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Kenya Finance Bill, 2022

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APRIL 2022





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The Finance Bill, 2022 (“The Bill”) was published on 12 April 2022 and tabled in Parliament on 13th April 2022.

The Bill has proposed amendments to various tax statutes and other laws regulating the financial sector.

When the Cabinet Secretary for the National Treasury and Planning read the Budget speech in Parliament, it appeared, based on the speech, that there would be minimal changes in terms of taxation measures.

However, the Bill indicates that there are quite a number of significant changes (including increases to tax rates) that have been proposed. Some of the significant tax proposals contained in the Bill include:

- Increase in Capital Gains Tax rate from 5% to 15%;
- Increase in the rate of Digital Services Tax from 1.5% to 3%;
- Widening of the scope of transfer pricing and reporting requirements for multinational enterprises;
- Introduction of withholding tax on gains from financial derivatives;
- Restriction on VAT return amendments to prevent deduction of input tax that is more than 6 months;
- Increases in excise duty rates for a wide range of products; and
- Requirement for a taxpayer to deposit 50% of tax in dispute prior to appealing a ruling by the Tax Appeals Tribunal

Some positive measures include relief for microfinance institutions from the EBITDA based interest restriction rule, incentives for pharmaceutical and local motor vehicle assembly sectors and amendment of the law to specifically allow taxpayers to opt for set-off of tax overpayment against tax liabilities.

The Bill is now before the National Assembly for consideration and the public has been invited to submit comments on the Bill before it is approved by Parliament and assented into law sometime in June.

This publication provides our detailed analysis of the amendments proposed through the Bill and their impact.

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Corporate Income Tax

Foreign exchange losses to be deferred where interest exceeds 30% of EBITDA

The measure

The Bill proposes to delete Section 4A (1)(ii)(a) of the Income Tax Act, which defers the deduction of realised foreign exchange losses on loans advanced to a thinly capitalised company by persons who control the company. In its place, a new Section 4A(1)(ii)(a) will be introduced. The new provision defers the deduction of realised foreign exchange losses where the loss is realised by a company whose gross interest exceeds 30% of the Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA).

Who will be affected

All companies relying on debt financing

When

Effective 1 July 2022

Our view

The thin capitalisation interest limitation rule was repealed under the Finance Act 2021 and replaced with an interest limitation rule based on 30% of EBITDA (Earnings Before Interest, Depreciation and Amortization).

The proposed amendment now seeks to align the treatment of foreign exchange losses in line with the new EBITDA interest restriction rules. Following this amendment, realised foreign exchange losses will be deferred and not allowed for deduction where a company has gross interest paid or payable exceeding 30% of EBITDA until the company's interest expense falls below 30% of EBITDA.

This amendment will make it more costly to rely on foreign currency denominated loans where the Company is highly geared. The provision is not equitable as it seeks to restrict deduction of foreign exchange losses but does not defer the taxation of foreign exchange gains for affected companies.





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Corporate Income Tax

Deductibility of expenditure on clearing and planting on agricultural land

The measure

The Bill proposes to amend Section 15(2)(l) of the Income Tax Act, which allows a deduction in respect of any expenditure of a capital nature incurred by the owner or tenant of any agricultural land, as defined in the Second Schedule, on clearing of such land, or on clearing and planting thereon permanent or semi-permanent crops is allowable for tax purposes.

The amendment proposes to delete the phrase as defined in the Second Schedule.

Who will be affected

Tenants or owners of agricultural land

When

Effective 1 July 2022

Our view

This is a move to harmonise and clean up the Income Tax Act, in light of the overhaul of the Second Schedule and subsequent deletion of the definition of 'agricultural land' following the repeal of the old Second Schedule by the Tax Laws Amendment Act, 2020.





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Corporate Income Tax

Cash donations to any charitable organization whose income is exempt from tax to be allowable

The measure

The Bill proposes to replace Section 15(2)(w) of the Income Tax Act, which allows a person to claim a deduction in respect of cash donations to charitable organisations that are registered under either the Societies Act or the Non-Governmental Organisations Coordination Act with a provision that will allow a deduction in respect of “any donation to a charitable organization whose income is exempt from tax under Paragraph 10 of the First Schedule to the Income Tax Act, or to any project approved by the Cabinet Secretary responsible for matters relating to finance”.

Who will be affected

All taxpayers

When

Effective 1 July 2022

Our view

The proposal to allow a deduction for donations to any tax-exempt charitable organisation or approved projects, irrespective of the law under which they are registered is welcome, particularly given that many taxpayers are involved in charitable activities through their corporate social responsibility programs and the charitable entities may be registered under different laws. The move should encourage more organisations and taxable persons to support charitable causes and in turn get some tax relief.





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Deletion of the provision that allows a deduction in respect of IRU

The measure

The Bill proposes to remove from Section 15 of the Income Tax Act the provision that allowed telecommunication operators to claim a deduction in respect capital expenditure incurred in the purchase or acquisition of an indefeasible right to use (IRU) a fibre optic cable.

Who will be affected

Telecommunication operators

When

Effective 1 July 2022

Our view

Expenditure incurred on indefeasible right to use fibre optic cable by telecommunication operators is eligible for investment allowances under the Second Schedule introduced by the Tax Laws (Amendment) Act, 2020, which came into effect on 25 April 2020.

This amendment therefore removes duplication since indefeasible right to use fibre optic cable are covered under the Second Schedule.





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Clean-up of the tax loss carry-forward provision

The measure

The Bill proposes to delete Section 15(4A) of the Income Tax Act, which allows the Minister, upon the recommendation of the Commissioner, to extend the period of utilising tax losses beyond ten years where a person applies through the Commissioner for such extension.

Who will be affected

All taxpayers

When

Effective 1 July 2022

Our view

This is a clean-up of the Income Tax Act. Prior to enactment of the Finance Act 2021, Section 15(4) of the Income Tax Act limited the period within which a taxpayer could utilise tax losses to the year in which they arose and the subsequent 9 years of income. The proviso under Sec 15(4A) provided a window for a taxpayer to apply for extension of the period to utilize tax losses beyond the prescribed period.

With the removal of the time limit for carry forward of tax losses via the Finance Act 2021, the proviso became redundant, which necessitated the proposed amendment.





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Corporate Income Tax

Exclusion of microfinance institutions from the EBITDA-based interest limitation rule

The measure

The Bill proposes to exempt Microfinance institutions licensed under the Microfinance Act, 2006 from the EBITDA based interest limitation introduced by the Finance Act, 2021.

Who will be affected

Microfinance institutions licensed under the Microfinance Act, 2006

When

Effective 1 July 2022

Our view

The proposal to exclude Microfinance institutions is a positive move, as Microfinance institutions would have been adversely affected if the EBITDA provisions were not amended to exclude them.

Currently, only banks and financial institutions licensed under the Banking Act, and micro and small enterprises registered under the Micro and Small Enterprises Act, 2012 are excluded from the EBITDA based interest limitation rule.

The amendment is an attempt to ensure equity in application of the tax laws for entities in similar businesses.

However, there is need to further review the EBITDA based interest deduction restrictions to cater for other businesses that would be adversely affected by the EBITDA provisions such as digital lenders, which have recently become popular in Kenya especially among micro, small, and medium enterprises (MSMEs) and other deserving cases such as start-ups and entities that invest significant amounts in capital projects or business expansion that would of necessity require debt financing.





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Taxation of registered family trusts

The measure

The Finance Act, 2021 introduced various amendments on the taxation of registered family Trusts. Among the changes include:

- 1) Introduction of Paragraph 57 into the First Schedule to the Income Tax Act providing for income tax exemption on the income or principal sum of a registered family trust;
- 2) Introduction of Paragraph 58 into the First Schedule to the Income Tax Act providing for income tax exemption on capital gains relating to the transfer of title of immovable property to a family trust; and
- 3) Introduction of a new subsection (subsection 3A) in Section 11 of the Income Tax Act deeming amounts paid out by a Trustee of a registered family trust to its beneficiaries to be income subject to tax, unless the amounts relate to the following:
 - any amount that is paid out of the trust income on behalf of any beneficiary and is used exclusively for the purpose of education, medical treatment or early adulthood housing;
 - income paid to any beneficiary which is collectively below KES 10 million in the year of income; or
 - 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.

The Finance Act, 2021 also introduced in the Third Schedule to the Income Tax Act a withholding tax of 25% on the deemed income of beneficiaries as provided for under Section 11(3A) of the Act.

The Finance Bill 2022 now proposes to reverse most of the proposals introduced by the Finance Act, 2021 on the taxation of registered family trusts. The proposed changes include:

- 1) Deletion of Paragraph 57 of the First Schedule to the Income Tax Act, which exempts the income or principal sum of a registered family trust from tax. Its deletion means that the income or principal sum of a registered family trust shall be taxable;





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Taxation of registered family trusts (cont.)

- 2) Deletion of Paragraph 58 of the First Schedule to the Income Tax Act, which exempts capital gains relating to the transfer of title of immovable property to a family trust from tax and reintroducing the same as Paragraph 61, meaning that the exemption has been retained but under a new paragraph; and
- 3) Deletion of subsection 3A of Section 11 to the Income Tax Act.

Who will be affected

Registered family trusts, its Trustees and beneficiaries

When

Effective 1 July 2022

Our view

The proposal to repeal the exemption of a registered family trust and subsection 3A of section 11 is meant to reinstate the treatment that applied prior to the amendment by the Finance Act, 2021 where the income of a registered family Trust was taxed in the hands of its Trustees as opposed to the beneficiaries. The taxation of the income at the level of the Trust reduces the extra withholding tax compliance burden that would apply should subsection 3A of section 11 be retained.

The deletion of the income tax exemption on capital gains relating to the transfer of title of immovable property to a family trust under paragraph 58 and re-introduction of the same under paragraph 61 is intended to clean up the First Schedule, as it contains another paragraph 58 that deals with the exemption of income earned by an individual who is registered under the Ajira Digital Program.





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Corporate Income Tax

Amended definition of manufacture in relation to electricity transformation and distribution

The measure

The Bill proposes to amend the Income Tax Act's Second Schedule by deleting the words, "through the national grid" appearing in the definition of "manufacture".

We note that this amendment is erroneous, as the same was already introduced through the Finance Act, 2021.

Who will be affected

Businesses that incur capital expenditure on transformation and distribution of electricity

When

Effective 1 July 2022

Our view

Prior to the Finance Act, 2021 amendment, the term "manufacture" in relation to generation, transformation and distribution of electricity only included "*the generation of electrical energy for supply to the national grid, or the transformation and distribution of electricity through the national grid*". However, the Finance Act, 2021 deleted the words "through the national grid" appearing in the definition of "manufacture". This amendment effectively meant that transformation and distribution of off-grid electricity qualifies as manufacture, and any machinery that is used for such purposes shall qualify for accelerated capital allowances of 50% in the first year of use, and 25% per annum thereafter.

The proposal by the Finance Bill, 2022 is therefore misplaced, as the change is already in force. It would be welcome if the definition of "manufacture" was further amended to cover generation of electricity for off-grid supply, as the term "manufacture" in relation to generation of electricity is restricted to generation of electricity for supply to the national grid.





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Restriction of the 100% accelerated investment allowance

The measure

The Bill proposes to amend the Income Tax Act's Second Schedule by introducing Paragraph 1B. The paragraph introduces a restriction on the applicability of Paragraph 1A, which entitles a person to claim an accelerated investment allowance of 100%:

- a) Where the cumulative investment value in the preceding 3 years outside Nairobi City County and Mombasa County is at least KES 2B;
- b) Where the investment value outside Nairobi City County and Mombasa County in the year of income under consideration is at least KES 250m; or
- c) Where the person has incurred investment in a special economic zone.

Paragraph 1B proposes to restrict the applicability of the accelerated investment allowance under Paragraph 1A to hotel buildings, buildings used for manufacture and machinery used for manufacture. It further provides that the 100% investment allowance shall not apply to investments which, due to the nature of their business, have to be located in places outside Nairobi and Mombasa Counties respectively.

Who will be affected

Manufacturers and investors

When

Effective 1 July 2022





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Restriction of the 100% accelerated investment allowance (Cont.)

Our view

Although this proposal significantly limits the scope of investments eligible for accelerated allowances, we note that the Second Schedule that was repealed by the Tax Laws Amendment Act 2020 had similar restrictions on the applicability of accelerated capital allowances. We understand that the government's intention is to encourage investment outside the main cities of Nairobi and Mombasa, which are considered relatively developed. Whereas this may be a noble objective, we believe it would still be appropriate to retain the accelerated allowance for high value investments by possibly having a higher threshold (e.g. KES 4 Billion) for investments within Nairobi and Mombasa County.

Furthermore, the second part of the amendment introduces unnecessary uncertainty and subjectivity in determining which investments qualify for the accelerated allowance as there is no prescribed test for the investments which "due to the nature of their business, have to be located in places outside Nairobi County and Mombasa County". We believe this restriction should be removed as the overall aim is to spur investment for greater economic growth.





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Expansion of the scope of transfer pricing

The measure

The Bill proposes to repeal Section 18(A) of the Income Tax Act, which deals with transfer pricing for a resident entity dealing with a related resident entity that operates in a preferential tax regime. Under the current provision, where a resident entity operating in a preferential tax regime carried on business with a related resident entity not operating in a preferential tax regime, such transactions were covered under the ambit of transfer pricing (TP).

The Bill proposes to expand the scope of TP to cover transactions between resident entities and: a non-resident person located in a preferential tax regime; or an associated enterprise of a non-resident person located in a preferential tax regime; or a permanent establishment (PE) of a non-resident person operating in Kenya where the non-resident person is located in a preferential tax regime and whether or not the non-resident is an associated person.

A “preferential tax regime” is defined as

- a) 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
- b) a foreign jurisdiction which –
 - does not tax income;
 - taxes income at a rate that is less than twenty per cent;
 - does not have a framework for the exchange of information;
 - does not allow access to banking information; or
 - lacks transparency on corporate structure, ownership of legal entities located therein, beneficial owners of income or capital, financial disclosure, or regulatory supervision.





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Expansion of the scope of transfer pricing (Cont.)

Who will be affected

Resident persons that have transactions with entities located in jurisdictions considered preferential tax regimes

When

Effective 1 January 2023

Our view

This measure imposes TP compliance requirements on entities transacting with independent non-resident entities (or their PE or associated entities) if the said non-resident entity is located in a preferential tax regime. This measure appears to be targeting transactions with entities in so-called tax havens and non-cooperative jurisdictions by introducing the extra burden on a Kenyan entity dealing with a non-related party. It would appear that the revenue authority is concerned that entities located in preferential tax regimes are a conduit for tax avoidance and/or evasion.

In our view, this expands the concept of TP beyond the international guidelines and risks TP adjustments on arm's length prices since transactions involving independent parties are at arm's length. In as much as the tax authority's concerns are valid, the focus on non-related entities may not be justified and places an undue burden on resident entities dealing with independent parties. A prudent approach would be to focus on related party dealings and adoption of other measures that have gained global acceptance under the BEPS action plans which address the concerns of revenue authorities.





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Country-by-Country Reporting Notifications

The measure

The Finance Act 2021 introduced a Country-by-Country reporting (CbCR) requirement on any Kenyan headquartered multinational enterprise group (MNE). CbCR requires MNEs to file a report providing a breakdown of the amount of revenue, profits, taxes, and other indicators of economic activities for each tax jurisdiction in which the MNEG operates. The current provision under Section 18b of the ITA does not cover MNEs whose ultimate parent entity (UPE) is not resident in Kenya.

Subsequently, for purposes of implementing the CbCR, the Cabinet Secretary published draft regulations in November 2021. The regulations though still in draft provided for CbCR notifications to be filed by subsidiaries and branches of MNEs operating in Kenya.

The Bill proposes to introduce CbCR notification requirements for MNEs resident in Kenya with a gross turn over of KES 95B (approximately EUR 750M). The MNE will be required to notify the Commissioner not later than the last day of the reporting financial year of the Group whether it is the UPE or Surrogate entity in the Group or the tax resident of the constituent entity that is the UPE or surrogate entity in the Group.

For purposes of this section:

- A constituent entity means:
 - any separate business unit of an MNE that is included in the consolidated financial statement of the MNE for financial reporting purposes or would be so included if the equity interest if such business unit of the MNE were traded in public securities exchange, or
 - any business unit that is excluded from MNEs consolidated financial due to materiality or
 - a PE of any separate business of the MNE provided that the business unit prepares separate financial statement for such PE for business or tax reporting purposes.





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Country-by-Country Reporting Notifications (Cont.)

- A surrogate entity means one constituent of the MNE appointed by the Group to file CbCR in the constituent entity jurisdiction on behalf of the Group.
- An ultimate parent entity means (i) an entity that is resident in Kenya for tax purposes, (ii) is not controlled by another entity (iii) owns or controls a MNE Group.

Who will be affected

MNEs that have operations in Kenya and meet the threshold of gross turn over of KES 95B (approximately EUR 750M) at group level.

When

Effective 1 July 2022

Our view

Kenya ratified the Convention on Mutual Administrative Assistance in Tax Matters (MAC) which was deposited with the Global Forum on Transparency and Exchange of Information on Tax Matters in July 2020. Under this convention, Kenya is expected to exchange information with tax jurisdictions that are members of the forum. This measure is aimed at enhancing transparency through comprehensive exchange of information between revenue authorities.

The purpose of the CbCR notification is provide visibility to the KRA on jurisdiction of the parent company where the Group's CbCRs are filed. In addition to CbCR notifications, there are instances where MNEs will be required to file a CbCR report in Kenya as analysed in the next section. These reports will aid the revenue authority in assessing transfer pricing risks of an MNE or its constituent entities and inform possible audits.





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CbCR Filing Requirements

The measure

The Bill proposes to introduce CbCR filing requirements for a UPE and a constituent entity of an MNE with gross turn over of KES 95Billion and above. A UPE is required to file a CbCR not later than 12 months after the last day of the reporting financial year of the Group.

Where there is more than one constituent entity of the same MNE resident in Kenya, the MNE may designate one such entity as the surrogate to file CbCR. An MNE not headquartered in Kenya will not be required to file a CbCR with the commissioner of the KRA if:

- The UPE is required to file a CbCR in its jurisdiction of residence;
- The jurisdiction where the UPE is resident has an international agreement for exchange of tax information with Kenya; or
- The commissioner has not notified the resident constituent entity in Kenya of any systematic failure to comply with the exchange of information (if any)

The CbCR reports shall contain information relating to each entity's tax residence, the group aggregate information relating to amount of revenue, profit or loss before income tax, income tax paid/ accrued, capital, number of employees, tangible assets (other than cash and cash equivalent), for each jurisdiction where the group has a taxable presence.

Who will be affected

All MNEs that have operations in Kenya where the groups' gross turnover is KES 95B and above.

When

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CbCR Filing Requirements (Cont.)

Our view

The proposed CbCR reporting requirements align with the international practice. For instance, the threshold of KES 95B is in line with the 750 million Euros set out in the Organization for Economic Co-operation and Development (OECD) and is a welcome move since MNEs that do not meet the global threshold will not be required to file CbC reports in Kenya.

In addition, an MNE Group that is controlled outside Kenya will not be required to file a CbC Report other than a notification indicating the jurisdiction of the entity where the Group's CbC reports are filed except where the jurisdiction of the parent company has not implemented CbCR or if there are difficulties in implementing the exchange of CbC Reports with the KRA.

The CbCR requirement will enable the KRA to have visibility of the financial and related information that will aid in assessing transfer pricing risks. For MNEs, this means additional transfer pricing compliance and reporting requirements. If enacted into law, the initial CbC reports for MNEs with a December year end will be filed on or before 31 December 2023.





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Requirement to File the Masterfile and Local File (Cont.)

The measure

The Bill proposes to introduce the Masterfile and local file filing requirements for a UPEs and constituent entities of MNEs with gross turn over of KES 95B. The Masterfile and local files shall be filed not later than 6 months after the last day of the reporting financial year of the MNE.

A summary of the content of the Masterfile and local file is provided below:

Description	Content
Masterfile	<ul style="list-style-type: none">• Detailed overview of the group and key value drivers.• Descriptions of the supply chain of the key products and services• Group's research and development policy• A description of each entity's contribution to value creation• Information about intangible assets and group intercompany agreement associated with them including any transfers of intangible assets during the tax period.• Information about financing activities of the group• The consolidate financial statement of group• Tax ruling if any made in respect of the group• Any other information as required
Local file	<ul style="list-style-type: none">• Details of the resident entity activities within the MNEs• Management structure of the resident entity• Business strategies including structuring, description of the material-controlled transactions, entity's business and competitive environment• Any other information that commissioner may require

Who will be affected

All MNEs that have operations in Kenya with gross group turnover of KES 95B and above.

When

Effective 1 July 2022

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Requirement to File the Masterfile and Local File (Cont.)

Our view

This measure is in line with Action 13 of the Base Erosion and Profit Shifting (“BEPS”) Action Plans, that require MNEs to file a three-tier TP documentation (Masterfile, local file and CbC reports) with tax authorities in countries where they have taxable presence.

The Masterfile and local file filing requirements will apply to MNEs with a gross turnover of KES 95B. The 2006 Kenyan TP rules require entities that have cross border related party transactions to maintain TP documentation and submit to the Commissioner upon request. If the proposed measure is enacted as is, MNEs that meet the KES 95B gross turnover threshold will be required to file Masterfile and local files while other MNEs below the threshold will maintain TP documentation in line with the existing TP rules.





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Personal Income Tax

Definition of permanent home

The measure

The Bill proposes to introduce a definition of a “permanent home” under Section 2 of the Income Tax Act (ITA) as being 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.

Who will be affected

All individuals especially those that live or work abroad for certain periods.

When

Effective 1 July 2022

Our view

The proposal to introduce the definition of a permanent home is welcome, given that it will now provide the much-needed clarity on what is considered a permanent home for the determination of tax residency for individuals. Under the proposed definition, Kenyan citizens may not necessarily become tax resident if they are present in Kenya in a year of income if they are not considered to have a permanent home in Kenya or to have personal or economic interests in Kenya. Currently, the Kenya Revenue Authority (KRA) tends to deem all Kenyan citizens to have a permanent home whether or not they live in Kenya. A person who is resident in Kenya in a year of income should declare and pay tax on any employment income that he/ she receives regardless of where the employment is exercised. The introduction of the definition of permanent home may relieve many Kenyan citizens from this requirement if they will not be considered to have a permanent home in Kenya. However, foreigners who may be considered to have a permanent home in Kenya will trigger residency in Kenya if they are in Kenya even for a day in a year of income. Currently, KRA considers a foreigner to be resident in Kenya if he/ she is in Kenya for at least 183 days in a particular year or for an average of 122 days in the year under consideration and the preceding 2 years. *(see next page for more comments)*

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Personal Income Tax

Definition of permanent home (Cont.)

However, there is need to provide clarity or guidelines on the definition of an individual's personal or economic interests instead of leaving the discretion to the Commissioner. If passed as it is, taxpayers will still be unable to determine what is considered to be 'their closest' ties and therefore the definition provided in the Bill is too subjective. To reduce individual's compliance burden, the Commissioner should publish guidelines, based on established precedence, on what would be considered to be an individual's closest personal or economic interest.





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Personal Income Tax

Taxation of benefits accruing from Registered and Unregistered Employee Share Ownership schemes

The measure

The Bill proposes to amend Section 5(5)(a) and Section 5(6)(a) of the ITA which provides for taxation of benefits accruing to an employee from a registered Employee Share Ownership Scheme (ESOP).

Currently, Section 5(5)(a) of the Income Tax Act provides that the value of the benefit accruing to an employee from an ESOP registered with KRA shall be the difference between the market value, per share, and the offer price, per share, at the date the option is **granted** by the employer.

The bill proposes to determine the value of a benefit accruing from an ESOP as 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 the employee **exercises** the option.

Further, the Bill proposes to amend Section 5(6)(a) of the Income Tax Act which currently provides that the benefits chargeable to tax under a registered ESOP shall be deemed to have accrued to the employee at the **end of the vesting period**. The Bill amends this to provide that the benefits chargeable shall be deemed to have accrued **on the date the employee exercises the option**.

Who will be affected

All employees and employers with an Employee Share Ownership plan.

When

Effective 1 July 2022





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Personal Income Tax

Taxation of benefits accruing from Registered and Unregistered Employee Share Ownership schemes (Cont.)

Our view

The amendments are welcome as they provide guidance on the taxation of unregistered ESOP schemes. Previously, only registered ESOP schemes were expressly provided for under Section 5 of the Income Tax Act. Further, the proposed amendments aim to harmonise the determination of benefits accruing from both registered and unregistered ESOP schemes as being the difference between the grant price at the date of grant and the market value at the date of exercise.

Whilst registered ESOP schemes will continue to enjoy the various tax exemptions provided in the Act, the proposed amendment may result in a higher tax burden for employees participating in registered ESOP schemes who were previously taxed on the difference between the market price per share and the grant price per share at the date of grant of the shares.

In addition, the employees will now be taxed on the ESOP benefit at the point of exercising the options. This implies that the employees will now be taxed at the point when the gain is actually realised as opposed to the current provision which deems the benefit to accrue at the end of the vesting period even though the employee may not be exercising his option. This has led to employers having to make arrangements to fund the tax due and recover the cost from the employees over a period thus attracting Fringe Benefit Tax (FBT) or some employees missing out the opportunity because they cannot afford to pay the tax at vest.





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Personal Income Tax

Inclusion of a gender-neutral provision with respect to life insurance relief

The measure

The Bill proposes to amend Section 31(1)(a) of the Income Tax Act by deleting the words, “*he has paid a premium for an insurance made by him on his life or the life of his wife or of his child*” and substituting the words thereof with “*the individual has paid a premium for an insurance made by the individual on the individual’s life of (sic) the life of the individual’s spouse or child*”.

Who will be affected

Taxpayers claiming insurance relief

When

Effective 1 July 2022

Our view

Individuals are eligible for an insurance relief of 15% of the premiums paid to a life insurance scheme subject to a maximum of KES 5,000 per month (KES 60,000 per annum).

The proposed amendment to the wording provided under Section 31(1)(a) is aimed at providing a more gender-neutral provision that explicitly allows all taxpayers, irrespective of their gender, to claim an insurance relief.

However, there appears to be a typo error which should be corrected prior to enactment of the bill.





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Personal Income Tax

Waiver of penalties and interest arising from PAYE non-compliance

The measure

The Bill proposes to delete Section 37(3) of the Income Tax Act which allows the Commissioner to remit the whole or part of any penalty imposed under section 37 of the Income Tax Act up to a maximum of five hundred thousand shillings per employer per annum.

Who will be affected

All employers seeking waiver of penalties for PAYE non-compliance

When

Effective 1 July 2022

Our view

The proposed amendment aims to harmonise the provisions of the Income Tax Act to that of the Tax Procedures Act (TPA), 2015 by amending provisions in the Income Tax Act that are considered to be redundant. The remission of penalties accruing to an employer should be done in accordance with Section 89 of the TPA which requires a taxpayer to make an application for remission of penalties to the Commissioner. The Commissioner may remit penalties of up to KES 1.5 million and where the amount exceeds this limit, prior approval from the Cabinet Secretary is required.





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Personal Income Tax

Clean-up of the tax set-off provision

The measure

The Bill proposes to amend Section 39(2) of the Income Tax Act by replacing all references to Section 10(e) to refer to Section 10(1)(e). Section 10(1)(e) provides for taxation of income earned in relation to an appearance at, or performance in, a public or private place for the purpose of entertaining, instructing, taking part in any sporting event or otherwise diverting an audience.

Who will be affected

All Kenyan citizens deriving income outside Kenya in respect of any activity under Section (10)(1)(e) of the Income Tax Act

When

Effective 1 July 2022

Our view

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Personal Income Tax

Clean-up of the tax set-off provision (Cont.)

Our view

Section 39(2) of the ITA provides that a Kenyan Citizen chargeable to tax in Kenya for any year of income on employment income and income in respect of any activity under Section 10(e), accrued in or derived from outside Kenya, is entitled to set off by way of credit of tax paid in the host country against the tax charged in Kenya on such income.

Prior to enactment of the Finance Act, 2014, Section 10 (e) made reference to income relating to an appearance at, or performance in, a public or private place for the purpose of entertaining, instructing, taking part in any sporting event or otherwise diverting an audience. Following the enactment of the Finance Act 2014, Section 10 was renumbered to include subsection 1. As such, any references to Section 10(e) under the Act ought to have been amended to reflect Section 10(1)(e).

However, Section 39(2) of the ITA, which makes reference to Section 10(e) of the ITA, was not amended. The Finance Bill 2022 therefore seeks to update Section 39(2) of the ITA to ensure it makes reference to the appropriate Section 10(1)(e) of the ITA. This implies that all Kenyan Citizens, accruing income outside Kenya in respect of activities falling under Section 10(1)(e), shall be entitled to a credit in respect of the foreign taxes paid.





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Capital Gains Tax

Capital Gains Tax Rate to be increased from 5% to 15%

The measure

The Bill proposes to amend Section 34 (1)(j) of the Income Tax Act by increasing the tax rate on capital gains from 5% to 15%.

Who will be affected

All taxpayers

When

Effective 1 January 2023

Our view

Whereas the current rate of CGT in Kenya (5%) is relatively lower compared to other jurisdictions, the current Kenyan CGT provisions do not provide for inflation adjustments (indexation).

The re-introduction of CGT at 5% in 2015 was widely viewed as a way to test the waters and it was speculated that the rate would be progressively increased. There were attempts to increase the rate through the Income Tax Bill, 2018 (to 20%) and the Finance Bill 2019 (to 12.5%) but none of these attempts were successful. It remains to be seen whether the current attempt will sail through.

With the increased pressure to collect more tax revenue, it comes as no surprise that the government sees this as a low hanging fruit. One would have hoped that with the proposed increase in the CGT rate, the Government would also have introduced the concept of indexation to ensure that the effects of inflation are factored in determining the taxable capital gains. The significant increase in CGT rate could also slow down investment and transactions in certain sectors such as real estate.





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Digital Service Tax

Non-residents with a Permanent Establishment in Kenya to be excluded from Digital Service Tax

The measure

The Bill proposes to amend Section 12E of the Income Tax Act to exclude non-resident persons with a Permanent Establishment (PE) in Kenya from the ambit of Digital Service Tax (DST).

Who will be affected

Non-resident persons with a permanent establishment in Kenya

When

Effective 1 July 2022

Our view

DST became effective in Kenya on 1 January 2021. At the time, DST was applicable to all persons including residents. However, resident and non-resident persons with a PE in Kenya were allowed to offset the DST against the tax payable for the respective years of income. With effect from 1 July 2021, the Finance Act 2021 amended the Income Tax Act to exempt resident persons from DST. In addition, the Finance Act 2021 deleted the provision that enabled non-resident persons with a PE to offset DST against the tax payable. In effect, this implied that DST paid by non-residents persons (including persons with a PE in Kenya) was final tax.

This proposal comes one year after resident persons were excluded from the ambit of DST and is a welcome move given that non-resident persons with a PE in Kenya account for tax like resident persons. If passed, non-resident persons that have a PE in Kenya will be exempt from DST. Effectively, DST will only be applicable to non-resident persons without a PE in Kenya.





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Digital Service Tax

Digital Service Tax rate increased from 1.5% to 3%

The measure

The Bill proposes to amend the Third Schedule to the Income Tax Act by increasing the rate of Digital Service Tax from 1.5% to 3%.

Who will be affected

Non-resident persons without a PE in Kenya, whose income from the provision of services is derived from or accrues in Kenya through a business carried out over the internet or an electronic network including through a digital marketplace.

When

Effective 1 July 2022

Our view

This proposal is aimed at increasing tax revenues. While the revenue impact of introducing DST has not been made public yet, this proposal demonstrates the Government's continued effort to net more revenue from the digital marketplace especially targeting non-resident entities.

Whereas DST is in line with the objective of effectively taxing transactions carried out in the digital marketplace that may not require physical presence, it should be noted that with the ongoing initiative under the OECD to develop global consensus on the taxation of such businesses, there is some opposition to unilateral DST measures. Notably Kenya has not yet signed the Inclusive Framework which proposes a two-pillar approach to address challenges in taxation of the digitalised economy. It appears the Kenyan authorities believe they would net more taxes through DST rather than the measures proposed under the Inclusive Framework.





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Withholding Tax

Gains accruing to non-residents from a financial derivatives contract with a resident person to attract withholding tax at 15%

The measure

The Bill proposes to introduce various amendments to the Income Tax Act in order to subject gains accruing to non-resident persons from a financial derivatives contract with a resident person in Kenya to a withholding tax of 15%.

The term “financial derivative” has been defined as *a financial instrument whose value is linked to the value of another instrument underlying the transaction which is to be settled at a future date.*

The Cabinet Secretary will be expected to issue Regulations that will provide more guidelines on the taxation of financial derivatives.

Who will be affected

Non-resident persons dealing in financial derivatives with resident persons

When

Effective 1 January 2023

Our view

The use of financial derivatives has recently become popular in Kenya due to the enhanced transactions with international markets, need for enhanced risk management tools and increased volatility in prices of goods in the local and international markets. The move to introduce tax on gains accruing to non-residents on financial derivative contracts should be seen as part of efforts to widen the tax net.

Although the new tax measure may increase tax revenue for the KRA, it may discourage foreign traders from participating in our local financial derivatives market. It is also possible that non-resident persons dealing in financial derivatives may pass the tax costs to resident traders by requiring all payments with respect to financial derivatives contracts to be net of taxes.



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Value Added Tax

Additional requirement for deduction of input tax

The measure

The Bill proposes to amend Section 17 (1) of the Value Added Tax Act, 2013 by linking the deduction of input tax to the return filed for the tax period in which the taxable supply occurred. The Bill also proposes to leave the scope of documentation that may be required to support input tax deduction at the Commissioner's discretion.

The Bill further seeks to amend Section 31 of the TPA which allows taxpayers to amend tax returns to limit allowability of input tax for amended VAT returns to within six months from the time of supply or importation.

Who will be affected

All VAT registered persons.

When

Effective 1 July 2022

Our view

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Value Added Tax

Additional requirement for deduction of input tax (Cont.)

Our view

This proposal is an additional legislative requirement for VAT registered taxpayers to file a VAT return on the iTax system in order to qualify as having validly deducted input tax.

This proposed change is likely to have been influenced by the 2019 High Court decision in **Rabai Operation & Maintenance Limited vs Commissioner of Domestic Taxes ML TA No. 7 of 2017 [2019] eKLR** (Rabai case) where the court held in favour of the taxpayer and found that a registered person ought not to file a VAT return as a prerequisite for deduction of input tax. The Rabai case set precedent which has been applied in the subsequent High Court decision in **Highlands Mineral Water Limited v Commissioner of Domestic Taxes [2021] eKLR**. The Tax Appeals Tribunal (TAT) held similar views in **Skyline Tower Investment v Commissioner of Domestic Taxes TAT No. 256 of 2018**.

The proposal to leave the scope of documentary support for input tax deduction at the discretion of the Commissioner is likely to lead to uncertainty and arbitrary application of the law by the Commissioner. This may potentially result in disputes due to perceived non-compliance. It is questionable whether this proposal is necessary when the revenue authority is currently facilitating migration into a more digitally enabled tax invoice management system.

In respect of the proposed change to the TPA, while Section 31 of the TPA allows registered persons to amend their VAT returns within a period of five years from the time of filing the original returns, an amendment of the VAT return may only admit input tax that is within six months from the time of supply. This proposal seeks to prevent instances where a registered person may seek to amend their VAT returns to admit input tax that is outside the six-month rule.

Taxpayers would need to be extra diligent to ensure the accuracy and completeness of input tax claims to avoid losing deductions that become time barred.





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Value Added Tax

Changes relating to digital marketplace supplies

The measure

The Bill proposes to amend the definition of a digital marketplace under Section 5 (9) of the Value Added Tax Act, 2013 to mean an online platform which enables users to sell goods or provide services to other users.

It further proposes to exclude the application of VAT on imported services on supplies made through a digital marketplace.

Lastly, it proposes to amend Section 34 (1) of the Value Added Tax Act, 2013 to exclude persons supplying imported digital services from the VAT registration threshold.

Who will be affected

Players in the digital space.

When

Effective 1 July 2022

Our view

With the interest shown over the last few years on the need to focus on the taxation of supplies made through a digital marketplace, the above proposed changes aim to expand the ambit of supplies that fall within scope of digital marketplace supplies. Specifically, the exclusion of digital marketplace supplies from the purview of imported services may possibly lead to a case where VAT on business to business transactions that are provided through a digital marketplace is accounted for by non-resident persons through the simplified VAT registration framework. Further the exclusion of these supplies from Section 34 (1) would require registration of non-resident persons who provide services through digital marketplaces even where they do not trigger the general registration threshold under the VAT Act. Lastly, we opine that there will be need to accordingly amend the applicable regulations to operationalize the above changes.





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Value Added Tax

Applicable penalties and interest on Import VAT

The measure

The Bill proposes to amend Section 22 (4) of the Value Added Tax Act, 2013 to allow the Commissioner to impose the penalties and interest prescribed by the Tax Procedures Act, 2015 (TPA). The Bill further proposes to restrict the interest payable to the principal tax due in line with the *in duplum* rule.

Who will be affected

Importers of goods especially in cases of customs post clearance audits.

When

Effective 1 July 2022

Our view

In the recent past, there has been an increased focus by the Commissioner to align all applicable domestic tax laws in the Kenya. As VAT is predominantly viewed as a domestic tax, the proposed change, in our view, seeks to align penalties and interest applicable to VAT imposed and collected at importation to those provided for under the TPA.

As the applicable penalties and interest under the TPA would predominantly be those relating to late payment, the proposal is likely to apply to cases of customs post clearance audits. The TPA provides for a late payment penalty of 5% and simple interest at 1%. The *in duplum* rule applies. On the other hand, the EAC Customs laws provide for a late payment interest of 2% per month which is not subject to the *in duplum* rule. It is also not clear whether the interest rate is compounded or simple.

This proposal may therefore be viewed, as favourable as it is likely to be less punitive especially for tax that is long outstanding.





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Value Added Tax

Repeal of the provisions for refund of taxes paid in error

The measure

The Bill proposes to repeal Section 30 of the VAT Act, thus deleting the provisions under the VAT law relating to refund of VAT paid in error.

Who will be affected

All VAT registered persons.

When

Effective 1 July 2022

Our view

This proposal intends to remove the provisions relating to tax paid in error from the VAT Act and, instead, apply the provisions of Section 47A and 47B of the TPA, which are new proposals in the Bill.

The Bill further seeks to amend Section 47 of the TPA to allow a registered person to claim refund of overpaid VAT. The Bill proposes that such claims should be lodged within six months after the date of overpayment. This time limit has been halved from the current twelve months under Section 30 of the VAT Act, 2013. While this may be a move to harmonise the provisions of tax statute relating to refunds, we are of the view that the proposed changes to Section 47(1)(b) of the TPA severely restricts the taxpayers' entitlement to refund of tax overpayments. It would be ideal to align the timeline to the five-year period allowed for other taxes.





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Value Added Tax

Change of VAT status of goods/services for construction of hospitals from exempt to standard rated

The measure

The Bill proposes to remove the following items from the VAT exemption schedule:

1. 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; and
2. Taxable services for direct and exclusive use for the construction of specialized hospitals with accommodation facilities upon recommendation by the Cabinet Secretary responsible for health, who shall issue guidelines for the criteria to determine the eligibility for the exemption.

However, the proposed changes allow any approval granted by the Cabinet Secretary before the commencement of the change in respect of the supply of taxable goods/services to continue to apply until the supply of the exempted construction of specialized hospitals is completed.

Who will be affected

The health sector

When

Effective 1 July 2022

Our view

The government has over the years aimed at reducing the list of exempt goods and services with the aim of increasing tax revenue. However, we are of the view that this proposed change will be detrimental to the efforts made towards reduction of the cost and accessibility of medical services as this reduces the incentive for investors to set-up hospitals. This is especially given the high chance of disallowance of input tax suffered on construction and equipping of medical facilities. It is likely to hamper progress made towards expanding access to healthcare under the Big Four Agenda.





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Value Added Tax

Exemptions affecting the healthcare sector

The measure

The Bill proposes to exempt the following goods from VAT:

1. Plant and machinery of Chapter 84 and 85 imported by manufacturers of pharmaceutical products or investors in the manufacture of pharmaceutical products upon the recommendation of the Cabinet Secretary responsible for matters relating to health;
2. Medical oxygen supplied to registered hospitals; and
3. Urine bags, adult diapers, artificial breasts, colostomy or ileostomy bags for medical use.

Who will be affected

Local manufacturers of pharmaceutical products and medical supplies.

When

Effective 1 July 2022

Our view

The proposed changes to exempt the above medical supplies align with addressing the cost of healthcare as envisioned in the Big 4 agenda. Our view is that this move together with the tax incentives already enjoyed by medicaments under the VAT law will further reduce the cost of medical supplies and pharmaceutical products thus allowing Kenyans to access affordable healthcare.

Further, in an effort to combat the COVID-19 pandemic and address the access to affordable and quality healthcare, the Bill proposes to exempt the importation of plant and machinery for the manufacture of pharmaceutical products from VAT.





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Value Added Tax

Exemptions affecting the healthcare sector (Cont.)

It is hoped that this proposal will assist in reducing the cost of production which in turn will make the pharmaceutical products more affordable. We expect that the proposal, once passed to law will further encourage additional investment in the health sector. An example of this is the recent memorandum of understanding signed between Kenya and Moderna to establish the first mRNA manufacturing facility in Africa. The anticipated investment is **USD 500 Million**. The facility aims to ensure sustainable access to transformative mRNA innovation on the African continent.





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Value Added Tax

Exemptions affecting local manufacturing of passenger vehicles

The measure

The Bill proposes to exempt the following goods and services from VAT:

1. Inputs and raw materials used in the manufacture of passenger motor vehicles; and
2. Locally manufactured passenger motor vehicles: Provided that “locally manufactured passenger motor vehicle” shall mean a motor vehicle for the transportation of passengers which is manufactured in Kenya and whose total value comprises at least thirty per cent of parts designed and manufactured in Kenya by an original equipment manufacturer operating in Kenya

Who will be affected

Local manufacturers of passenger motor vehicles.

When

Effective 1 July 2022

Our view

In the recent past, the Government has progressively initiated various tax incentive schemes to promote the local assembly and manufacture of motor vehicles. These measures are aimed at reducing the importation of used motor vehicles and to boost the local manufacturing sector. For example, in 2017 a reduced corporation tax rate of 15% was introduced for newly incorporated companies venturing into local motor vehicle assembly. Subsequently, the excise duty on locally assembled motor vehicles was removed. In addition, the Government through various budgets has made an exclusive preference to purchase locally assembled motor vehicles by allocating KES 600 million for the purchases in FY 2020 and FY 2021.





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Value Added Tax

Exemptions affecting local manufacturing of passenger vehicles (Cont.)

The exemption of inputs used in local manufacturing of passenger vehicles from VAT will reduce the cost of local assembly as envisioned by the continuous efforts made by the Government to promote this sector. Importantly, exemption of inputs safeguards the players in the sector against potential disallowance of input tax that would be occasioned by exemption of the final product.

In our view, the exemption from VAT of locally manufactured passenger vehicles will further make the vehicles cheaper and more competitive compared to the imported vehicles.





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Value Added Tax

Deletion of articles of apparel, clothing accessories and equipment specially designed for safety or protective purposes from the zero-rating schedule

The measure

The Bill proposes to delete the supply of articles of apparel, clothing accessories and equipment specially designed for safety or protective purposes for use in registered hospitals and clinics or by county government or local authorities in fire fighting from the zero-rating schedule.

Who will be affected

Consumers and suppliers/ manufacturers of articles of apparel, clothing accessories and equipment specially designed for safety or protective purposes.

When

Effective 1 July 2022

Our view

The proposal to remove the above protective apparel from the zero-rating schedule will result in a higher cost for these products for hospitals and the county governments. This proposal appears to contradict the government's efforts to reduce the cost of healthcare and provision of services to citizens such as fire fighting.





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Value Added Tax

Clarification of the VAT status of flour

The measure

The Bill proposes to delete Paragraph 108 of the First Schedule, and Paragraph 20 of the Second Schedule to the VAT Act that relates to the supply of maize (corn) flour, cassava flour, wheat or meslin flour.

Who will be affected

N/A.

When

Effective 1 July 2022

Our view

The proposal seeks to clarify the rate applicable on flour in the VAT Act. Currently, the supply of flour is repeated three times in the VAT Act, that is under Paragraph 108 of the First Schedule, Paragraph 20 and 22 of the Second Schedule.

The proposed change clarifies the applicable rate and does not affect the zero rating of the supply of maize (corn) flour, cassava flour, wheat or meslin flour as it retains these items under Paragraph 22 of the Second Schedule.





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Excise Duty

Exemption of certain products from inflationary adjustment by the Commissioner General

The measure

The Bill proposes to amend Section 10 of the Excise Duty Act to allow the Commissioner General (CG) to exempt specified products from the inflation adjustment after considering the circumstances prevailing in the economy in that year in respect of such products. The exemption will be subject to approval by the Cabinet Secretary (CS) for the National Treasury and will be communicated through a notice in the Kenya Gazette.

Who will be affected

Local manufacturers and importers of excisable goods with specific rates.

When

Effective 1 January 2023

Our view

Section 10 of the Excise Duty Act empowers the CG to adjust specific excise duty rates by the average rate of inflation for the prior financial year subject to approval by the CS for the National Treasury. Although the section is not cushioned in mandatory terms, we note that the CG has consistently effected inflationary adjustments on all excisable goods with specific rates including essential products such as petroleum products and bottled water.

Annual increases of excise duty on some essential excisable products has had negative implications on consumers due to the increase in the cost of these products. In 2021, the High Court granted a stay on implementation of the inflationary adjustment on petroleum products following applications filed by various stakeholders.

The proposal to allow the CG the discretion to exclude certain products from inflationary adjustment is a welcome move that will protect certain industries and consumers from negative economic impacts arising from increased costs of the excisable products.





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Excise Duty

Amendment of the definition of ex-factory selling price of locally manufactured excisable goods

The measure

The Bill proposes to amend Section 11 of the Excise Duty Act to read as follows:

The ex-factory selling price of excisable goods shall be:

(a) if the excisable goods are sold by the manufacturer to a purchaser in an arm's length transaction, the price payable by the purchaser.

Who will be affected

Local manufacturers of excisable goods.

When

Effective 1 July 2022

Our view

Section 11 of the Excise Duty Act defines the ex-factory selling price of excisable goods sold by a manufacturer to a purchaser in a transaction that is not at arm's length as the price payable for the goods. In our view, this goes against the general principles of valuation of arm's length transactions where the price payable for goods is accepted as the transaction value for tax purposes. Further, the open market value of goods is ordinarily used as the taxable value for transactions between related parties particularly where the relationship is deemed to have influenced the price.

The proposed change is in our view intended to rectify what appears to be a drafting error of Section 11 of the Excise Duty Act.





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Excise Duty

Penalties and interest in relation to excise duty on imported goods to be as per the Tax Procedures Act

The measure

The Bill proposes to amend Section 36(4) of the Excise Duty Act to provide for application of the Tax Procedures Act provisions with regards to imposition of penalties and interest on excise duty on imported goods. Additionally, the Bill proposes to apply the *in duplum* rule on interest payable with respect to excise duty.

Who will be affected

Importers of excisable goods

When

Effective 1 July 2022

Our view

Section 36(4) of the Excise Duty Act provides for application of the East African Community Customs Management Act (EACCMA) for purposes of assessing, collecting, accounting and enforcing the payment of excise duty on the importation of goods into Kenya. This implies that provisions of the EACCMA with regards to penalties and interest are applicable in relation to excise duty on imported goods, notably Section 249 of the EACCMA, which provides for a late payment interest of 2% per month. Section 249 does not provide for the *in duplum* rule and is silent on whether late payment interest should be compounded or simple interest.

The proposal to rely on the TPA provisions on interest and penalties will imply that a lower late payment interest of 1% per month and late payment penalty of 5% will apply on late payment of excise duty on imported goods. The proposal also means that the *in duplum* rule will now apply. This proposal will be a welcome relief for importers of excisable goods if adopted and will cushion importers from excessive interest currently applicable under the EACCMA.





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Excise Duty

Amendment of the excise duty regime on liquid nicotine

The measure

The Bill proposes to amend the excise duty regime on liquid nicotine products under the First Schedule to the Excise Duty Act by replacing electronic cigarettes (which attract KES 4,171.59 per unit excise duty) and cartridges used in electronic cigarettes (which attract KES 2,781.43 per unit excise duty) with the following products:

- Electronic cigarettes and other nicotine delivery devices - 40%
- Liquid nicotine for electronic cigarettes – KES 70 per millilitre

Who will be affected

Local manufacturers and importers of liquid nicotine products

When

Effective 1 July 2022

Our view

This measure is aimed at bringing into the ambit of excise duty, other liquid nicotine products that have been recently introduced into the Kenyan market.

Consumption of liquid nicotine has been very popular in Kenya particularly amongst the youth. Liquid nicotine products are widely associated with negative health effects. This measure is therefore geared towards discouraging consumption of these products to protect the population from the associated health effects. It also aims to increase the revenue collected on the affected products.





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Excise Duty

Increase of excise duty on specific products

The measure

The Bill proposes to amend the First Schedule to the Excise Duty Act by increasing the excise duty rate on various goods and services mostly products considered as “harmful products” and “luxurious products” as per the table below:

Product description	Current rate	Proposed 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.	KES 12.17 per litre	KES 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.	KES 6.03	KES 6.60
Beer, cider, perry, mead, opaque beer and mixtures of fermented beverages with non-alcoholic beverages and spirituous beverages of alcoholic strength not exceeding 6%	KES 121.85 per litre	KES 134 per litre
Powdered beer	KES 121.85 per litre	KES 134 per litre
Wines including fortified wines, and other alcoholic beverages obtained by fermentation of fruits	KES 208.20 per litre	KES 229 per litre
Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 6%	KES 278.70 per litre	KES 335.30 per litre
Cigars, cheroots, cigarillos, containing tobacco or tobacco substitutes	KES 13,906.04 per kg	KES 13,296.60 per kg





Excise Duty

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Product description	Current rate	Proposed rate
Cigarette with filters (hinge lid and soft cap)	KES 3477.61 per mille	KES 3,825.99 per mille
Cigarettes without filters (plain cigarettes)	KES 2502.74 per mille	KES 2,752.97 per mille
Other manufactured tobacco and manufactured tobacco substitutes; “homogenous” and “reconstituted tobacco”; tobacco extracts and essences	KES 9734.45 per kg	KES 10,707.88 per kg.
Motor cycles of Tariff Heading 8711 other than motor cycle ambulances and locally assembled motor cycles	KES 12,185.16 per unit	KES 13,403.64 per unit
Imported sugar confectionery of Tariff Heading 1704	KES 36.74 per kg	KES 40.37 per kg
White chocolate, chocolate in blocks, slabs or bars of tariff numbers 1806.31.00, 1806.32.00 and 1806.90.00	KES 220.31 per kg	KES 242.29 per kg
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	KES 1,259.64 per kg	KES 2,500 per kg
Jewellery of tariff heading 7113 and imported jewellery of tariff heading 7117”	10%	15%
Betting	7.5%	20%
Gaming	7.5%	20%
Price competition	7.5%	20%





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Excise Duty

Increase of excise duty on specific products (Cont.)

Who will be affected

Local manufacturers and importers of the affected excisable goods.

When

Effective 1 July 2022

Our view

In our view, this proposal is primarily geared towards generating additional revenue for the Government. It is expected that the CG will also adjust excise duty rates for inflation on the same products later in the year. If the above increments are passed into law, the same will likely have adverse effects on the affected industries particularly considering recent annual inflationary adjustments on the same products.

The continued increase of excise duty on excisable goods by the Government could potentially reduce the demand for these products, which will ultimately lead to the exit of some of the players in the affected industries and also discourage investment in the affected industries. Higher excise taxes will potentially shift consumption to cheaper illicit products and promote cross border smuggling especially from jurisdictions where the taxes are lower than in Kenya.

In the long run, the suppressed demand of the excisable goods may reduce excise duty revenue generated from these products.





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Excise Duty

Introduction of excise duty on various goods and services

The measure

The Bill proposes to amend the First Schedule to the Excise Duty Act by introducing the following products to the excise duty regime:

- a) Articles of plastic of Tariff Code 3923.90.90 (other articles of plastic for conveyance or packing) at 10%. Currently, the Excise Duty Act provides for excise duty on carboys, bottles, flasks and similar articles at 10%.
- b) Imported potatoes of Tariff Code 0710.10.00, 2004.10.00 and 2005.20.00 at 25%. Currently, the Excise Duty Act provides for excise duty on potatoes of Tariff Heading 0701 at 25%.
- c) Ice cream and other edible ice whether or not containing cocoa of Tariff Code 2105.00.00 at 15%.
- d) Locally manufactured glass bottles (excluding glass bottles for packaging of pharmaceutical products) at 25%. Currently, only glass bottles imported outside the EAC are subject to excise duty.
- e) Fees charged for advertisement by television stations, print media, billboards and FM radio stations on alcoholic beverages, betting and gaming, lottery and prize competitions at 15%.

Who will be affected

Importers and local manufacturers of the affected products as well as persons who own television stations, print media, billboards and FM radio stations

When

Effective 1 July 2022





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Excise Duty

Introduction of excise duty on various goods and services (Cont.)

Our view

In our view, the proposed increase in excise duty is primarily geared towards generating additional revenue for the Government.

The Government has in the past introduced tax measures (including excise duty) aimed at discouraging consumption of alcohol as well as betting and gaming activities.

The Bill proposes to further introduce excise duty on the advertisement of the foregoing activities. It is expected that the excise duty on such advertisements shall either discourage advertisements of these products or be passed to consumers, hence making them costly. Reduced advertisements or increase in the costs of the products shall likely affect the uptake of the products.

We also note that the Bill has proposed to increase excise duty on alcoholic beverages, betting, gaming, price competition and lottery to further discourage consumption of these products.

The introduction of excise duty on ice cream is perhaps geared towards discouraging consumption given the negative health effects associated with consumption of sugar and in line with the current law of providing for excise duty on confectionery and chocolate.

The proposed changes also seek to expand the scope of various product categories that are currently subject to excise duty such as articles of packaging and conveyance made of plastic, potatoes and glass bottles.





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Excise Duty

Introduction of additional products in the exemption schedule

The measure

The Bill proposes to amend the Second Schedule to the Excise Duty Act by introducing the following new items to the exemption schedule:

- Fertilised eggs for incubation of Tariff Code 0407.11.00 and 0407.19.00 imported by hatcheries upon recommendation by the CS responsible for Livestock;
- Neutral spirit imported or purchased locally by registered pharmaceutical manufacturers upon approval by the Commissioner; and
- Locally manufactured passenger motor vehicles. Locally manufactured passenger vehicles have been defined as vehicles for transportation of passengers manufactured in Kenya and whose total value comprise at least 30% of parts designed and manufactured in Kenya by an original equipment manufacturer operating in Kenya.

Who will be affected

Importers and local manufacturers of the affected products

When

Effective 1 July 2022

Our view

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Excise Duty

Introduction of additional products in the exemption schedule (Cont.)

Our view

The proposal to exempt imported eggs for hatching is geared towards promoting the hatching business that was adversely affected by the introduction of excise duty on imported eggs particularly considering that Kenya lacks sufficient capacity to meet the local demand for eggs.

The Excise Duty Act provides for refund of spirits used for manufacture of unexcisable goods. The CS has proposed to exempt neutral spirits used by pharmaceutical manufacturers to address cash flow challenges faced by these manufacturers as a result of the lengthy process of claiming refund of excise duty paid on the neutral spirits.

The Excise Duty Act currently excludes locally assembled motor vehicles from excise duty. The CS has proposed to further provide for exemption of locally manufactured passenger motor vehicles which may not qualify for excise duty exemption under the current provisions. To provide clarity, the Bill has defined passenger motor vehicles that will be eligible for the exemption.





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Miscellaneous Fees & Levies

Amendment of Import Declaration Fee (IDF) and Railway Development Levy (RDL) exemption schedules

The measure

The Bill proposes to amend the Second Schedule to the Miscellaneous Fees and Levies Act to introduce IDF and RDL exemption on inputs and raw materials used for manufacture of pharmaceutical products upon recommendation by the CS for Health.

Who will be affected

Pharmaceutical manufacturers

When

Effective 1 July 2022

Our view

This is a welcome proposal that if adopted will promote local manufacturing of pharmaceutical products in Kenya and encourage local investment in the industry.

We note that the Bill has proposed a similar exemption under the VAT Act.





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Miscellaneous Fees & Levies

Introduction of export levy on iron ores and concentrates

The measure

The Bill proposes to introduce an export levy on iron ores and concentrates, including roasted iron pyrites at USD 175 per tonne.

Who will be affected

Exporters of iron ores

When

Effective 1 July 2022

Our view

Iron ore is a critical ingredient in the steel making industry. Kenya has discovered deposits of iron ores in counties like Kilifi. The proposal to introduce export levy on iron ores is perhaps geared towards discouraging the exportation of iron ore to protect local manufacturers who rely on iron ore from competition from the export market.





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Miscellaneous Fees & Levies

Reduction of export levy on raw hides and skins

The measure

The Bill proposes to reduce export levy on raw hides and skins from 80% or USD 0.52 per Kg to 50% or USD 0.32 per Kg.

Who will be affected

Exporters of raw hides and skins

When

Effective 1 July 2022

Our view

Raw hides and skins are subject to export levy to discourage exportation of these products and promote local value addition. However, there appears to be insufficient local demand for raw hides and skins, which has negatively affected the raw hides and skin business by local pastoralists. This proposal is therefore geared towards reducing the cost of exporting raw hides and skins in a bid to increase the profitability of exportation of raw hides and skins.





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Miscellaneous Fees & Levies

Amendment of the effective date for annual inflation adjustment on export levy

The measure

The Bill proposes to amend the effective date for inflationary adjustment of export levies from 1 July of every year to a date before 1 October of every year.

Who will be affected

Exporters of scrap metal, raw hides and skins and potentially iron ores.

When

Effective 1 July 2022

Our view

Section 5(4) of the Miscellaneous Fees & Levies Act provides for adjustment of specific rates of export levy annually to take into account inflation. The specific rates should be adjusted at the beginning of every financial year by the average rate of inflation for the prior year. We however note that since the inception of the Miscellaneous Fees & Levies Act, the CG has yet to adjust the levies for inflation.

The proposed change is intended to allow for sufficient time to comply with the requirements of the Statutory Instruments Act, which require the CG to table statutory instruments such as legal notices before parliament and subject the same to public participation.

The proposal is also in line with the effective date for inflationary adjustment of excise duty rates.





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Miscellaneous Fees & Levies

The Tax Procedures Act to apply with respect to penalties and interest on levies imposed under the Miscellaneous Fees & Levies Act

The measure

The Bill proposes to amend Section 9B (b) of the Miscellaneous Fees & Levies Act to provide for application of the TPA with respect to payment of interest on overpaid levies that remain unpaid 2 years after the application for refund is submitted to the Commissioner.

Who will be affected

Importers

When

Effective 1 July 2022

Our view

Section 9B(b) of the Miscellaneous Fees & Levies Act provides that the provisions of Section 47 of the TPA shall apply for the purposes of the determination by the Commissioner of penalties and interests on fees that remain unpaid. Section 47(5) of the TPA provides for a late payment interest of 1% per month on the amount of refundable overpaid tax that remains unpaid 2 years after the refund application.

The proposed change is perhaps aimed at addressing an earlier omission when Section 9B(b) was introduced in 2021.





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Tax Procedures

Requirement of a PIN to register a Trust and notification requirement for changes of the details of a Trust

The measure

The Bill proposes to amend Section 9 of the Tax Procedures Act, 2015 (“TPA”) to compel trusts in Kenya (whether carrying out business or not) to notify the Commissioner of any changes in the identity and addresses of the trustees and beneficiaries of the trust, within 30 days of the occurrence of the change.

The Bill further proposes to amend the TPA’s First Schedule to include the registration of a trust as among the transactions for which a tax PIN is required.

Who will be affected

All trusts operating in Kenya, whether established for purposes of carrying out business or not

When

Effective 1 July 2022

Our view

The effect of the proposed amendments will be to obligate all trusts, regardless of whether they have been established with the explicit purpose of carrying out business in Kenya (that is, a for-profit objective) or not, to furnish the Commissioner with updated details of their trustees and beneficiaries.

Furthermore, the proposed changes also imply that any person who intends to set up a trust within Kenya should have a tax PIN.

These proposals reflect the intent of the KRA to continuously monitor the activities of trusts, in light of the tax risks they present. This is also in line with the drive for transparency following the changes in the Companies Act 2015, requiring disclosure of beneficial interest. Hitherto, details of trustees and ultimate beneficiaries, were characterised by high levels of confidentiality, making them high-risk vehicles for tax-related risks such as tax evasion.





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Tax Procedures

Amendment of self-assessments with respect to input VAT to be limited to a 6-month period

The measure

The Bill proposes to amend Section 31 of the TPA to restrict amendments to a taxpayer's VAT self-assessment so that input tax is only allowable for deduction within six (6) months after the end of the tax period in which the supply or importation occurred.

Who will be affected

All VAT-registered taxpayers

When

Effective 1 July 2022

Our view

The proposal seeks to align the time-limit for claiming of input VAT in amended VAT returns to the provisions of Section 17 of the VAT Act, which provides that input VAT can only be claimed within six (6) months of the supply or importation with respect to which input VAT was incurred. In our view, this is an attempt to reverse the effect of the judgement in the case of *"Highlands Mineral Water Limited Vs The Commissioner of Domestic taxes"*, where it was ruled that, the taxpayer could claim input VAT, if incurred within six months of the date of the return period. The reference was to the return period and not the date of the transaction. Whereas in the proposed amendment, the reference point is the date of the transaction to the date of amendment.

This proposal will lock out many taxpayers from claiming input VAT in their amended returns. This will disadvantage taxpayers who obtain information or the requisite documentation relating to a supply or importation more than 6 months after the transaction date. The proposed limitation is inconsistent with the TPA, which allows a VAT return to be amended by the taxpayer within five (5) years from the date of the original return. It therefore means that a taxpayer can only amend a VAT return if it leads to additional liability and disadvantages a taxpayer who has genuine VAT inputs.





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Tax Procedures

Property other than land or building to be used as security for unpaid tax

The measure

The Bill proposes to repeal Section 40 of the TPA and replace it with a new section, which provides that where a taxpayer fails to pay a tax, the Commissioner General shall be empowered to issue directives requiring Registrars of ships, aircrafts, motor vehicles and any other property that may be used as security for unpaid taxes to restrict disposal or transaction of these assets upon receipt of direction from the Commissioner. Presently, the TPA only empowers the Commissioner General to direct the Land Registrar to restrict the disposal of land belonging to taxpayers with tax arrears.

Where a taxpayer fails to pay the tax liability within two (2) months after receipt of the notification, the Commissioner may, at the taxpayer's expense, dispose the property to recover the tax.

Who will be affected

All taxpayers

When

Effective 1 July 2022

Our view

Presently, Section 40 of the TPA only provides for the use of land or buildings as security for unpaid taxes. The intention of the proposed amendment is to widen the scope of this provision to secure unpaid tax revenue due from taxpayers who may have assets other than land.

Although this proposal is intended to enhance revenue collection by providing the KRA with more options to recover taxes, we believe it could also infringe on the taxpayers' property rights. Further, it might slow down transactions involving such assets, as it takes long to lift such caveats upon settlement or recoveries of the taxes in question. Additionally, the two-month period within which a taxpayer ought to settle the outstanding tax, failing which their property will be disposed, is rather short. We note also the new Section 40 seems to overlap with certain provisions of Section 41, as regards "distress orders".



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Tax Procedures

New rules to govern the application for refund of overpaid tax

The measure

The Bill proposes to repeal Section 47 of the TPA and replace it with a new Section, which provides that where a taxpayer has overpaid a tax under any tax law, the taxpayer may apply to the Commissioner to either:

- Offset the overpaid tax against future tax liabilities; or
- Refund the overpaid tax within 5 years, or 6 months in the case of VAT, after the date on which the tax was overpaid.

Upon receipt of an application for refund or set-off, the Commissioner must make a determination regarding whether to approve or reject it within ninety (90) days.

Where the Commissioner approves a refund of cash, the same must be paid within a period of two years from the date of the application, failure which, the Commissioner shall pay interest at 1% per month or part thereof until the date it is refunded to the taxpayer.

Any taxpayer aggrieved by the Commissioner's decision with respect to this section can appeal to the Tax Appeals Tribunal ("TAT") within thirty (30) days of the date of the decision.

Who will be affected

All taxpayers

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Tax Procedures

New rules to govern the application for refund of overpaid tax (Cont.)

Our view

The proposed changes are progressive and provide a welcome relief for taxpayers who have reeled from the effects of the controversy surrounding the interpretation of current Section 47 and the confusion occasioned by the ruling in the case of '*National Bank of Kenya Vs Commissioner of Domestic Taxes' at the TAT*, which led to KRA issuing numerous additional assessments.

Accordingly, the proposed amendment is a welcome reprieve to taxpayers, as it provides more certainty concerning the utilization of overpaid tax. Crucially, the proposal also offers additional benefits to taxpayers, including:

- A taxpayer will have the choice between either a cash refund, or to utilize the overpaid tax against future tax liabilities; and
- The decision by the Commissioner to either accept or reject a refund application will be an appealable decision before the TAT. Presently, refund decisions are "tax decisions" under the TPA, meaning that an aggrieved taxpayer can only object the decision to the Commissioner before seeking recourse at the TAT.





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Tax Procedures

New rules to govern the application of refund of tax paid in error

The measure

The Bill proposes to introduce Sections 47A and 47B to govern the refund of tax paid in error. As a consequential amendment to this addition, the provisions governing refund of tax paid in error in the VAT Act, 2013 are also proposed to be repealed, such that all refunds of tax paid in error are governed by the TPA.

Specifically, the proposed amendment provides that:

- Where a tax is paid in error, the Commissioner shall, upon application by the taxpayer, refund such tax. Refunds of tax paid in error shall be governed by the same rules proposed to govern refunds of overpaid tax, including that a taxpayer can choose between either a cash refund or for the overpaid tax to be utilized against future liabilities;
- Where a tax is paid in error because the exemption or zero-rating of a supply was not effected due to circumstances beyond the taxpayer's control, the Commissioner shall refund such tax as well.

Who will be affected

All taxpayers

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Tax Procedures

New rules to govern the application for refund of tax paid in error (Cont.)

Our view

The proposed amendment will provide certainty on the rules governing the application of refunds of tax paid in error. Presently, the TPA vide Section 47 only provides for refunds of overpaid tax. Accordingly, most refunds of tax paid in error, other than those relating to VAT, have been erroneously anchored on Section 47, owing to the lack of an applicable provision. Furthermore, there has been confusion in KRA regarding the regime and officers responsible for processing such refund. The proposal will thus provide legal backing for refund applications relating specifically to tax paid in error.

The proposed amendment will also provide much-needed assurance to taxpayers, who, owing to delayed updates to the iTax system or other extraneous factors, are unable to benefit from the exemption or zero-rating of a supply granted by the law. The effect of this is that some taxpayers have paid more tax than ought to be paid. Such taxpayers will now have a legal recourse to seek refunds of tax paid in error.





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Tax Procedures

Timelines governing decisions to be issued by the Commissioner relating to Objections

The measure

The Bill proposes to amend Section 51 of the TPA, which governs objections to tax decisions, by introducing the following changes:

- Deletion of the word “immediately” from Section 51(4) and substituting therefor the words “fourteen days”. The effect of this amendment is to increase the timeframe within which the Commissioner ought to notify a taxpayer about the (in)validity of their objection to two weeks;
- Amending Section 51(7) to require the Commissioner to consider an application for extension of time to lodge an objection. The Commissioner will also be required to issue a decision on such an application within 14 days. The provision as presently drafted has no timelines for the Commissioner’s decision and appears to grant the Commissioner the discretion to consider the application or not.
- Amending Section 51(11) of the TPA to require the Commissioner to issue an objection decision within one cycle of 60 days from the date of receiving a valid notice of objection from a taxpayer.
- Introducing Section 51(12), which provides that a person dissatisfied with the decision of the Commissioner under Sec 51(11) may appeal to the TAT within 30 days

Who will be affected

All taxpayers

When

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Tax Procedures

Timelines governing decisions to be issued by the Commissioner relating to Objections (Cont.)

Our view

The proposed amendments seek to cure the ambiguities inherent in the provisions governing objections and decisions made thereunder by the Commissioner. These ambiguities have been the subject of several decisions at the TAT and the High Court (“HC”). The proposed amendments largely align with the pronouncements of the TAT and the HC in those cases. Specifically, the ambiguities that will be cleared up by the proposed amendments are:

- The “immediacy” test relating to invalidation notices: as currently drafted, the TPA requires the Commissioner to notify the taxpayer ‘immediately’ where it is determined that an Objection has not been validly lodged. Accordingly, invalidation notices issued days or months after the objection is lodged have been successfully challenged before the TAT. As the Commissioner has been unable to meet this timing threshold, the proposed amendment will grant the Commissioner 14 days to notify a taxpayer whether their objection is valid or not.
- The time limitation for Objection Decisions: although the TPA presently provides a time limit of 60 days for the Commissioner to issue an objection decision, it also allows the Commissioner to send several requests for additional information, and any such request provides the Commissioner with additional 60 days to make a decision. By capping the time limit to one cycle of 60 days, the proposed amendment will facilitate speedy dispute resolution thereby easing the time, cost and administrative burden shouldered by the taxpayers engaged in tax disputes.
- However, it is unclear on how this should proceed in the event of an invalidly lodged notice of objection noting that section 51 (3) of the TPA on all relevant documents is not clearly defined. Nevertheless, the proposal may see the KRA conclude cases and recover taxes that are due sooner. Conversely, it may lead to more cases ending at the TAT due to Commissioner issuing objection decisions without considering all factors surrounding the case, due to time pressure, unwittingly turning the KRA into a conveyor belt.
- The bill appears to introduce Section 51(12), which overlaps with Section 52 regarding a persons’ right to appeal the decision issued by the Commissioner under section 51(11).





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Tax Appeals Tribunal

50% of disputed tax to be deposited before appealing the TAT's decision to the courts

The measure

The Bill seeks to repeal Section 32 of the Tax Appeals Tribunal Act (“TATA”) and replace it with Section 32(1), which shall provide that taxpayers aggrieved by the TAT’s decision should deposit fifty percent (50%) of the disputed tax in a special account at the Central Bank of Kenya (“CBK”) before filing the appeal at the High Court.

Once all appeals have been exhausted and the court has ruled in favour of the taxpayer, the Commissioner shall refund the amount within thirty (30) days of the matter’s final determination.

Who will be affected

All taxpayers with tax disputes at the Tax Appeal Tribunal (TAT).

When

Effective 1 July 2022

Our view

This proposal is bound to have far reaching negative repercussions as affected taxpayers may not have the cashflows to allow for such outlays. It is a departure from current practice, where taxpayers are only required to pay the amount not in dispute. If the proposal passes into law, it is likely to increase the cost of doing business as taxpayers may be forced to borrow money to meet the required deposits with the CBK and incur the associated finance costs. The deposits may be substantial going by the astronomical assessments that the KRA has been confirming that end up in the TAT.

Additionally, for a taxpayer who does not have 50% of the tax in dispute, this proposal could impede the taxpayers’ constitutional right to fair administration action and access to justice in line with Articles 47 and 48 of the Constitution of Kenya, 2010.

We believe this measure should be dropped as there are sufficient safeguards for the revenue authority to collect any taxes determined to be payable. Additionally, the Courts are empowered to determine if a taxpayer should place security for taxes in dispute by considering relevant factors presented by both parties to the dispute.





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Tax Appeals Tribunal

50% of disputed tax to be deposited before appealing the TAT's decision to the courts (Cont.)

Our view

In countries where this measure has been implemented in one form or another, it has been generally abused by some revenue authorities through issuance of inflated assessments to trigger significant payments by taxpayers. In addition, the process of getting back the deposits, in the event the taxpayer wins the case at the end, is a painful one.

In view of the above, we believe this proposal is retrogressive and should be dropped.





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Other measures

In addition to the tax measures, the Bill has also proposed the following changes. The changes are expected to come into force upon assent:

Capital Markets Act (Cap 485A)

The Bill proposes the following changes to the Capital Markets Act (Cap 485A):

- 1) Amendment of the definition of "Investment Advisor" in Section 2 by deleting subparagraph 3. The subparagraph restricts the total value of the portfolio that could be managed by investment advisors to that prescribed by the Authority from time to time. In our view, this move is aimed at eliminating the restriction of the value of portfolio that could be managed by investment advisors;
- 2) Amendment of section 29 (1) (a) by deleting "a company incorporated under the companies Act with such minimum share capital" and substituting it with "such legal entity as may be prescribed in the regulations. This change is aimed at allowing licensing of entities such as partnerships and sole proprietorships to serve as investment advisors; and
- 3) Amendment of section 29 (1) (c) by deleting the words "director and at least one employee who is the chief executive of the applicant company, have" and substituting them with "the director, chief executive officer or such other person who directs, conducts, manages or supervises the business of the applicant has". This change is targeted at limiting the qualification requirements for licensing to at least one person who could be a director, CEO or any other person charged with the management of the entity as opposed to the current provision that requires both the director and the CEO to fulfil the requirements for licensing





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Unclaimed Financial Assets Act

The Bill proposes the following changes to the Unclaimed Financial Assets Act:

- 1) Amending section 33 by capping the penalties payable under subsections 1, 4 and 5 to the value of the assets found to be reportable and deliverable;
- 2) Introducing a new section (section 33A) that provides for waiver of penalties, fines and audit fees in part or in full where:
 - a) The waiver is intended to facilitate the holder of the asset to disclose and deliver the undeclared asset to the Authority;
 - b) In the opinion of the Authority, there is justifiable reasons to do so; or
 - c) It is in the public interest to do so; and
- 3) Introducing a new section (section 33B) that provides for a Voluntary Unclaimed Financial Assets Disclosure Programme (VUFADP). The Programme shall run for 12 months and shall grant relief on penalties and interest relating to unclaimed assets where the holder discloses, reports or delivers the assets to the Authority in accordance with the section. Only assets held up to the 30th June 2022 shall be covered by the programme.

The Evidence Act (Cap 80)

The Bill proposes to amend section 133 of the Evidence Act to extend the privilege accorded to revenue officers from disclosing their sources of information regarding the commission of any offence against any of the laws specified in the First Schedule to the Kenya Revenue Authority Act, 1995.

The laws specified in the First Schedule to the Kenya Revenue Authority Act, 1995 include all laws that govern the administration and collection of taxes and duties in Kenya.

Currently, the privilege accorded to revenue officers only applies to commission of an offence against the law relating to public revenue or to income tax, customs and excise.





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The Statutory Instruments Act

The bill proposes to exempt statutory instruments issued under the 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 from the automatic revocation after the lapse of 10 years from the date the statutory instrument was created. Statutory instruments created pursuant to any other Act shall continue to expire on the earlier of:

- a) 10 years from the date the instrument is created;
- b) The date the instrument is repealed; or
- c) The date the instrument expires

The proposal to exempt tax related regulations from automatic expiry is a welcome move as it will provide certainty in the regulations governing tax administration, which is one of the key canons of taxation. Further, it protects revenue collection and mobilization by cushioning such regulations from automatic expiry.





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