Finance Bill, 2022 Analysis

Kenya

April 2022

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Foreword

The Finance Bill, 2022 (the Bill) was tabled at the National Assembly on Tuesday, 12 April 2022. This year, the Bill was released earlier than usual to facilitate its passing before the National Assembly takes a break to prepare for the general elections that are scheduled for August 2022.

In his budget speech, the Cabinet Secretary proposed tax measures that he expects to generate additional revenue of KES 50.4 billion. This is a relatively small amount when looked at in the context of the overall budget of over KES 2 trillion and is indicative of the shrinking avenues for raising additional revenue in an economy that is in turmoil.

The proposed tax measures included in the Bill cover incentives to promote the manufacturing and healthcare pillars of the Big 4 Agenda as well as procedural measures to safeguard tax revenues. In addition, the Bill has proposed clarifications and new measures on the taxation of digital services and financial derivatives, introduced new procedures for refund of tax overpayments and changes to the Transfer Pricing provisions, among others.

One key proposal is the exemption from VAT and Excise Duty on parts used in manufacturing passenger vehicles, as well as the supply of locally assembled passenger vehicles, subject to certain requirements being met. In addition, the Bill proposes to exempt from VAT plant and machinery used by pharmaceutical entities.

The Bill has proposed some interesting amendments on tax disputes resolution. Currently, where the Commissioner does not issue an objection decision within 60 days of receipt of an objection, the objection is considered to have been accepted by the Commissioner. The Bill proposes to allow the Commissioner to provide a decision within 60 days of receiving an objection decision, with no indication as to whether the objection decision is considered as allowed where the Commissioner does not communicate his decision within the required timeframe.

Perhaps more controversial is the requirement for taxpayers to deposit 50% of the disputed amount before filing an appeal against a tax tribunal decision. This is likely to have a significant impact on taxpayers and could act as an impediment to taxpayers seeking justice.

We provide in the ensuing pages our analysis of the proposed changes.

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Definition of "fair market value"

Proposed amendment: The Bill proposes to introduce a definition of the term "fair market value" to mean: 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.

Implication: The proposed definition seeks to remove any ambiguity on what the term fair market value means, wherever used in the Income Tax Act (ITA).

Proposed effective date: 1 July 2022

Deferment of realized foreign exchange loss now aligned with new thin capitalization rules

Proposed amendment: The Bill proposes for the deferment of realized foreign exchange loss for 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.

Implication: The proposal aligns the restriction on foreign exchanges loses deductibility with the thin capitalization rules introduced by the Finance Act, 2021.

Proposed effective date: 1 July 2022

Microfinance institutions off the Thin Cap hook

Proposed provisions: Microfinance institutions licensed under Microfinance Act shall be excluded from the thin capitalization rules.

The Finance Act, 2021 changed the basis for interest restriction under thin capitalization rules from using the ratio of debt to equity of 3:1 to 30% of Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA). Banks and other financial institutions are exempted primarily due to their business operating model which largely involves lending and borrowing of funds and thus high interest expense.

Implication: Exclusion of Microfinance institutions is a welcome move as interest expense is a major expense for these entities and disallowing the interest expense would have driven them out of the market.

Proposed effective date: 1 July 2022

Income Tax- Corporation Tax

Income of a registered family trust now subject to tax

Proposed amendment: The Bill proposes to subject to tax income or principal sum of a registered family trust.

Implication: This will discourage formation of family trusts, which have been one of the vehicles for succession planning.

Proposed effective date: 1 July 2022

DST rate - 3% from 1.5%

Proposed provisions: The Bill proposes to increase the digital service tax rate from 1.5% to 3% of the gross transaction value.

Implication: This provision is aimed at increasing the tax revenues from digital services and is a recognition of the growth of e-commerce and the government desire to dip into the market for additional revenues. The increase in tax rates comes in the wake of the ongoing global discussions on the taxation of the digital economy.

Proposed effective date: 1 July 2022

Gains from Financial Derivatives accruing to non-residents now taxable

Proposed provision: The Bill proposes to bring to tax gains accruing to non-resident persons from transactions involving financial derivatives in Kenya.

The Bill defines a financial derivative to mean "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."

The gains will be subjected to withholding tax at 15%, subject to Regulations to be issued by the CS National Treasury.

Implication: The proposed change will widen the tax base by bringing the gains accrued by non-resident persons from financial derivatives within the tax net.

Additionally, the proposal to tax non-residents persons on the gains derived from financial derivatives could be one way of promoting equity because such gains are taxed on resident persons. The regulations will provide more insights on this grey area.

Proposed effective date: 1 July 2022

Income Tax- Corporation Tax

Short-lived relief for beneficiaries of income from registered trusts

Proposed provision: The Bill proposes to delete the tax exemption on income from registered trusts which was exempt under the following conditions:

(a) any amount that is paid out of the trust income on behalf of any beneficiary and is used exclusively for the purposes of education, medical treatment or early adulthood housing;

(b) income paid to any beneficiary which is collectively below KES 10 million in the year of income;

(c) such other amount as the Commissioner may prescribe from time to time and at such rate as prescribed in Paragraph 5 of the Third Schedule to the ITA.

Implication: The proposal seeks to bring to an end the short-lived tax exemption that was introduced last year by the Finance Act, 2021.

Proposed effective date: 1 January 2023

Non-resident persons with a permanent establishment in Kenya off the hook on Digital Service Tax

Proposed provision: The Bill proposes to exclude non-resident persons with a permanent establishment (PE) in Kenya from paying Digital Service Tax.

Implication: The proposal is a relief to non-residents with a PE in Kenya who are already subjected to tax on the income derived from digital platforms.

This is to avoid double taxation of the income derived from digital platforms by a Kenyan PE and create a level playing ground with the resident services providers who are not subject to DST.

Proposed effective date: 1 July 2022

Income Tax- Corporation Tax

Cash donations - Tax deductible!

Proposed provision: The Bill proposes to allow deduction of donations to any tax exempt charitable organization.

Currently, the only donations which are tax deductible are the ones which are 'cash' in nature, relate to charitable organizations which are tax exempt and registered under the Societies Act or the Non Governmental Organizations Coordination Act, or for projects approved by the CS National Treasury.

Implication: This welcome move is a reprieve to organizations which make donations but are currently not eligible for a tax deduction, thus negatively impacting their effective tax rate.

Hopefully, this will serve as an incentive to these organisations to donate more, which will benefit the less privileged members of the society.

Proposed effective date: 1 July 2022

Aligning of the Indefeasible Right of Use allowance

Proposed provision: The Bill proposes to delete the deduction of 5% of the cost incurred on the purchase or acquisition of an indefeasible right to use a fibre optic cable by telecommunication operators.

Implication: The Second Schedule to the ITA already provides for a capital allowance of 10% of on the cost of the indefeasible right of use a fibre optic cable by telecommunication operators. The proposal seeks to remove the duplicated deductions for these assets.

Proposed effective date: 1 July 2022

Income Tax- Corporation Tax

Capital Allowances

Proposed provision: The Bill proposes to limit the application of 100% investment deduction to:

a) hotel building

b) building used for manufacture

c) machinery used for manufacture subject to the current proviso —

– the cumulative investment value in the preceding three years outside Nairobi City County and Mombasa County is at least two billion shillings:

Provided that where the cumulative value of investment for the preceding three years of income was two billion shillings on or before the 25th April, 2020, and the applicable rate of investment deduction was one hundred and fifty per cent, that rate shall continue to apply for the investment made on or before the 25th April, 2020;

– the investment value outside Nairobi City County and Mombasa County in that year of income is at least two hundred and fifty million shillings; or

– the person has incurred investment in a special economic zone.

The above provisions shall not apply to investments which, due to the nature of their business, have to be located in places which are outside Nairobi City county and Mombasa county.

While the Bill makes reference to Paragraph 1(b)(a), the current Second Schedule to the ITA , does not have such a provision. Perhaps the drafters of the Bill had in mind (b)(i) which refers to machinery used for manufacture, hence this perhaps an inadvertent drafting error.

Implication: This proposal will limit 100% claim of investment allowance to investments listed in a) to c) above. Further, businesses, which due to their nature have to operate outside Nairobi and Mombasa counties, will not benefit from the 100% investment allowance deduction.

Proposed effective date: 1 July 2022

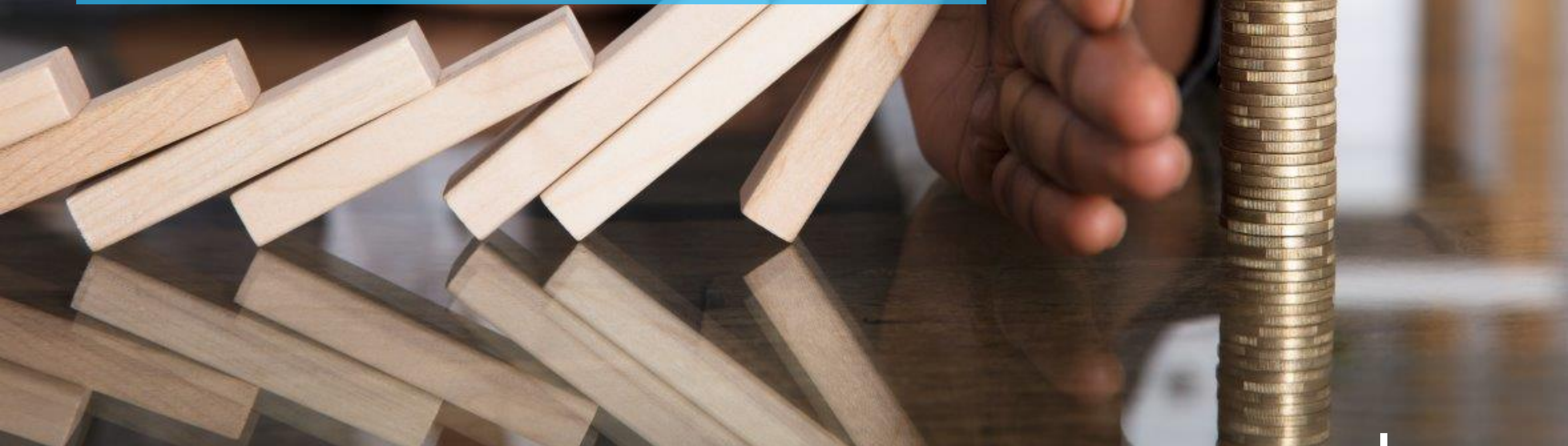
Income Tax- Corporation Tax

Higher CGT rate - From 5% - 15%!

Proposed provisions: The Bill proposes to increase the rate of CGT from 5% to 15%.

Implication: This move is designed to align the Kenyan CGT rate with the regional CGT rates. However, the 200% increase is likely to elicit strong reactions from stakeholders. A significant portion of capital gains on disposal of properties is often attributable to general increase in prices as a result of inflation. The proposed increase in CGT rate should therefore have considered an inflation adjustment (indexation) to arrive at their equitable value. Indexation refers to an adjustment of the asset value to eliminate the effect of inflation using the Consumer Price Index (CPI).

Proposed effective date: 1 January 2023



Income Tax – Transfer Pricing

Transfer Pricing implications for entities operating in a preferential tax regime

Proposed provision: The Bill seeks to amend section 18 (A) of the ITA to include within the ambit of transfer pricing (TP) transactions between resident persons and the following persons located in a preferential tax regime;

i. A related resident person;

ii. A non-resident person;

iii. An associated enterprise of a non-resident person; and

iv. A permanent establishment of a non-resident person.

The term "preferential tax regime" has been defined to mean;

i. Any Kenyan legislation, regulation or administrative practice which provides a preferential rate of tax to such income or profit, including reductions in the tax rate or the tax base; or

ii. A foreign jurisdiction which
   - Does not tax income;
   - Taxes income at a rate that is less than 20%;
   - Does not have a framework for exchange of information;
   - Does not allow access to banking information; or
   - Lacks transparency on corporate structure, ownership of legal entities locates therein, beneficial owners of income or capital, financial disclosure or regulatory supervision.

i. e, ownership of legal entities locates therein, beneficial owners of income or capital, financial disclosure or regulatory supervision.

Implication: Prior to the proposed amendment, the (TP) requirement only applied to transactions between resident persons operating in a preferential tax regime and related resident persons operating outside a preferential tax regime.

The proposal therefore aims to widen the scope of transactions falling within the ambit of transfer pricing by including non-resident persons operating within the preferential tax regime.

Proposed effective date: 1st January 2023

Income Tax – Transfer Pricing

CbC reporting notification requirement for Multinational Enterprises

Proposed provision: The Bill, proposes to introduce a requirement for Multinational enterprise group (MNE) or constituent entity, that is resident in Kenya, to notify the Commissioner as to whether it is;

i. The Ultimate Parent Company (UPE) of the group or;

ii. A Surrogate Parent Entity (SPE); or

iii. If its neither the UPE or SPE, the identity of the constituent entity which is the UPE or the SPE and tax residence of that constituent entity.

The notification should be made not later than the last day of the reporting period of the reporting financial year of that group and is effective from the year of income 2022.

Implication: The notification is aimed at assisting the Commissioner in identifying the party responsible for submitting the CbC report within the MNE group .

Proposed effective date: 1st July 2022

Filing of country-by-country reports, master file and local files for MNEs

Proposed provision: Country by Country (CbC) requirement for MNEs resident in Kenya detailing the group's financial activities in Kenya as well as in other jurisdictions where the group has a taxable presence. The Bill prescribes the turnover threshold requirement of KES 95 billion including extraordinary or investment income. The CbC report should be filed within 12 months after the last day of the reporting financial year of the MNE group.

The Finance Bill also proposes to compel MNE's resident in Kenya to file a local file and a master file not later than six months after the last day of the reporting financial year of the MNE group.

A local file means a file containing material transactions of the local taxpayer. A master file contains standardized information relevant for all the MNE group members.

A person who fails to comply with the reporting requirements will be subject to the penalties prescribed under the Tax Procedures Act.

Implication: The proposal to introduce CbC report, local file and master file documentation requirements is in line with OECD BEPS Action 13 report which proposes a three tiered approach comprising of ;

- A master file with high level information regarding a multinational enterprise's (MNE group) global business operations and transfer pricing policies

Income Tax – Transfer Pricing

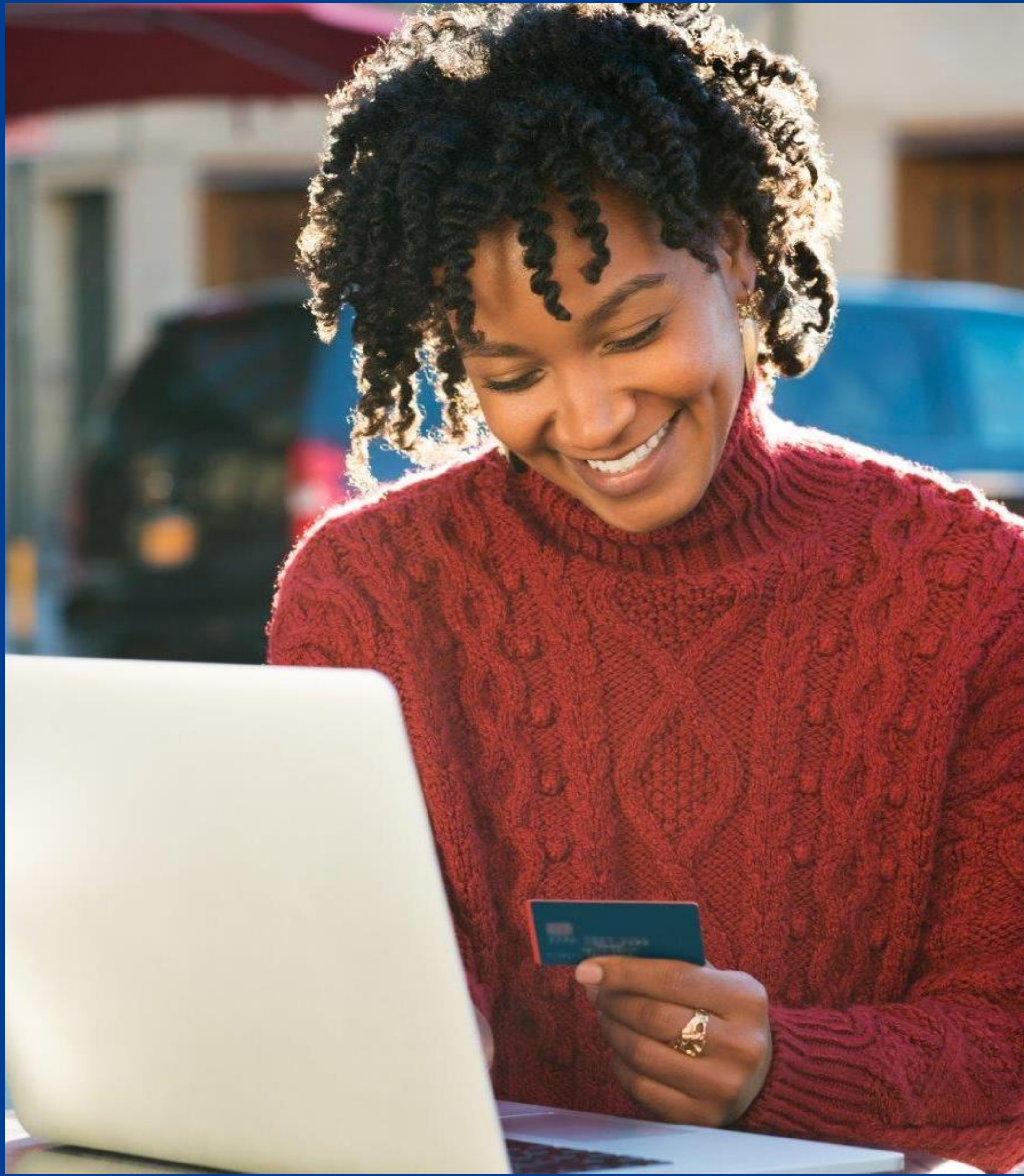
Filing of country-by-country reports, master file and local files for MNEs… Cont'd

- A local file with detailed transactional transfer pricing documentation specific to each jurisdiction; and
- A CbC report that provides annually and for each tax jurisdiction in which an MNE group does business, the amount of revenue, profit before income tax and income tax paid and accrued, together with other information relevant.

The new documentation requirements constitute a substantial increase of tax reporting obligations for MNEs. This will not only result in increased compliance costs on the reporting but also on the resultant tax audits based on the review of the information provided. It is likely that the Kenya Revenue Authority will use the additional reports to propose adjustments on group intercompany transactions.

The proposed annual turnover threshold for the CbC report is in line with the OECD revenue threshold which is set at Euros 750million . Given the revenue threshold, it is expected that the number of MNEs in scope will be limited.

Proposed effective date: 1st July 2022



Pay As You Earn

Pay As You Earn

Clarity on definition of permanent home
The Finance Bill proposes to introduce the definition of 'Permanent Home' to include 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 closes.

Implication: This amendment clarifies the ambiguity on the definition of what a permanent home meant in determination of a tax residency.
Proposed Effective Date: 01 July 2022

Change in computation of benefits for ESOPS
The Finance Bill proposes to amend the computation of 'a benefit' relating to employee share option plan to be: Market Value per share (on the date the employee exercises the option) – Offer price (on the date when the option is granted by employer).

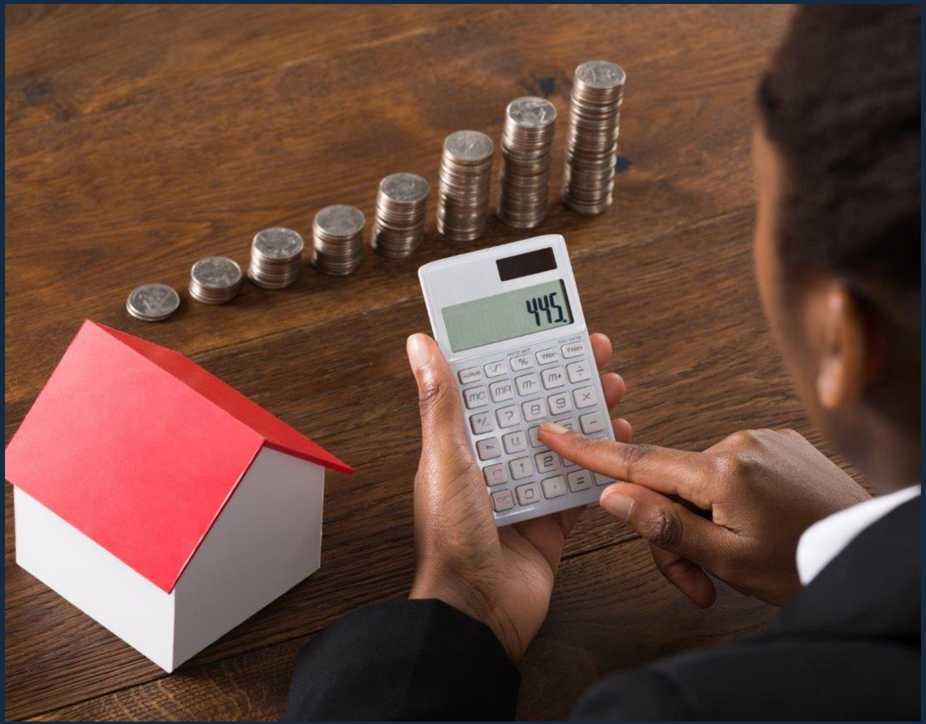
Implication: Previously, the difference between the offer price and market price was computed as at the date the option is granted by the employer.

The amendment is largely to take into account the change in value of shares over time and as such tax the benefit on the actual cost to the employer as at the date the benefit crystallizes.
Proposed Effective Date: 01 July 2022

ESOPS no longer required to register with CMA?
The Finance Bill proposes to remove the requirement to have ESOPs registered with the Commissioner as a collective investment scheme. Additionally, the benefits from ESOPs shall accrue to the employee at the date the employee exercises the option and not at the vesting date.

Implication: This amendment brings clarity to a longstanding grey area on the taxation of ESOPS.

Proposed Effective Date: 01 July 2022



Pay As You Earn

Alignment of PAYE penalties and interest

The Finance Bill proposes to delete the provision of the ITA which allowed the Commissioner to remit penalties amounting to not more than ***KES 500,000*** in relation to PAYE from one employer in a year of income without the approval of the Minister.

In addition, the Finance Bill also proposes to delete provision requiring the Commissioner to provide quarterly reports to the CS National Treasury of all penalties remitted in that quarter.

Implication: This provision seeks to house the administration of all the tax heads under the TPA. Specifically, under the TPA the Commissioner can remit penalties and interest of upto ***KES 1,500,000*** which will also be applicable to PAYE.

Further, it is important to note that the requirement to file quarterly reports to the CS National Treasury is still applicable under the TPA.

Proposed Effective Date: 01 July 2022

Clarification on life insurance premiums paid by an individual

The Finance Bill proposes to amend one of the requirements of qualifying for insurance relief to "the individual has paid a premium for an insurance made by the individual on the individual's life or the life of the individual's spouse or child'.

Implication: Previously, the insurance relief only applied to individuals (husbands) who paid a premium on their life, that of their wife or child. This provision is a rewording to ensure that all taxpayers (including husbands and wives) are entitled to the insurance relief.

Proposed Effective Date: 01 July 2022

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Value Added Tax

Value Added Tax

Online transactions headache!!

Proposed provision: The Bill has sought to bring clarity on online transactions subject to VAT. The following changes have been proposed:

- The Bill has proposed to amend the definition of a digital market place by deleting the expression “sell or provide services, goods or other property” and substituting it with the words “sell goods or provide services”
- The Bill has also proposed to amend the VAT Act by including a provision that exempts services made over the internet or an electronic network or through a digital marketplace from Reverse VAT
- The Bill has also proposed to amend the VAT Act by excluding persons supplying imported digital services over the internet or an electronic network or though a digital marketplace from meeting the KES 5 million VAT registration threshold.

Implication: The proposed amendment clarifies what constitutes a “digital market-place” for VAT purposes. Previously, a provider of imported digital services could argue that they did not meet the VAT registration threshold of KES 5 million as a basis for not registering for DSVAT. By excluding the suppliers of imported digital services from the KES 5 million VAT registration threshold, all suppliers of imported digital services will now be required to register for the DSVAT obligation, regardless of the value of supply made in Kenya.

The proposal also clarifies that imported digital services are not subject to Reverse VAT. Under the current Digital Services VAT Regulations, businesses importing services under the B2B model are required to notify the person supplying imported digital services that they will account for Reverse VAT on the such supplies. With the proposed removal of the requirement to account for Reverse VAT on imported digital services, the notification requirement by resident businesses to the non-resident suppliers of digital services is now not necessary. With this amendment, there is need to also update the regulations to align with the substantive legislation.

Proposed Effective Date: 01 July 2022

Value Added Tax

Sealing loophole on claiming of input VAT

Proposed provision : The Bill seeks to amend Section 17 of the VAT Act that provides for deduction of input VAT to the extent that the input VAT was acquired to make taxable supplies.

The Bill has included a proposal that provides that input VAT is only claimable by a registered person if the input VAT was declared in a return for the period.

Further the Bill seeks to introduce a provision that empowers the Commissioner to request any other documentation that he may require to validate input tax.

Implication: This provision comes to cure the long outstanding dispute between KRA and taxpayers where KRA requested for various documents such as proof of payment to enable them allow the input tax. In addition, the proposals also clarifies that input VAT is only claimable if it has been declared in the VAT return. Further, should the proposal come to fruition, the Commissioner will be legally empowered to request for additional information such as evidence of payment and bank statements, as has been experienced by taxpayers during the VAA reviews.

Proposed Effective Date: 01 July 2022

Aligning the VAT Act and TPA provisions on imported goods

Proposed provision: The Bill proposes to amend Section 22 of the VAT Act by adding the following provisions under subsection (4):

i. The Tax Procedures Act, 2015 shall apply with regard to imposition of interest and penalties; and

ii. in cases where interest becomes payable it shall not, in aggregate, exceed the principal tax.

Implication: This amendment brings clarity on the applicable penalties and interest on VAT on imported goods which are subject to customs control as there has been confusion on whether the penalties stipulated in in EACCMA were applicable or the provisions under the TPA.

Proposed Effective Date: 01 July 2022

Proposed provision: The Bill proposes to delete Section 30 of the VAT Act which provided for refund of tax paid in error.

Implication: This is a clean-up to align the VAT Act with the TPA with respect to refunds for overpaid taxes/taxes paid in error.

Proposed Effective Date: 01 July 2022

Value Added Tax

Proposed reclassification of goods from VAT exempt status to standard-rated

- If this proposal is enacted, the following goods and services would be subject to VAT at the standard rate of 16%

– Taxable goods for the direct and exclusive use in the construction and equipping of specialized hospitals with a minimum bed capacity of fifty, approved by the Cabinet Secretary upon recommendation by the Cabinet Secretary responsible for health who may issue guidelines for determining eligibility for the exemption.

– Taxable services for the direct and exclusive use in the construction and equipping of specialized hospitals with accommodation facilities upon recommendation by the Cabinet Secretary responsible for health who may issue guidelines for determining eligibility for the exemption.

Implication: The intention of introducing the exemption was to make access to health affordable and therefore the deletion of this provision contradicts the Big 4 Agenda on universal healthcare.

It is important to note that any exemption provided before assent of the Finance Act 2022, would continue until the taxable goods and services in question are supplied in full.

Proposed Effective Date: 01 July 2022

No room for error for overpaid VAT

The Bill proposes to delete the provision of the VAT Act relating to VAT paid in error and move its administration to the Tax Procedures Act. Currently, a taxpayer may apply for a refund of VAT paid in error within 12 months of making the error.

The Bill proposes to reduce the period for application for VAT refunds for amounts paid in error to six months.

Implication: The reduced period within which a person can apply for VAT paid in error means that taxpayers need to be more vigilant by identifying early, instances where VAT is paid in error and lodging for an application for this refund in good time. At the same time, this proposal may require taxpayers to institute better controls within their system to reduce instances of VAT paid in error.

Proposed Effective Date: 01 July 2022

Value Added Tax

Clean-up of the VAT Act

Proposed provision: The Bill proposes to delete a provision under the Second Schedule to the VAT Act that provided for zero-rating of "supply of maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour by more than ten percent. However this provision had a proviso that the zero-rating of this supply was only for six months.

Implication: The proposal seeks to give clarity to the tax status of the abovementioned flours as the Finance Act 2021 introduced a new paragraph zero-rating the supply but did not delete the previous provision that had a rider of six months. This basically means the supply of maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour by more than ten percent is zero-rated.

Proposed reclassification of goods from Zero-rating status to Standard-rated

Proposed provision: The Bill proposes to standard rate goods purchased from duty free shops by passengers departing to places outside Kenya.

Implication: The zero rating of goods sold at duty free shops is a practice held by many countries in the world as the goods are exported outside Kenya. This proposal will lead to increased prices of the goods sold at the duty free shops and may lead to reduced brand awareness of Kenyan products .

Proposed Effective Date: 01 July 2022

Affordable energy sources

Proposed provision: The Bill proposes to exempt fuel pellets from VAT..

Implication: The fuel pellets in addition to the fuel briquettes is an alternative source of clean energy and therefore the exemption will go a long way in environmental conservation.

Proposed Effective Date: 01 July 2022

Value Added Tax

Affordable health care

The Bill proposes to exempt from VAT the following items:

- Plant and machinery for use by manufacturers of pharmaceutical products upon recommendation of the Cabinet Secretary.
- Medical oxygen supplied to registered hospitals.
- Urine bags, adult diapers, artificial breasts and colostomy or ileostomy bags for medical use.

Implication: With the upsurge of new Covid-19 variants and the escalating cost of treating ailments such as cancer, the proposal to provide these exemptions is a welcome move. These proposals, if adopted, will lower the cost of pharmaceutical products and increase access to quality medical care. In addition, the proposal to exempt the plant and machinery for use by manufacturers of pharmaceutical products comes against the backdrop of investments into the health care such as the proposed Moderna vaccine production plant.

Proposed Effective Date: 01 July 2022

Buy Kenya build Kenya – Exemption from VAT on local passenger vehicles

The Bill proposes to exempt from VAT inputs and raw materials used in the manufacture of passenger vehicles and locally manufactured passenger motor vehicles. The provision provides that locally manufactured means a motor vehicle for the transportation of passengers which is manufactured in Kenya and whose total value comprises at least 30% of parts designed and manufactured in Kenya by an original equipment manufacturer operating in Kenya.

Implication: The proposed change is intended to encourage investment in the automotive sector, specifically, spur manufacturing of passenger motor vehicles. This will make locally manufactured motor vehicles affordable, consequently reducing the dependence of second-hand motor vehicles. In addition, this will increase employment opportunities and impact the environment positively.

Proposed Effective Date: 01 July 2022

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Excise Duty

Excise Duty

Annual inflation adjustment

The Bill seeks to amend Annual inflation adjustment provision to empower the Commissioner General, by notice in the Gazette and with the approval of the Cabinet Secretary, to exempt specified products from inflation adjustment after considering the circumstances prevailing in the economy in that year in respect of such products.

Implication: The intention of the proposal is to protect consumers from increase in prices due to annual inflation adjustments on excise duty of specified products. However, this proposal does not provide the parameters that the Commissioner General will use in determining the products to be excluded from the inflation adjustment review.

Proposed Effective Date: 01 January 2023

In-duplum rule for excise duty on imported goods

The Bill proposes to align the imposition of penalties and interest with respect to imported goods with the provisions of the Tax Procedures Act, 2015. Further, the Bill proposes to cap the interest payable with respect to unpaid taxes to the principal amount.

Implication: Currently, there are instances where the interest on unpaid excise duty relating to imports exceeds the principal amount. This proposal will therefore come as a relief to importers of goods, and will also align with best practice where the interest on unpaid taxes does not exceed the principal amount due.

Proposed Effective Date: 01 July 2022

Excise Duty

Provision : The Bill seeks to amend the First Schedule to the Excise Duty Act, 2015 as below :
a) Increase in the rates:

	Old rate	New rate
Fruit juices (including grape must), and vegetable juices, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter"	KSh 12.17 per litre	KSh 13.30 per litre
Cosmetics and Beauty products of tariff heading No. 3303, 3304, 3305 and 3307"	10%	15%
Bottled or similarly packaged waters and other non-alcoholic beverages, not including fruit or vegetable juices	KSh. 6.03 per litre	KSh. 6.60 per litre
Beer, cider, perry, mead, opaque beer and mixtures of fermented beverages with non-alcoholic beverages and spirituous beverages of alcoholic strength not exceeding 6%"	KSh. 121.85 per litre	KSh. 134 per litre

Excise Duty

a) Increase in rates (continued):

	Old rate	New rate
Powdered Beer	KSh. 121.85 per Kg	KSh. 134 per Kg
Wines including fortified wines, and other alcoholic beverages obtained by fermentation of fruits	KSh. 208.20 per liter	KSh. 229 per liter
Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 6%	KSh. 278.70 per liter	KSh. 335.30 per liter
Cigars, cheroots, cigarillos, containing tobacco or tobacco substitutes	KSh. 13,906.04 per Kg	KSh. 13,296.60 per Kg
Cigarette with filters (hinge lid and soft cap)	KSh. 3,447.61 per mille	KSh. 3,825.99 per mille
Cigarettes without filters (plain cigarettes)	KSh. 2,502.74 per mille	KSh. 2,752.97 per mille
Other manufactured tobacco and manufactured tobacco substitutes; "homogenous" and "reconstituted tobacco"; tobacco extracts and essences"	KSh. 9,734.45 per Kg	KSh. 10,707.88 per Kg

Excise Duty

a) Increase in rates (continued)

	Old rate	New rate
Motorcycles of tariff no. 8711 other than motorcycle ambulances and locally assembled motorcycles	KSh. 12,185.16 per unit	KSh. 13, 403.64 per unit
Imported sugar confectionary of tariff heading 17.04	KSh. 36.74 per kg	KSh. 40.37 per kg
White chocolate, chocolate in blocks, slabs or bars of tariff nos. 1806.31.00, 1806.32.00 and 1806.90.00	KSh. 200 per kg	KSh. 242.29 per kg
Jewellery of Tariff heading 7113 and imported jewellery of Tariff heading 7117"	10%	15%
Products containing nicotine or nicotine substitutes intended for inhalation without combustion or oral application but excluding medicinal products approved by the Cabinet Secretary responsible for matters relating to health and other manufactured tobacco and manufactured tobacco substitutes that have been homogenized and reconstituted tobacco, tobacco extracts and essences"	KSh. 1,200 Per Kg	KSh. 2,500 per Kg

Excise Duty

a) Increase in rates (continued)

Description	Old rate	New rate
Betting: Wager or stake	7.5%	20%
Gaming: Wager or stake	7.5%	20%
Prize competition	7.5%	20%
Lottery (excluding charitable lotteries)	7.5%	20%

Implication: While the government is proposing an avenues for pausing inflationary adjustments, it is proposing a substantial increase in the excise duty rates for most of the excisable products. It does appear that faced with the high cost of living and the need to increase tax revenues, the government has been forced to look to excise duty to bridge the revenue gap.

Proposed Effective Date: 01 July 2022

Excise Duty

b) Introduction of excise duty on new products and services

	Old rate	New rate
Electronic cigarettes and other nicotine delivery devices	**N/A**	40%
Liquid nicotine for electronic cigarettes	**N/A**	KES 70 per ml
Ice cream and other edible ice whether or not containing cocoa of tariff number 2105.00.00	**N/A**	15%
Fees charged by all television stations, print media, billboards, and radio stations for advertisements of gambling, gaming and alcoholic beverages	**N/A**	15%

Implication: Excise duty is a key enabler for the government to achieve the tax revenues. Further, the items that the Government seeks to subject to excise duty those whose consumptions it seeks to reduce. Unfortunately, the items have an inelastic demand resulting in increase in tax collections without achieving the deterrence goal.

Proposed Effective Date: 01 July 2022

Decrease in rates

Cigars, cheroots, cigarillos, containing tobacco or tobacco substitutes rate has been reduced from Ksh. 3,906.04 per Kg to Kshs 13,296.60 per Kg
Implication: This is the only item on which excise duty was reduced thus the impact in revenue collection may be negligible.

Proposed Effective Date: 01 July 2022

Excise Duty

Increase in the scope within the First Schedule to the Excise Duty Act, 2015:

Glass bottles

Imported Glass bottles (excluding imported glass bottles for packaging of pharmaceutical products) and the proviso thereto and substituting the tariff description "Glass bottles (excluding glass bottles for packaging of pharmaceutical products).

Implication: Excise duty on bottles is currently levied on imported bottles only. If the Bill is passed, all glass bottles whether imported or manufactured locally will be subjected to excise duty. This will increase the cost of items packaged in glass bottles. This increase may in turn discourage the use of glass bottles and manufacturers may result to using plastic bottles to remain competitive in the market. The move also puts at a disadvantage local manufacturers of bottles who have to contend with higher operating cost compared to their international competitors.

While the Government will collect more taxes, there may be an increase in the use of plastic products and this will be counterproductive to environmental protection campaigns, both locally and globally.

Proposed Effective Date: 01 July 2022

Articles of plastics

The Bill seeks to include other articles of plastics of HS code 3923.90.90 within the ambit of excise duty at a rate of 10%.

Implication: The move is welcome as it will discourage use of plastic items which are not environment friendly. However, with the increase in excise duty on glass bottles, it will be interesting to see what manufacturers will opt for, bearing in mind, the cost will be passed to the end user.

Proposed Effective Date: 01 July 2022

Importation of potatoes

The bill proposes to include imported potatoes and potato product of HS Code 0710.10.00, 2004.10.00 and 2005.20.00 to the excise duty bracket at a rate of 10%.

Implication: If enacted, it will protect the local farmers from cheaper imports as well as incentivise the locally production of potatoes.

Proposed Effective Date: 01 July 2022

Excise Duty

Provision : The Bill seeks to amend the Second Schedule to the Excise Duty Act, 2015 as below:
Exemption from excise duty

	Old rate	New rate
Hatching eggs imported by licensed hatcheries	25%	Exempt
Neutral spirits imported by registered pharmaceutical manufacturers	KES 278.70 per Litre	Exempt
Locally manufactured passenger motor vehicles	20% to 35% dependent on cc rating and fuel	Exempt

The exemption of hatching eggs and neutral spirits are subject to approval by the Cabinet Secretary and Commissioner respectively.

Implications:

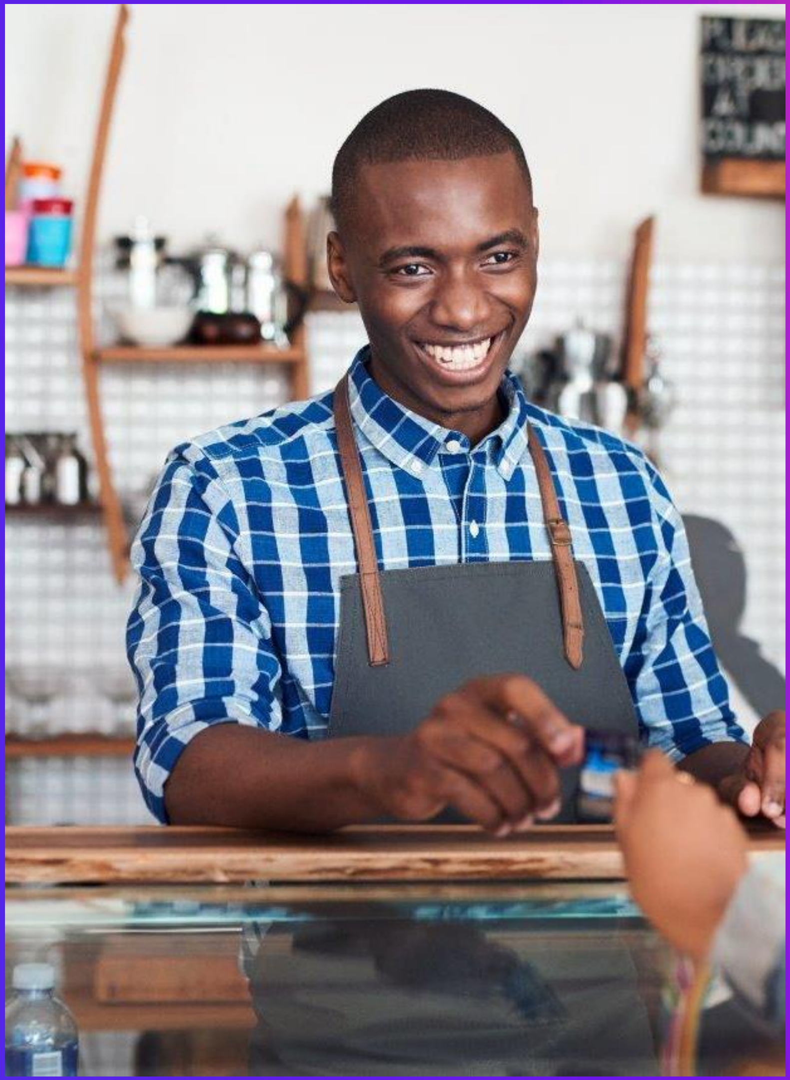
a) Hatching eggs: The Finance Act 2021 introduced excise duty on the importation on hatching eggs in order to protect the local farmers from cheap imported eggs. This proposal has had undesired effects in the hatching business as there was a significant supply gap. The proposal to exempt importation of hatching eggs is a welcome move in the agricultural sector as Kenyans will have access to cheaper eggs for hatching, consequently increasing the poultry and lowering costs of eggs which in the recent past has been on the rise.

b) Neural spirits: Providing affordable healthcare is one of the Big 4 Agenda's. As such, the exemption of Neural spirit, which is used in the manufacture of local pharmaceutical products, is Ilikely to lower the cost of manufacturing and will allow Kenyans to have increased access to quality medical care. Its also intended to encourage investment in this crucial sector of the economy.

c) Locally manufactured passenger cars: This proposal is aimed at reducing the cost of locally manufactured passenger vehicles. This proposal is in line with the VAT exemption proposal, and is linked to a condition that at least 30% of the parts are designed and manufactured in Kenya by an original equipment manufacturer operating in Kenya. If enacted, manufacturers of these vehicles will need to meet this condition to take advantage of the exemptions.

Proposed Effective Date: 01 July 2022

Miscellaneous Fees and Levies Act-



Miscellaneous Fees and Levies Act-

Scrap iron to remain in Kenya as leather is exported!
The Bill proposes to amend the export levies of the products as tabulated below.

HS Code	Description	New Rate	Old Rate
26.01	Iron ores and concentrates, Including roasted iron pyrites	USD 175 per tonne	0
4101.20.00, 4102.21.00, 4102.29.00, 4103.20.00, 4103.30.00, 4103.90.00, 4104.19.00, 4301.60.00, 4101.40.00, 4101.50.00, 4101.90.00, 4102.10.00, 4301.10.00, 4301.80.00, 4301.90.00, 4302.11.00, 4302.19.00, 4302.20.00, 4302.30.00	Export levy on the raw hides, skins and furskins	50% of value of the goods or USD 0.32 per Kg (whichever is higher)	80% or USD 0.52 per Kg (whichever is higher)

Implication:
The proposal is likely to discourage export of iron ores, concentrates including roasted iron pyrites and encourage export of raw hides, skins and furskins. Taxpayers in the respective sectors should note this as it directly affects their export price.

Proposed effective date: 1 July 2022

Miscellaneous Fees and Levies Act-

First Schedule Part III

Adjustment for inflation

Proposed provision: The CS proposes to change export levy of the goods in Part I for the adjustment for inflation from the beginning of every financial year to a date not later than the 1st October of every financial year.

Implication:

This will align the adjustment for inflation with the Excise Duty. This will ensure uniformity of the adjustments.

Proposed effective date: 1 July 2022

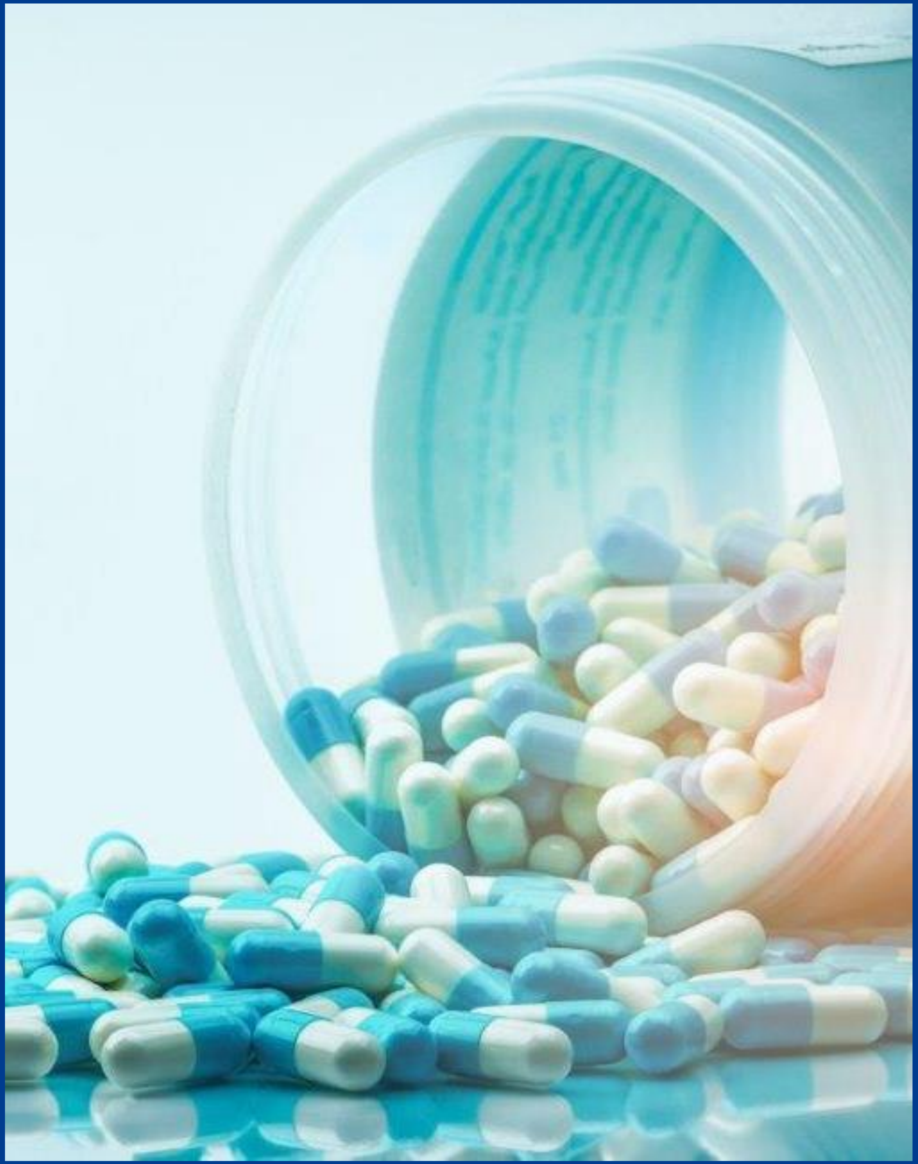
Pharmaceutical companies exempt from IDF and RDL

The Bill proposes to exempt from Import Declaration Fees (IDF) and Railway Development Levy (RDL), inputs and raw materials imported by manufacturers of pharmaceutical products upon the recommendation of the Cabinet Secretary responsible for health.

Implication:

The proposal on exemption from IDF and RDL on inputs imported by manufactures of pharmaceutical products, if adopted, is likely to lower the cost of pharmaceutical products and allow Kenyans to have increased access to quality medical care. Its also intended to encourage investment in this crucial sector of the economy.

Proposed effective date: 1 July 2022



Miscellaneous Fees and Levies Act-

Penalties and interest on levies

Proposed provision:

The Bill proposes to allow the Commissioner to determine the penalties and interest that would accrue on unpaid levies.

Implication:

The proposal will now empower the Commissioner to go after penalties and interest on levies in addition to the usual penalties and interest on other fees under the Miscellaneous Fees and Levies Act.

Proposed effective date: 1 July 2022

Tax Procedures Act

Tax Procedures Act

Requirement for trusts to notify the Commissioner about changes

- **Proposed provision**: The Bill proposes that trusts, whether in business or not, should notify the Commissioner about any changes in the identity, address of the trustees or beneficiaries of the trust.

- Previously, trusts were still required to report change in particulars to the Commissioner but the TPA had not specified if this applied to those not carrying on a business.

- **Implication**: This will likely result to more scrutiny by KRA in trusts, particularly dormant ones and those used purely for investment or charitable purposes. KRA will be interested in knowing if there is any tax collectible on change in trusts even if the trust is not in business.

Proposed effective date: 1 July 2022

Amendment of VAT assessments

- **Proposed provision**: The Bill proposes that in instances where the Commissioner amends an assessment relating to VAT, the input tax shall be allowable for a deduction within six (6) months after the date of supply.

- **Implication**: This addresses a gap in the TPA on amended assessments and will align with the VAT Act's provisions in relation to claiming of input tax.

Proposed effective date: 1 July 2022

Tax Procedures Act

Security on property for unpaid tax

- **Proposed provision**: The Bill proposes to widen scope of property that the Commissioner can use as security for unpaid tax. The proposed definition of property consists of land, buildings, aircraft, ship, motor vehicle or any other property that the Commissioner may deem sufficient as security.
- Previously, only land and buildings were to be held as security.
- The Bill further proposes to give the Commissioner powers to dispose of the property used as security if the taxpayer does not settle the tax liabilities within 2 months of being notified by the relevant government Registrar.
- **Implication**: This will enhance recovery of tax arrears by KRA due to the wider portfolio of assets that can be used as security.

Proposed effective date: 1 July 2022

Refund of overpaid tax

- **Proposed provision**: The Bill seeks to allow taxpayers to apply for overpaid tax, including overpaid instalment tax to be offset against future tax liabilities. Any outstanding tax after the offsetting will accrue interest and penalties. This applies to situations where the taxpayer has overpaid instalment tax.
- Taxpayers may appeal to the TAT within 30 days of the Commissioner's decision to either refund overpaid tax or apply it against future liabilities.
- **Implication**: The additional options proposed will help KRA address cashflow issues around refunds due to overpayments. Taxpayers have an option of having the overpaid tax (including overpaid instalment tax) applied against offsetting future liabilities instead of waiting for two years for a refund.

Proposed effective date: 1 July 2022

Tax Procedures Act

Refund of tax paid in error

- **Proposed provision**: The Commissioner can refund any tax paid in error if satisfied that the amounts should not have been paid.
- The procedure for refund for tax paid in error will be similar to that for overpayments.
- Refunds to also apply where tax paid in error is on zero-rated or exempt supplies due to circumstances beyond taxpayer's control.
- **Implication**: This will be welcome for taxpayers as they can apply for tax paid in error but subject to the satisfaction of the Commissioner. The TPA previously only provided for instances where it was an erroneous refund of tax by the Commissioner.

Proposed effective date: 1 July 2022

Objection to tax decisions

- **Proposed provision:** The Commissioner should notify the taxpayer within 14 days if notice of objection is not validly lodged. Previously the Commissioner was required to notify the taxpayer immediately.
- The application for extension of time to lodge notice of objection should be decided by the Commissioner within 14 days
- The Commissioner will be expected to issue an objection decision within 60 days from the day of receiving a valid objection by a taxpayer.
- If the Commissioner does not issue the objection decision within 60 days , it does not mean that the taxpayer's objection is allowed.
- Taxpayer may appeal to TAT within 30 days of objection decision
- **Implication**: The 14 days timeline for communicating whether an objection decision is valid and to consider a request for extension of time is welcome.
- The 60 days within which the Commissioner should make an objection decision is also welcome. However, deleting the consequence of issuing the decision out of time is a counter-productive move because KRA can issue its decision out of the 60 days but the taxpayer will have no reprieve.

Proposed effective date: 1 July 2022

Tax Procedures Act

PIN requirement for registration of a trust

- **Proposed provision:** The Bill proposes to amend the First Schedule of the TPA to include registration of a trust as a transaction that requires a PIN.
- **Implication**: The revenue authorities will pay greater attention to trusts. This may due to the fact that trusts are increasingly being used as a means to transfer and hold assets by wealthy individuals and corporations and tax plan.

Proposed effective date: 1 July 2022

TAT Act - Requirement to pay 50% of disputed tax upfront on appeal

- **Proposed provision**: There is a proposal for taxpayers to deposit 50% of the tax in dispute with CBK prior to appeal to the High Court.
- Refund is to be done in 30 days if the appeal is successful.
- **Implication**: This is likely to result to cashflow problems for taxpayers considering the time it takes to hear appeals at the High Court, Court of Appeal and Supreme Court, where applicable. The Bill proposes that the Commissioner will not be subject to the 50% deposit requirements. This may be unfair to the taxpayers as it denies them the right to their property and presumption of innocence until a matter is heard and determined.

Proposed effective date: 1 July 2022

KPMG

Other Acts

Other Acts

Evidence Act – Privilege to withhold information

- **Proposed provision**: The Bill proposes to widen the scope of revenue officers who have privilege to not provide their sources of information relating to commission of an offence.
- The proposed amendment would see the privilege extended to those specified in the First Schedule to the Kenya Revenue Authority Act.
- The Bill also proposes to amend the definition of revenue officer to be "any officer employed in or about the business of any public office for the collection of public revenue".
- **Implication:** This has the potential to be abused by the revenue authorities in issuing assessments to taxpayers. However taxpayers can apply to court to cross examine revenue officers to verify the accuracy of the information that has been used to raise assessments.

Proposed effective date: 1 July 2022

Incentive to report unclaimed assets

Proposed provisions:

- There is a proposal for waiver of penalties, fines and audit fees in justifiable circumstances .
- Penalties and interest will be capped so as to not exceed the value of the asset
- New Voluntary Disclosure Program for a period of 12 months to grant relief of penalties for assets held up to 30 June 2022.
- **Implication**: It remains to be seen whether the public will take up the opportunity to report unclaimed assets to Unclaimed Financial Assets Authority with the above incentives.

Proposed effective date: 1 July 2022

Other Acts

Capital Markets Act – Definition of investment advisor

Proposed provision: The Bill proposes to delete the following from definition of an "investment advisor":

➢ "any person (other than a bona fide officer, director, trustee, member of an advisory board or employee of a company as such) who, for remuneration pursuant to a contract or arrangement with a client, undertakes on behalf of the client (whether on a discretionary authority granted by the client or otherwise), the management of a portfolio of securities for the purpose of investment, where the total portfolio does not exceed the amount prescribed by the Authority from time to time."

- **Implication**: The deletion of the above section means that advisers who enter into contracts on behalf of clients to manage securities for purposes of investment will not be regarded as investment advisors subject to obtaining a license from the Capital Markets Authority. The amendment is not clear on how such investment advisers will be regulated going forward.

Proposed effective date: 1 July 2022

Capital Markets Act - Licensing requirements

Proposed provision:

- There is a proposed amendment to the Capital Markets Act to allow for legal entities prescribed under CMA regulations to apply for license. Previously only companies incorporated under the Companies Act were allowed to apply.

- The Capital Markets Act is proposed to be amended by allowing the director or the chief executive or any person who directs or manages the business of the applicant to comply with the minimum qualification requirements.

- **Implication**: This will lead to increase number of applicants as new legal entities other than companies will be applying to be licensed. In addition, more stringent requirements will apply to licensees as CMA will review the fitness of other persons who direct, conduct, manage or supervise the business of the applicant over and above the directors and one chief executive.

Proposed effective date: 1 July 2022

Other Acts

Clean up –Insurance Act

Proposed provision:

- There is a proposal to amend section 10 of the Insurance Act to delete the reference to section 21 therein and substitute it with section 21 A.
- **Implication**: Section 21 A was introduced by Finance Act, 2021. The section deals with closed funds and the amendment to section 10 (4) and (8) to is to give the Authority the power to penalize an insurer who is is found to have disposed of or misappropriated assets from a closed fund contrary to the provisions of section 21A.

Proposed effective date: 1 July 2022

Perpetual term for tax related regulations

Proposed provision: Tax-related statutory instruments will be exempt from automatic expiry of 10 years. The instruments are those under Income Tax Act, Stamp Duty Act, Value Added Tax Act,2013, Tax Appeals Tribunal Act, 2013, Excise Duty Act 2015 and Tax Procedures Act, 2015.

Implication: This will ensure continuity of the tax administration and revenue collection system, especially for regulations that were enacted prior to 2013 and the 10 year period is to lapse in 2023.

Proposed effective date: 1 July 2022

Other Acts

Better administration of retirement benefits for the Deputy President and designated state officers

Proposed provision:

- There is a proposal to amend section 13 of the Retirement Benefits (Deputy President and Designated State Officers) Act, 2015. The proposal seeks to require that certain retirement benefits for the Deputy President, Vice President and Prime Minister be administered through the Office of the President, those for the Speaker through Parliamentary Service Commission and those for the Chief Justice and Deputy Chief Justice through the Judiciary Fund. The entities are also required to come up with guidelines for computing the benefits. The benefits for these officers are currently administered by Cabinet Secretary, National Treasury.

- **Implication**: The proposed amendments will provide better administration of the envisaged benefits for the Deputy President, Vice President, Prime Minister, Speaker , Chief Justice and Deputy Chief Justice. The Office of the President, the Parliamentary Service Commission and the Judiciary Fund will have a chance to prepare estimates for the retirement benefits in time for approval in Parliament and harmonise the benefits for the retired state officers once they come up with guidelines,

Proposed effective date: 1 July 2022

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