KPMG

Decoding the five-year tax loss carry-forward limit under the Finance Act 2025

Introduction

This alert brings to your attention our analysis of the five-year tax loss carry-forward cap introduced by the Finance Act 2025, along with a Kenya Revenue Authority private ruling, issued to a taxpayer and subsequently made public.

Background

The Finance Act, 2025 amended Section 15(4) of the Income Tax Act (ITA) to introduce a limit of five years within which tax losses may be carried forward and deducted. The amendment took effect on 1 July 2025 and now provides that:

> **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 such person for that year and the succeeding five years of income.**

This new wording has two direct consequences:

- Tax losses may now be carried forward for a maximum of five years from the year in which they arise; and
- Any portion of a loss that remains unutilised after the five-year period will lapse and cannot be used to offset future taxable profits.

Before this amendment, Section 15(4) of the ITA permitted losses to be carried forward indefinitely. Taxpayers therefore retained the right to apply accumulated losses against taxable income without any statutory time limit.

Unlike previous amendments to this provision, the 2025 change does not contain a transition clause. Such a transition clause would clarify how losses incurred under the previous regime would be treated once the new law takes effect.

The absence of a transition clause creates ambiguity on the treatment of tax losses accumulated prior to 1 July 2025. This tax alert sets out our interpretation of the amendment.

Historical Context

The tax treatment of carry-forward of tax losses under Section 15(4) of the ITA has undergone several changes over the past two decades.

In 2009, the Finance Act amended Section 15(4) of the ITA to limit the carry-forward period to five years. Taxpayers could apply to the Minister for Finance (now the Cabinet Secretary, National Treasury and Planning - CS) for a further extension, subject to recommendation from the Kenya Revenue Authority (KRA).

This amendment included a transition clause under Section 15(4)(iv) of the ITA, which provided that:

> **Any deficit incurred by a person as at 1 January 2010 shall be deemed to have been incurred in that year of income.**

The transition clause ensured that all accumulated losses prior to the change in law were treated as if they arose in 2010, thereby starting the five-year timeline uniformly for all taxpayers. However, the five-year cap proved insufficient time for capital-intensive sectors with significant investment allowances that required a longer tax losses recovery period.

To address this, the Finance Act, 2015 extended the carry-forward of tax losses period to ten years. Subsequently, the Finance Act, 2021 repealed the time limitation altogether, reinstating indefinite carry-forward of tax losses, provided such tax losses were properly substantiated.

This position remained until 1 July 2025, when the Finance Act, 2025 reintroduced a fixed five-year limitation from the year in which a loss is incurred. The amendment also restored the option for taxpayers to apply for a further five-year extension, subject to KRA's recommendation and approval by the CS.

Unlike the 2009 amendment, the 2025 amendment does not contain a transition clause. As a result, the law does not expressly address how tax losses accumulated prior to 1 July 2025 should be treated, creating uncertainty and leaving room for divergent interpretations between taxpayers and KRA.

Tax Authority's perspective

As noted above, the amendment introduced by the Finance Act, 2025 does not state how losses incurred prior to the commencement date of 1st July 2025 should be treated.

However, in a private ruling issued recently to a taxpayer by KRA and made public subsequently, the revenue authority set out its interpretation of the transitional treatment of accumulated tax losses under the amended Section 15(4) of the ITA. In its ruling, KRA acknowledged that the amendment lacks a transition clause but nonetheless took the view that tax losses incurred before the year of income 2020 are no longer deductible.

According to KRA's interpretation:

- Only tax losses arising in 2020 - 2024 remain eligible for carry-forward, subject to the new five-year limitation; and
- Losses from 2019 and earlier years are extinguished and cannot be applied against future taxable income.

Placing the Tax Authority's Interpretation in context

While the Commissioner's position provides insight into KRA's administrative interpretation, it does not constitute a binding legal position for taxpayers. A private ruling reflects the Commissioner's view on a specific set of facts disclosed by a particular taxpayer and is binding only on the Commissioner. It cannot operate as a general or authoritative interpretation of the law.

Our Comments

A strict and literal reading of the amended Section 15(4) of the ITA supports a prospective application. The amendment took effect on 1 July 2025, and in the absence of express language to the contrary, only losses incurred from that date forward fall within the purview of the new five-year limitation. Tax losses accumulated before 1 July 2025 were incurred under a legal regime that permitted indefinite carry-forward. Without a transition clause extinguishing those rights, such losses should remain available for offset until fully utilised.

The prospective application of laws has recently been reinforced by the Court of Appeal's (CoA) reasoning in Madison Insurance Kenya Limited v Commissioner of Domestic Taxes [2025] KECA 4 (KLR).

In the Madison Insurance case, the CoA was dealing with an appeal from the High Court where the main issue for determination was whether losses incurred in life insurance business prior to the repeal of Section 19(9) of the ITA and the amendment of Section 19(5) of the ITA by the Finance Act, 2008, could be carried forward after 1 January 2009. In addressing this question, the CoA held that:

> “In the absence of express provision to the contrary, statutes should be considered as affecting future matters only... No statute is to be construed as having retrospective operation which would have the effect of altering rights acquired under existing laws.”

The CoA held that the right to carry forward tax losses was determined by the law in force at the time the loss was incurred.

Similarly, the Supreme Court in Kandie v Alassane Ba & another [2017] eKLR while dealing with the retrospective application of the Constitution to treaties ratified before 2010, was categorical in holding that that constitutional provisions are not presumed to have retrospective effect unless expressly stated. Therefore, absence of transitional clauses means the law cannot apply to past events.

Further, the High Court in Commissioner of Domestic Taxes v Sendy Limited [2025] KEHC 14814 (KLR) clarified the limited effect of private rulings, holding that:

> "A private ruling cannot override the correct statutory interpretation of the law by a court of competent jurisdiction"

Taken together, these decisions confirm that accumulated tax losses constitute a vested tax attribute, and that such rights cannot be extinguished unless Parliament expressly provides for that outcome.

Proposed way forward

Based on the CoA's reasoning in Madison Insurance case, the statutory text, and the principle that ambiguities in tax legislation should be interpreted in favour of the taxpayer, it is our considered view that:

- The five-year limitation applies only to tax losses arising on or after 1 July 2025; and
- Tax losses accumulated prior to 1 July 2025 remain deductible and available for carry-forward, subject to verification of their validity and quantum.

Drawing from the precedent set by the 2009 amendment, we expect the National Treasury may in future provide clarity on the treatment of losses accumulated prior to 1 July 2025.

Additionally, taxpayers and industry stakeholders may advocate for the inclusion of a formal transition clause through the Finance Bill, 2026, by making submissions to the Parliamentary Committee for Finance and National Planning for consideration during the public participation process.

KPMG is happy to assist on any issues arising from this alert. Contact our tax and regulatory team on taxandregulatory@kpmg.co.ke or cakora@kpmg.co.ke.

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