# Tax Alert

## Customs restricts goods eligible for bonded warehouses

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### Introduction

**In exercise of the powers granted under Regulation 64(k) of the East African Community Customs Management Act Regulations, 2010 ("the Regulations"), the Commissioner, Customs and Border Control ("Customs"), Kenya Revenue Authority ("KRA"), has through Gazette Notice no. 3530 ("GN") dated 13 May 2020, notified the public that certain goods will no longer be warehoused. The cessation of warehousing will be effective upon the expiry of 90 days from the date of the GN, i.e., from 12 August 2020.**

### Customs warehousing

The East African Community Customs Management Act, 2004 ("EACCMA") provides that imported goods liable to import duty may be warehoused without payment of the requisite duties. Such goods may be warehoused in a Government warehouse or a bonded warehouse (whether general or private), commonly referred to as Customs bonded warehouses. Goods which are warehoused may subsequently be cleared for *inter alia* home consumption, exportation, or for use as stores for aircrafts or vessels.

Customs bonded warehouses are operated under the supervision of Customs; bond security is executed to guarantee the deferred duties on the goods stored therein. Goods at the warehouse may undergo repackaging, breaking bulk and labelling, but their identity is largely preserved. Where the goods are entered for home consumption, duties are paid before release.

### Goods currently not warehoused

The Regulations specify goods that may not be warehoused. These are: acids, ammunition and arms for trade and business; chalks; explosives; fireworks; dried fish; perishable goods; combustible or inflammable goods (except petroleum products which are stored in approved facilities); and matches other than safety matches.

### Specific changes introduced by Customs

The GN has widened the scope of goods not to be warehoused by declaring the cessation of warehousing of the following goods with effect from 12 August 2020:

1. Foodstuffs in any form, fresh or preserved, including bulk commodities, except where these are used as ship stores and in duty free shops.
2. Ashes.
3. Lubricants and batteries including vehicle batteries.
4. Building and construction materials including stones, sand, paint, pipes, nuts, bolts, nails, tiles, metals, electrical fixtures and parts and tools.
5. Furniture, carpets, and floor coverings.
6. Cigarettes and tobacco (except those warehoused by local excise factories or imported by duty free shops and used as ship stores).
7. New and used clothing and textiles.
8. Denatured and undenatured spirits of tariff 2207.10.00 and 2207.20.00.
9. Cameras and phones except those warehoused for duty free shops.
10. Used footwear.
11. Office supplies ready for retail sale including stationery cartridges/ toners for pens and printers.
12. Toiletries and cosmetic products for retail sale including fragrances, powder, lotions, creams, lipsticks, hair colouring and hair care products except for those warehoused for duty free shops.
13. Second-hand motor vehicles.
14. New and used spares for motor vehicles.
15. Tyres for motor vehicles and motor-cycles.
16. Wines, spirits and other alcoholic beverages except those imported for sale in duty free shops and wines and spirits in bulk imported by licensed manufacturers of wines and spirits.
17. Any other goods which may be determined, at the Commissioner's discretion, to have a likely negative impact on the implementation of Customs laws and any other written laws.

## Impact of the changes

Warehousing typically provides businesses with benefits such as:

- Cash flow management: payment of import duty, including Value Added Tax ("VAT") and Excise duty, on warehoused goods is deferred until the goods are ready for local sale and can be cleared for home consumption.
- Stock management: stock levels may be managed conveniently, i.e., goods may be stored in a warehouse in readiness for stock replenishment without necessarily having to wait for new imports which may be fraught with delays, especially where sea freight is involved. This also ensures continuous production as raw materials are kept within the country rather than imported when required.
- Export planning: businesses that deal in exports have time to source for customers after which goods may be cleared from the warehouse directly for export without the requirement to pay duties.

Businesses which import and supply goods listed in the GN will therefore cease to enjoy the above mentioned benefits e.g., motor sector supplying motor vehicle and motor-cycle tyres and spare parts for motor vehicles; cigarettes and tobacco sector; and importers/distributors of wines, spirits and other alcoholic beverages. The businesses of warehouse owners will also be adversely impacted by the change in legislation.

The timing of the changes could not have come at a worse time considering the current global pandemic that has negatively impacted businesses' cashflows and employment opportunities; this is also contrary to the government's initiative of relieving businesses from an undue tax burden.

## Policy considerations

Businesses world over rely on bonded warehousing to manage cashflow and secure global supply chains. Bonded warehousing is one of the most effective tools in the hands of Customs to enable it carry out its core mandate of trade facilitation. The above restrictions are likely to have the undesired effect of making the country uncompetitive and less attractive to investors; and is counterproductive to the government's agenda of developing infrastructure to make Kenya a global and regional logistics hub.

Understandably, Customs is tasked with curbing illegitimate trade. However, in its efforts to ensure the proper enforcement of Customs laws and regulations, it must continually strive to facilitate legitimate trade.

The above said, the GN elicits some questions which remain unanswered, including:

- What will happen to the above listed goods which are currently stored in the bonded warehouses, will businesses be required to pay duties on the goods effective 12 August 2020?
- What will happen to businesses that currently use Kenya as a regional hub, will they be allowed to warehouse goods destined for the regional export market?

It is worth noting that in the recent past, we have observed Parliament annul changes to tax legislation on the basis that they were effected without taking the proposed changes through public participation as required under the Constitution of Kenya.

There is a risk that the changes communicated through the GN will be the subject of similar concerns.

## Conclusion

There is an urgent need for businesses that use Customs bonded warehouses in the country to assess the impact to their activities; including Customs warehouse operators.

The new rules are expected to potentially have a negative impact on multinational and local businesses that are involved in international trade activities, both in Kenya and in the wider Eastern Africa region, as well as on potential new investors.

We recommend that businesses further analyze the impact as well as the practical aspects of the new rules, with particular consideration to potential supply chain restructuring.

**Please feel free to get in touch with your usual PwC contact or any of our Customs and International Trade experts listed herein should you wish to discuss this further.**

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