Deloitte.

MAKING AN IMPACT THAT MATTERS since 1845

Tax & Legal Alert
November 2021

Keeping you in the loop

Specific excise duty rates adjusted for inflation

The Commissioner General ("CG") of the Kenya Revenue Authority ("KRA"), through Legal Notice No 217 dated 25 October 2021, published new excise duty rates on certain excisable goods with specific rates to take into account the average inflation for the last financial year of 4.97%. The new rates have been adjusted for inflation in accordance with Section 10 of the Excise Duty Act.

Background

Section 10 of the Excise Duty Act provides that the CG may, subject to approval by the Cabinet Secretary for the National Treasury (CS), adjust specific rates of excise duty to take into account inflation through a notice in the Gazette. The inflationary adjustment is calculated as the average rate of monthly inflation of the preceding financial year. In this financial year, the specific rates have been adjusted by the average inflation rate for the financial year 2020/2021 of 4.97%. The specific excise duty rates are adjusted annually and should take effect on 1 October of every year.

The Finance Act No. 8 of 2020 amended Section 10 of the Excise Duty Act to align it with the provisions of the Statutory Instruments Act with respect to publication and operation of statutory instruments. Specifically, Section 10 of the Excise Duty Act now clarifies that the above-mentioned notice should be laid before the National Assembly within 7 days after the date of publication. Further, the National Assembly is required to pass a resolution within 28 sitting days of the receipt of the notice.

Pursuant to the provisions of the Statutory Instruments Act, the CG , through a Public Notice dated 10 August 2021, invited members of the public and stakeholders to submit their views regarding the inflationary adjustment of excise duty rates.

Subsequently, the Ufanisi Centre filed a petition at the High Court to have petroleum products expunged from Legal Notice 217 on the basis that fuel is one of the biggest contributors to the current high cost of living. The High Court, through an order dated 27 September 2021, issued temporary conservatory orders quashing the CG`s decision to adjust excise duty rates on petroleum products pending hearing and determination of the matter.

In light of the foregoing, petroleum products are excluded from the list of products whose rates have been adjusted for inflation.

The list of products published in Legal Notice 217 is as outlined in the table below:

Tariff Description	Current Rate of Excise Duty (Ksh.)	New Excise Duty (Ksh.)
Fruit juices (including grape must), and vegetable juices, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter	11.59 per litre	12.17 per litre
Bottled or similarly packaged waters and other non-alcoholic beverages, not including fruit or vegetable juices	5.74 per litre	6.03 per litre
Beer, cider, perry, mead, opaque beer and mixtures of fermented beverages with non-alcoholic beverages and spirituous beverages of alcoholic strength not exceeding 6%	116.08 per litre	121.85 per litre
Powdered beer	116.08 per kg	121.85 per kg
Wines including fortified wines, and other alcoholic beverages obtained by fermentation of fruits	198.34 per litre	208.20 per litre
Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 6%	265.50 per litre	278.70 per litre
Cigars, cheroots, cigarillos, containing tobacco or tobacco substitutes	Shs.13,247.63 per kg	Shs.13,906.04 per kg
Electronic cigarettes	3,974.08 per unit	4171.59 per unit
Cartridge for use in electronic cigarettes	Shs.2,649.74 per unit	Shs.2,781.43 per unit
Cigarette with filters (hinge lid and soft cap)	Shs.3,312.96 per mille	Shs.3477.61 per mille
Cigarettes without filters (plain cigarettes)	Shs.2,384.24 per mille	Shs.2502.74 per mille
Other manufactured tobacco and manufactured tobacco substitutes; "homogenous" and "reconstituted tobacco"; tobacco extracts and essences	Shs.9,273.55 per kg	Shs.9734.45 per kg
Motor cycles of tariff no. 87.11 other than motor cycle ambulances and locally assembled motor cycles	Shs.11,068.23 per unit	Shs.12,185.16 per unit
Imported sugar confectionery of tariff heading 17.04	Shs.35 per kg	Shs.36.74 per kg
Imported white chocolate, chocolate in blocks, slabs or bars of tariff numbers 1806.31.00, 1806.32.00 and 1806.90.00	Shs.209.88 per kg	Shs.220.31 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	Shs.1,200 per kg	Shs.1,259.64 per kg

Our view

The adjustment of specific excise duty rates for inflation is geared towards ensuring that excise duty revenue generated from such goods grows in tandem with the general increase in price of goods. However, the Government should consider the impact the annual increase in excise duty may have on the demand of the affected excisable goods, how the change ultimately affects the excise duty revenue generated and the overall impact on economic growth. The Government should, for instance, conduct studies aimed at establishing the optimal tax rate of the goods, which would provide guidance on implementation of the inflationary adjustments. Section 10 of the Act is not couched in mandatory terms implying that the CG may decide if it is appropriate to adjust excise duty rates for inflation taking stakeholder input into consideration. To this end, the CG has the option to exclude sensitive products where increase in excise duty may for instance negatively affect the growth of the industry or reduce demand of the products.

The exclusion of petroleum products from inflationary adjustment is a welcome move that will provide the much-needed relief, albeit small, to majority of Kenyans who are directly or indirectly impacted by the price of fuel. This is particularly crucial at a time when the international prices of petroleum products have soared to a three-year high. Petroleum products play an important role in almost every sector of the Kenyan economy, and changes in the price of petroleum products generally increases the cost of living. The conservatory order issued by the High Court stopping the CG from adjusting the excise duty rates of petroleum products was timely. Taxes and levies make up a significant proportion of the prices of petroleum products. Considering the important role petroleum products play in the Kenyan economy, the Government should review the taxation policy of these products.

We note that Legal Notice 217 does not expressly specify the commencement date of the inflationary adjustment. Although the Excise Duty Act provides that the adjusted prices should take effect on 1 October of every year, Legal Notice 217 was published on 2 November 2021, and therefore a commencement date of 1 October 2021 would amount to retrospective application of the law. According to Section 23 of the Statutory Instruments Act, where the implementation date is not specified in the statutory instrument, the commencement shall be the date of publication of the instruments in the Gazette. This is likely to cause confusion amongst taxpayers and the revenue authority particularly where the revenue authority takes a contrary view.

Contacts for this alert

Fredrick Omondi
Tax & Legal Leader, Deloitte East Africa
fomondi@deloitte.co.ke

Lillian Kubebea
Tax & Legal Partner
lkubebea@deloitte.co.ke

Peter Njenga
Senior Manager, Tax
pnjenga@deloitte.co.ke