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REPUBLIC OF KENYA

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## **KENYA GAZETTE SUPPLEMENT**

**NATIONAL ASSEMBLY BILLS, 2022**

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**NAIROBI, 8th April, 2022**

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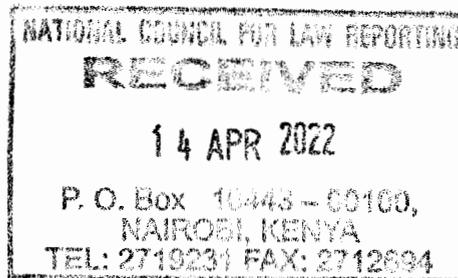
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**THE FINANCE BILL, 2022**

**A Bill for**

**AN ACT of Parliament to amend the laws relating to various taxes and duties; and for matters incidental thereto**

**ENACTED** by the Parliament of Kenya, as follows—

**PART I—PRELIMINARY**

**1.** This Act may be cited as the Finance Act, 2022 and shall come into operation or be deemed to have come into operation as follows —

Short title and commencement.

- (a) sections 3, 6, 11, 15, 16, 21(b) and 31, on the 1st January, 2023; and
- (b) all other sections, on the 1st July, 2022.

**PART II—INCOME TAX**

**2.** Section 2 of the Income Tax Act is amended by inserting the following new definitions in proper alphabetical sequence—

Amendment of section 2 of Cap. 470.

“fair market value” means the comparable market price available in an open and unrestricted market between independent parties acting at arm's length and under no compulsion to transact, which is expressed in terms of money or money's worth;

“financial derivative” means a financial instrument the value of which is linked to the value of another instrument underlying the transaction which is to be settled at a future date; and

“permanent home” means a place where an individual resides or which is available to that individual for residential purposes in Kenya, or where in the opinion of the Commissioner the individual's personal or economic interests are closest.

**3.** Section 3 of the Income Tax Act is amended in subsection (2) by adding the following new paragraph immediately after paragraph (h)—

Amendment of section 3 of Cap. 470.

- (i) gains from financial derivatives.

4. Section 4A of the Income Tax Act is amended in subsection (1) by deleting subparagraph (ii)(a) of the proviso and substituting therefor the following new subparagraph—

Amendment of section 4A of Cap. 470.

- (a) where the foreign exchange loss is realized by a company whose gross interest paid or payable to related persons and third parties exceeds thirty per cent of the company's earnings before interest, taxes, depreciation and amortization in any financial year.

5. Section 5 of the Income Tax Act is amended—

Amendment of section 5 of Cap. 470.

(a) in subsection (5), by deleting paragraph (a) of the proviso and substituting therefor the following new paragraph—

- (a) in the case of an employee share ownership plan, the value of the benefit shall be the difference between the offer price, per share, at the date the option is granted by the employer, and the market value, per share on the date when the employee exercises the option;

(b) in subsection (6), by deleting paragraph (a) and substituting therefor the following new paragraph—

- (a) the benefits chargeable shall be deemed to have accrued on the date the employee exercises the option.

6. Section 9 of the Income Tax Act is amended by adding the following new subsections immediately after subsection (2) —

Amendment of section 9 of Cap. 470.

(3) Where a resident person enters into a financial derivatives contract with a non-resident person, any gain accruing to the non-resident person from that arrangement shall be subject to tax at the rate specified in the Third Schedule.

(4) The provisions of subsection (3) shall be carried out in accordance with Regulations made by the Cabinet Secretary.

7. Section 11 of the Income Tax Act is amended by deleting subsection (3A). Amendment of section 11 of Cap. 470.

8. Section 12E of the Income Tax Act is amended by adding the following proviso to subsection (1)— Amendment of section 12E of Cap. 470.

Provided that this section shall not apply to a non-resident person with a permanent establishment in Kenya.

9. Section 15 of the Income Tax Act is amended— Amendment of section 15 of Cap. 470.

(a) in subsection (2)—

(i) by deleting the words “as defined in the Second Schedule” appearing in paragraph (l);

(ii) by deleting paragraph (w) and substituting therefor the following new paragraph—

(w) any donation in that year of income to a charitable organization whose income is exempt from tax under paragraph 10 of the First Schedule to this Act, or to any project approved by the Cabinet Secretary responsible for matters relating to finance;

(iii) by deleting paragraph (y);

(b) by deleting the subsection (4A).

10. Section 16 of the Income Tax Act is amended in the proviso to subsection (2)(j) by adding the following new subparagraph immediately after subparagraph (iii)(B)— Amendment of section 16 of Cap. 470.

(C) microfinance institutions licensed under the Microfinance Act, 2006. No. 19 of 2006.

11. The Income Tax Act is amended by repealing section 18A and replacing it with the following new section— Repeal and replacement of section 18A of Cap. 470.

Ascertainment of gains and profits of business in a preferential tax regime.

**18A. (1) Where—**

- (a) a resident person carries on business with a related resident person operating in a preferential tax regime; or

(b) a resident person carries on business with —

- (i) a non-resident person located in a preferential tax regime; or
- (ii) an associated enterprise of a non-resident person located in a preferential tax regime; or
- (iii) a permanent establishment of a non-resident person operating in Kenya where the non-resident person is located in a preferential tax regime,

and the business produces no gains or produces less gains than those which would have been expected to accrue from that business if the business activity was not with a party in a preferential tax regime, the gains of that resident person from that business shall be deemed to be the amount which would have been expected to accrue if that business had been conducted by an independent person dealing at arm's length, or if none of the parties were located in a preferential tax regime.

(2) For the purposes of this section, "preferential tax regime" means —

- (a) any Kenyan legislation, regulation or administrative practice which provides a preferential rate of tax to