

MEMORANDUM: Finance Bill 2023

Date: 9th May 2023

To: The Clerk of the National Assembly
Main Parliament Buildings
P.O. Box 41842-00100, Nairobi

From: The Chief Executive Officer
Viffa Consult Limited
One Padmore Place, Kilimani, Nairobi
P.O Box 35320-00200, Nairobi
Email: ceo@viffaconsult.co.ke; Cell: +254 769 713936

Dear Sir,

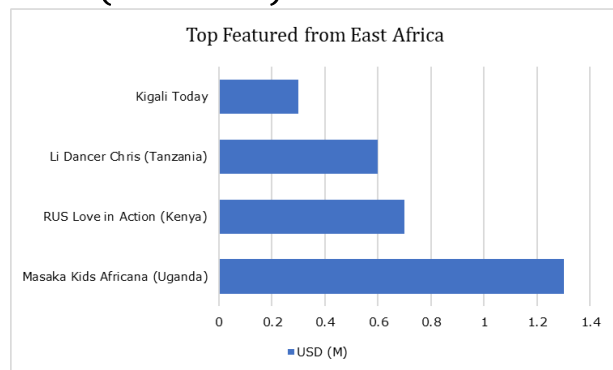
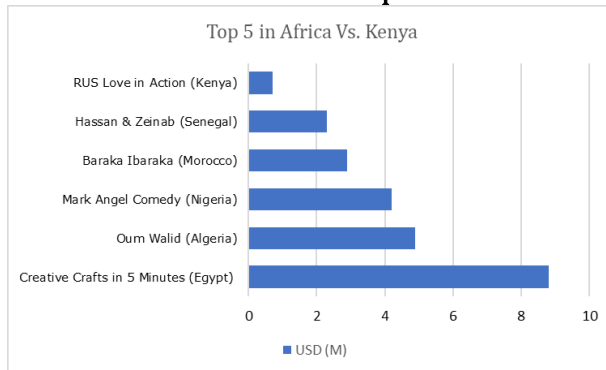
Re: Proposed 15% Withholding Tax for Content Creators in the Finance Bill, 2023

We are writing to bring to your attention our concerns about the proposed 15% withholding tax for content creators in the Finance Bill, 2023¹. As you are aware, there has been an upsurge in the use of digital platforms in Kenya, especially after the COVID-19 pandemic. This has opened up job and business opportunities in the ICT sector, with software developers and vendors proffering a wide range of solutions. In the creative industry, social media has become an avenue for content creators to showcase their talent, build their brands, and reach new audiences. However, the proposed 15% withholding tax on their gross earnings could hinder the growth of this budding industry.

Background:

The creative industry in Kenya is still developing, and monetization structures are yet to mature. There are an estimated 300 content creators with followers exceeding 100,000, with only 5% making meaningful income. Even then, it will take years for Kenyan content creators to accumulate audiences and earnings compared to African leaders like Egypt’s Creative Crafts in Five Minutes, Nigerian comedian Mark Angel, Algeria’s Oum Walid, and Uganda’s Masaka Kids Africana.

Top All-Time Earners in Africa (CashNet USA)



¹ Proposed amendment to Paragraph 5 of the Third Schedule of the Income Tax Act by inserting a new subparagraph (m) “in respect of payments relating to digital content monetization, fifteen per cent”



It is our considered view that the proposed withholding tax of 15% on their gross earnings could discourage content creators from pursuing their craft and limit their earning potential.

Challenge:

While the Finance Bill's scope is limited to taxation measures, it appears to conflict with other pronouncements by the government to provide an environment where budding creatives can develop their craft. The Budget Policy Statement 2023 promised two key areas of intervention to support small business development – including the creative industry:

1. **Transforming the Micro, Small, and Medium Enterprise (MSME) Economy:** The government committed to a review and rationalization of all business licenses, cap total licenses at 1.5% of turnover and enact administrative burden law ensuring no business spends more than 4 person-hours a month on tax and regulatory compliance². Content creators who use social media platforms will have the burden of navigating Income Tax and Withholding Tax, with the latter being a daily affair. In addition, the Value Added Tax (Electronic, Internet And Digital Marketplace Supply) Regulations, 2023³ requires that those who make supplies over the internet, an electronic network, or through any digital marketplace register for VAT - in reading Regulation 4 together with Regulations 3 and 8.
2. **Digital Superhighway and Creative Economy:** The government's commitment is to bring more Kenyans online, especially the youth online for businesses, learning, entertainment, and socialization⁴. Instead, the proposed WHT seems to be punitive to those who choose online channels. The Finance Bill proposes that those who engage in sales promotions, marketing, and advertising be subjected to a WHT of 5%. However, those who do the same thing through digital platforms⁵ shall be subjected to a WHT of 15%⁶.

Secondly, the proposed withholding tax rate of 15% is significantly higher than the current withholding tax rates applied to other professional services such as consultancy, legal and accounting services. This proposed rate will place an undue burden on content creators, who are still struggling to establish themselves in the industry.

Third, the Finance Bill (2023) proposes an amendment to Section 12C of the Income Tax Act to lower the floor of those liable for turnover tax from KES One Million to KES Five Hundred Thousand and the ceiling from KES Fifty Million to KES Fifteen Million. Such a move would work against the objective of cushioning the public against rising costs of living. The new thresholds will subject a struggling group of artists to new costs - in the name of taxes. We contend that may be more of a process challenge since the Finance Bill comes before the Budget Speech where the government would have the opportunity to articulate specific support programmes that would provide comfort to the newly targeted income bracket.

² Budget Policy Statement (2023), page 5

³ The Value Added Tax (Electronic, Internet And Digital Marketplace Supply) Regulations, 2023

⁴ Budget Policy Statement (2023), page 8 - 9

⁵ Proposed definition of “digital content monetization”

⁶ Comparison of proposed new subparagraph (l) and (m) in proposed amendment to Paragraph 5 of the Third Schedule of the Income Tax Act



Proposals:

1. The withholding tax payable by content creators should be 5% - which levels the playing field with the rest of the professional services. Those conducting their business online should not be discriminated against.
2. Withholding tax paid by content creators who earn up to KES 600,000 per annum should be deemed as the final tax, and therefore not be subjected to turnover tax. Content creators are already grappling with the high cost of content creation, marketing, and distribution, and any attempt to introduce additional costs in the form of taxes will only serve to discourage their growth.
3. Introduce a regime where cumulative costs of any other national/county licenses required of the content creator should not exceed 1.5% of their turnover or KES 100,000 per annum, whichever is lower. This is to encourage the formalization of businesses.
4. Incapacitated persons should be protected from the actions and/or inactions of their trustees/guardians. Such trustees/guardians should be held personally liable for tax demands arising from earnings made by incapacitated persons. Of particular concern is the fact that minors form a considerable part of the creative industry and their guardians manage their affairs. It is unfair to hold minors responsible for decisions made by their guardians.

Conclusion:

In conclusion, we believe that the proposed 15% withholding tax rate for content creators is too high and will serve as a disincentive to the growth of the creative industry in Kenya. We recommend a reduction of the withholding tax rate to 5% and the introduction of measures to protect content creators earning less than KES 600,000 per annum, limit the cumulative cost of national and county licenses required of content creators, and protect incapacitated persons from the actions of their trustees or guardians. These measures will go a long way in supporting the growth of the creative industry in Kenya and promoting the digital economy.

Edgar Andagalu
Chief Executive Officer
Viffa Consult Limited



About Viffa Consult Limited

Viffa Consult is a Kenyan-based management consultancy with a primary focus on developing Small and Medium Enterprises (SMEs) and Start-ups in Africa.

SMEs in Kenya and Africa are the backbone of the economy yet are neglected in terms of policy and business support from other stakeholders in the ecosystem.

Our theory of change is premised on the idea that Africans can transform their socio-economic status through meaningful and profitable trade and business engagement.

Since inception, we have continued to positively impact the Kenyan entrepreneurial ecosystem by publishing riveting policy and strategic opinion pieces, SME policy advocacy at local and international levels as well as consultancy.

Viffa Consult seeks to alleviate SMEs' challenges through a blend of granular research aimed at building a knowledge base that informs SME policies, and SME engagement with corporates, provides SMEs with information and market intelligence as well as direct SME support having supported over 500 SMEs in Sub-Saharan Africa.

Viffa Consult Limited

One Padmore Place | George Padmore Road | Kilimani | Nairobi | Kenya

Email: info@viffaconsult.co.ke

Website: www.viffaconsult.co.ke

Twitter: @ViffaConsult

LinkedIn: Viffa Consult

Facebook: Viffa Consult