

26 May 2025

The Clerk of the National Assembly
Main Parliament Buildings, First Floor
Parliament Road
P.O. Box 41842 – 00100
Nairobi

By email: cna@parliament.go.ke

Dear Sir,

Memorandum: Legislative proposals for consideration by the National Assembly in the Finance Bill, 2025 (National Assembly Bill No. 19 of 2025)

We, Maersk Kenya Limited, (collectively "Maersk Kenya" or "the Company"), refer to the above subject matter where you invited interested members of the public and organizations to submit any representations that they may have on the Finance Bill, 2025 ("the Bill"). These representations have been made pursuant to Article 118 (1) (b) of the Constitution and the National Assembly Standing Order 127 (3).

1. Company Background

Maersk Kenya is a company incorporated in Kenya under the Companies Act, Chapter 486 of the Laws of Kenya. The Company acts as a shipping agent for Maersk Shipping Line within the A.P. Møller-Maersk group of companies. Maersk Kenya is a key player in Kenya's logistics and shipping sector, offering a range of services including container shipping, freight forwarding, and supply chain solutions. Since 1987, the Company has been active in the Kenyan market with offices in both Nairobi and Mombasa.

The Company has remained a tax compliant taxpayer since its inception and is also responsible for the applicable tax obligations of its Principal, mainly consisting of freight tax under Section 9(1) of the Income Tax Act ("ITA").

In respect of freight tax, the Company has noted key changes proposed through the Finance Bill, 2025 that seek to replace the current tax compliance framework, where Maersk Kenya accounts for freight tax on behalf of its Principal, with a withholding tax regime.

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The Company understands that the proposed change will vest the responsibility to deduct and account for freight tax, under a withholding tax regime, with the various customers of its Principal. We understand that this may have been influenced by, arguably, the ambiguity within the provisions of the ITA concerning the party responsible for accounting for freight tax and the absence of a clearly defined due date under the law.

The Company therefore submits this memorandum to further make proposals for consideration by the National Assembly and for inclusion in the Bill prior to assent.

2. Our tax proposals for consideration

2.1 Proposals included in the Finance Bill, 2025

Clause 16 of the Bill seeks to amend Section 35 of the ITA by inserting a new Paragraph immediately after Paragraph (t). The proposed amendment reads as below:

16. Section 35 of the Income Tax Act is amended –

(a) in subsection (1) by inserting the following new paragraph immediately after paragraph (t) –

(u) gains or profits which are chargeable to tax under section 9(1) derived from business of a ship owner or charterer;

Section 9(1) of the ITA provides as below:

9. (1). Where a non-resident person carries on the business of ship owner, charterer or air transport operator and a ship or aircraft owned or chartered by him calls at any port or airport in Kenya, the gains or profits from that business from the carriage of passengers who embark, or cargo or mail which is embarked, in Kenya shall be the gross amount received on account of the carriage ; and those gains or profits shall be deemed to be income derived from Kenya; but this subsection 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 trans-shipment.

Provided that all income of a non-resident shipping line including income from delay in taking delivery of goods or returning any of the equipment used for transportation of goods shall be deemed to be income derived from Kenya.

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Section 47(2) of the ITA further provides as below:

*“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 9 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.”*

The import of Section 9(1) as read together with 47(2) of the Income Tax Act is that Section 47(2) bestows a responsibility upon the master of a ship, or the captain of an aircraft including any other agent to account for tax charged under Section 9(1).

The proposal to amend Section 35 of the ITA as above seeks to remove the tax imposed under Section 9(1) from a self-declaration regime to a withholding tax one. Effectively, should this proposal be passed as currently drafted under the Bill, the obligation to account for freight tax will be transferred from Maersk Kenya, who collates data and declares freight tax under self-assessment regime, to the customers of Maersk Shipping Line.

Through this memorandum, Maersk Kenya, on behalf of its Principal MLAS, proposes as below in respect of the change.

2.2 Our Proposals for consideration by the National Assembly on The Finance Bill (National Assembly Bill No. 19 of 2025)

2.2.1 Retention of the current self-declaration tax regime

Section 9(1) of the ITA is currently administered through a self-declaration regime where ship owners self-charge and account for tax on qualifying income mainly through their maritime agents. In the case of Maersk Shipping Line, Maersk Kenya, being the appointed maritime agent accounts for tax imposed under Section 9(1) of the ITA as below:

- Maersk Kenya receives data from MLAS relating to all qualifying income mainly consisting of gross income received on account of the carriage of cargo that is embarked onto MLAS vessels at Kenya's ports;
- Maersk Kenya then computes the tax applicable under Section 9(1) and prepares a payment return on the iTax Portal; and
- Maersk Kenya, on behalf of MLAS, then settles the tax liability to the Kenya Revenue Authority ("KRA") by the 20th day of the following month.

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This tax compliance process currently works seamlessly and allows the KRA to monitor compliance by reaching out to agents of shipping companies where compliance gaps are observed. Accordingly, Maersk Kenya, on behalf of MLAS, wishes to propose the retention of the current self-declaration regime. This is for the following reasons:

Rationale for retention of the self-declaration regime

- The number of entities through which the KRA collects freight tax on qualifying income is currently limited to appointed maritime agents who collect and remit the tax. In practice, though not provided for in the ITA, the tax is remitted every 20th day of the following month. According to the Kenya Ships Agents Association ("KSAA") website, there are about forty-five registered shipping agents. These agents represent majority of the shipping lines that dock at Kenyan Ports. Accordingly, they form a significant number of the agents that collect and account for freight tax under Section 9(1) of the Income Tax Act.

The proposed move to change the collection of freight tax from a self-declaration regime to a withholding tax regime means a move from these limited number of shipping agents to thousands of exporters who pay shipping lines for cargo embarked onto vessels mainly for export. In the case of Maersk, for instance, the Shipping Line operates hundreds of vessels that call at Kenyan Ports in a month which translates to thousands of customers. Maersk Kenya records an average of fifteen thousand transactions relating to cargo embarked onto vessels monthly.

The proposed change would require a shift from a centralised collection and accounting for freight tax by Maersk Kenya to a regime requiring thousands of shippers to account for withholding tax upon payment to Maersk. Extrapolation of this scenario to all shipping lines docking at Kenya's ports would completely decentralize compliance. Such decentralization of tax compliance will not only lead to tax administration challenges but also heavy leakage in revenue and high cost of enforcement/administration. This comes at a time when the Country is making every effort to mobilize tax revenue in view of the limited options in financing the Budget.

- Secondly, MLAS is apprehensive that decentralization of compliance through the adoption of a withholding tax regime creates potential internal administrative challenges and costs on its part. For instance, not all persons shipping cargo out of Kenya would necessarily understand the administration of withholding tax upon payment. Potentially therefore, the Company may face cases of over-deduction or under-deduction, an issue that would not only necessitate regular reconciliations on the part of the Company but could also impact the Company's cashflows. This is considering the fact that the tax rate

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is also subject to change based on the Double Tax Agreements signed with other Countries across the globe.

Further, the proviso to Section 10(1) of the ITA provides that Withholding Tax shall not apply unless a 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. Accordingly, in Kenya, Business to Consumer ("B2C") transactions do not attract withholding tax. As a result, there is a high likelihood that the Government will lose revenue where freight income is earned on B2C transactions.

Further, the proposed move to a withholding tax regime would require all customers who make qualifying payments to MLAS to commence complying with the current five-day working deadline within which to make withholding tax payments. Section 35(5) of the ITA requires a person who deducts withholding tax to remit tax so deducted to the Commissioner within five working days after the deduction was made. An enactment of the change to a withholding tax regime would require traders to start remitting freight tax every five working days, an adventure that the Company considers not only cumbersome but one that will increase compliance, enforcement, and administrative costs to both the KRA and taxpayers.

Ultimately, this proposed change would result in rising non-compliance, enforcement challenges on the part of KRA, heavy revenue leakage, and loss to the National Treasury. On the taxpayers' side, it creates further an administrative and compliance burden, potential cash-flow challenges and additional operating costs. It's demerits heavily outweigh the advantages it poses. The Company submits that the same should not be considered for enactment into law.

2.2.2. Alternative proposed changes to the law

Further, as noted above, the Company appreciates that the ITA may have legislative gaps when it comes to the procedural framework for the administration of freight tax. For instance, the Income Tax Act does not prescribe the timelines within which freight tax ought to be paid. While the KRA has modified the iTax Portal to allow for filing and settlement of freight tax by the 20th day of the next month, the law does not prescribe this timeline.

Accordingly, the introduction of a timeline will enhance clarity, transparency and efficiency in tax administration which will reduce ambiguity and disputes. Additionally, this introduction should align with the current practice where iTax is configured to recognize the twentieth day of the following month as the due date. Such alignment will ensure that the KRA

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does not incur further costs to modify the iTax system to support a different deadline for remittance of freight tax.

Further, Section 47(2) of the Income Tax Act deems the master of any ship as the agent of a non-resident ship owner for purposes of collection of freight tax under Section 9(1) of the Act. The Section does not expressly include shipping agents as an agent for purposes of collection of tax yet shipping agents remain, in practice, the primary agents that administer the collection and remittance of freight tax. To avert any ambiguity in the law as to whether shipping agents would be liable for freight tax on qualifying income earned by their principals, an amendment of Section 47(2) is necessary.

In light of the foregoing, the Company proposes the following changes to the ITA to address the current ambiguity:

a) Deadline - amendment to Section 9 of the ITA

An amendment to Section 9(1) of the Income Tax Act to prescribe the timelines for the payment of freight tax as below:

Section 9 of the Income Tax Act is amended by inserting the following new subsection immediately after subsection (1):

(1A): Tax chargeable under subsection (1) shall be payable monthly at a date not later than the twentieth day of the month succeeding that in which the income is earned.

b) Responsible party to compute and remit freight tax - amendment to Section 47 of the Income Tax Act

An amendment to Section 47(2) of the Income Tax Act to expressly recognize shipping agents as alternative agents to ship masters:

Section 47 of the Income Tax Act is amended by inserting a proviso immediately after subsection (2):

Provided that the owner of any ship may elect to use his shipping agent as an agent for purposes of collection and remittance of tax under Section 9(1) in place of the master of the ship. The owner of the ship shall notify the Commissioner, not later than thirty days after the appointment of his shipping agent as agent for purposes of collection and remittance of tax under Section 9(1). The notification referred to shall be made to the Commissioner in such form as the Commissioner may specify.

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2.3 Our request

In conclusion, we request your favourable consideration and support of our submissions to amend the relevant tax laws to retain the current freight tax regime and to introduce relevant provisions that lay a clear legal framework for the administration of freight tax as set out above.

Please feel free to reach out to the undersigned or our tax agents, Deloitte & Touche LLP via email cmusyoka@deloitte.co.ke should you require additional information or clarification regarding our submissions.

Yours faithfully,

Oliver Bunting
Chief Finance Officer

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