clear legal framework on how it will be collected, managed and implemented.

Select provisions and comments on the Act

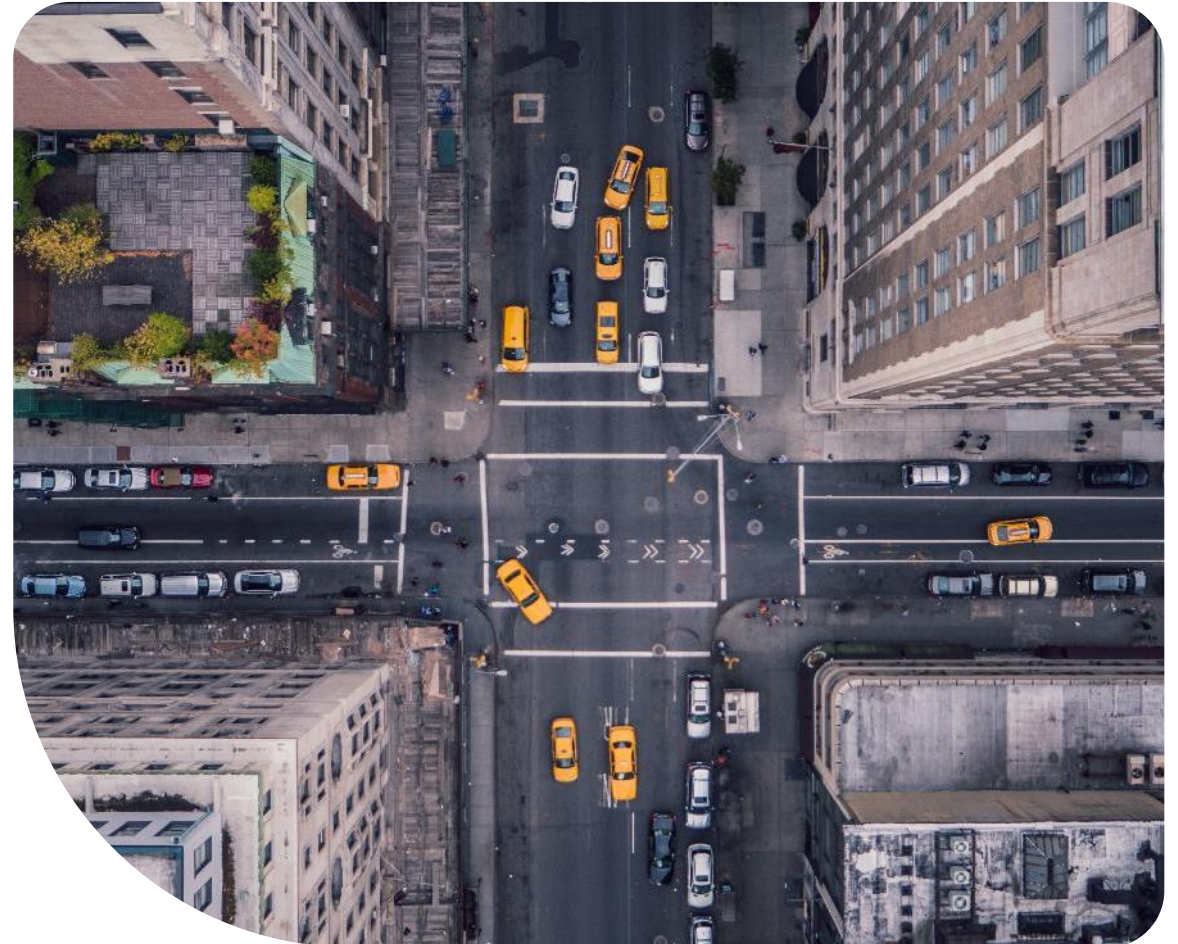
Section	Provision of the ACT	Our comments
Part II- IMPOSITION OF THE LEVY and DUE DATE FOR REMMITANCE Section 4(2)(3)	(2) The Levy shall be at the rate of one point five percent of— (a) the gross salary of an employee; or (b) the gross income of a person received or accrued which is not subject to the Levy under paragraph (a). 3) The Levy shall be payable to the collector, for remittance into the Fund, not later than the ninth working day after the end of the month in which the gross salary was due or gross income was received or accrued.	<ul style="list-style-type: none"> ❖ The Affordable Housing Levy will be imposed on an employee at the rate of 1.5% of the gross salary of an employee (salaried persons). ❖ Both salaried and non-salaried persons are now mandated to pay the levy. Section 4(2) (b) now brings to the net the non-salaried persons. ❖ The effect of this section is that unemployed/non-salaried persons will be subject to imposition of the housing levy at the rate of 1.5% of their gross income. Initially as provided in the Finance Act 2023, housing Levy was on imposed on salaried persons. This led to the High Court declaring the Levy unconstitutional on the basis of it being discriminatory. ❖ Kenya Revenue Authority (KRA) issued a communication explaining what constitutes gross salary. According to the communication from KRA, gross salary will constitute gross pay such as basic salary, cash allowances, house allowance, and travel allowance among other regular cash payments.
OBLIGATIONS OF EMPLOYER Section 5(1)(a)(b)	1) An employer shall— (a) deduct and remit the amount referred to in section 4(2)(a) from the gross salary of an employee; and (b) remit an amount equivalent to the amount deducted under section 4(2) (a), to the collector.	<ul style="list-style-type: none"> ❖ Therefore, non-regular cash payments like leave allowances, bonuses, gratuities, pensions, severance compensation, or any other terminal dues and benefits are not included in gross pay for determining the housing levy due. ❖ The levy deducted should be remitted by 9th day of the month following the month when the income (gross salary or gross income) was earned. If you earned income in March 2024, then the Levy should be remitted not later than the 9th April 2024. Additionally, Section 5(1) of the Affordable Housing Act (the ACT), 2024 makes it mandatory, that it is the responsibility of an employer to deduct and remit the levy. ❖ It is important to note that, the employer should match the deductions from the employee gross salary and remit the same to the collector. However, employer’s contribution to the Affordable Housing Levy is an allowable deduction as per the provisions of Section 15 of Income Act (ITA). ❖ Section 2 of the Act defines the collector to mean the Commissioner General of the Kenya Revenue Authority (KRA)
EXEMPTIONS FROM IMPOSITION OF THE LEVY Section 6	The Cabinet Secretary for the time being responsible for the National Treasury may, on the recommendation of the Cabinet Secretary, provide, by notice in the Gazette, that— (a) any income or class of income; or (b) any person or category of persons, shall be exempt from the application of section 4 to the extent specified in the notice.	<ul style="list-style-type: none"> ❖ Section 6 of the Act affords the Cabinet Secretary for National Treasury upon recommendation of the cabinet to exempt certain category of persons or class income from imposition of the Housing Levy.
PENALTIES Section 7	Where an amount of the Levy remains unpaid after the date when it becomes due and payable by a person liable to remit the amount, a penalty equal to three per centum of the unpaid amount shall be due and payable for each month or part thereof that the amount remains unpaid and shall be summarily recovered as a civil debt for the person liable to remit the amount.	<ul style="list-style-type: none"> ❖ Section 7 places a penalty of a sum equivalent to 3% of the unpaid amount for every month the levy is unpaid. Previously, the Finance Act 2023 had provided for a penalty of 2% imposed monthly for non-compliance.
RESTRICTIONS TO OWNERS OF AFFORDABLE HOUSING UNIT Section 54	Except with the prior written consent of the Board, a purchaser of an affordable housing unit under this Act shall not by contract, agreement or otherwise, sell or agree to sell his or her unit or any interest therein to any other person.	<ul style="list-style-type: none"> ❖ Initially, there was discussions of having a capped timeline in which purchasers of the units would not be allowed to sell in a bid to ward off investors for speculative purposes. However, as the Act reads, this seems like buyers are not entitled to sell in entirety.
CONSEQUENTIAL AMENDMENT AND TRANSITION Section 60(2)	Any payment made or action taken under the sections repealed under subsection (1) shall be deemed to have been paid or taken under this Act	<ul style="list-style-type: none"> ❖ This pre-empts the debate around refunds of payments made under the Finance Act, 2023. It also goes against the principle that laws aren’t to be applied retrospectively especially where the Court of Appeal confirms deductions under the Finance Act were indeed unconstitutional.

Key takeaways

Of the key takeaways from the ACT is that the Levy will now be imposed on both salaried and non-salaried persons whose income is accrued in Kenya. Additionally, the Act will amend section 30A of the Income Act (ITA) to allow resident individuals who pay the affordable housing levy to be entitled to the affordable housing relief, provided that the resident individual proves that in that particular year of income, he paid the affordable housing levy. However, the 3rd schedule of ITA, which provides for computation of the relief limits the affordable housing relief to employees leaving out non-salaried persons. The relief is provided at 15% of the employee's contribution but shall not exceed KES. 108,000 per annum. Initially, this relief was limited to resident employees who had applied and were awaiting the allocation of a house under an affordable housing scheme.

We have noted that the ACT does not provide how the levy will be collected from non-salaried persons. Section 4 (3) of the ACT aligns the date of remittance of the Levy with the date on which P.A.Y.E. is remitted to KRA. Employers should be aware that they are mandated to deduct and remit the Levy to KRA, this is a mandatory obligation of which failure will lead to penalties for want of compliance with provisions of the Act. On the issue of exemption from payment of levy, the ACT is vague on which means will be used to grant the same. We, however, wait for regulations to provide deeper clarity and step-wise implementation of the Act.

KRA has provided a notice on how employers will remit the levy. Employers should declare the AHL under sheet "M" of the PAYE return on iTax, then generate a payment slip under the head agency revenue and sub-head housing levy. This levy payment should be paid to KRA agent banks or via mobile money (Mpesa or Airtell) via eCitizen paybill number 222 222.



About Us

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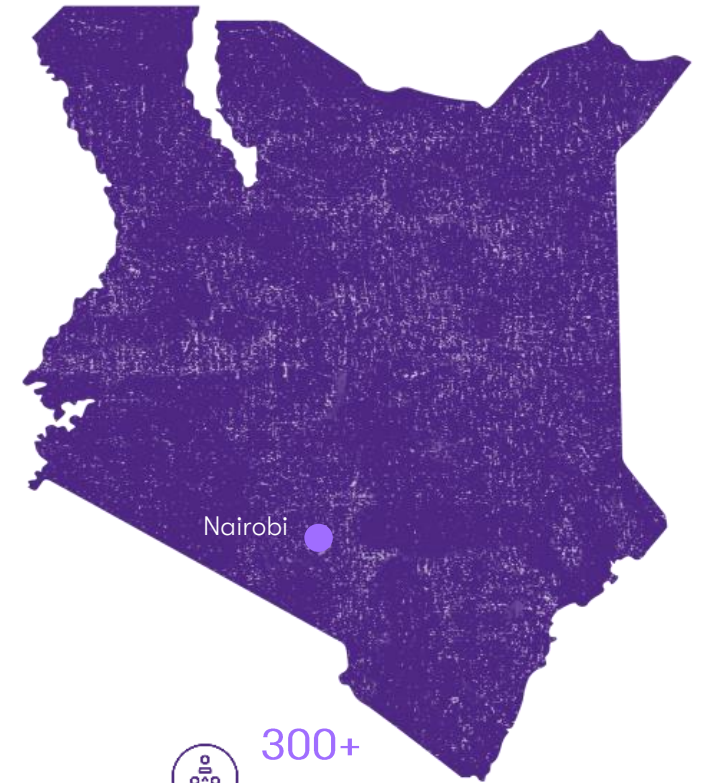
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