Tax Alert

Highlights of the Finance Bill, 2022

Subsequent to the reading of the National Budget by the Cabinet Secretary of National Treasury on 7 April 2022, the Finance Bill, 2022 (“FB”, “The Bill”) was tabled to the National Assembly on 12 April 2022 for the first reading. The proposals in the Bill are significant and may have an impact on the businesses of several taxpayers. It appears that the National Treasury is continuing to pursue a policy of revenue mobilisation by increasing tax rates, expansion of tax base and reduction of tax exemptions and incentives.

The Bill proposes to amend the following Laws: Income Tax Act (“ITA”), Value Added Tax Act, 2013 (“VAT Act”), Excise Duty Act, 2015, Tax Appeals Tribunal Act (“TAT Act”), Tax Procedures Act (“TPA”), the Miscellaneous Fees and Levies Act, 2016 (“MFLA”), Evidence Acts, Capital Markets Act, Retirement Benefits Act, Insurance Act, Unclaimed Financial Assets Act, 2011 and the Statutory Instruments Act, 2013.

In this Alert, we provide an analysis of the changes proposed by the Bill. The effective date for these changes is 01 July 2022, unless specified otherwise in the sections herein.

Income Tax Act amendments

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Taxation of gains accruing to a non-resident from financial derivatives	The ITA currently does not have provisions on taxation of gains accruing to a non-resident from financial derivatives	A financial derivative is defined in the FB 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. Gains accruing to a non-resident person without a permanent establishment who has entered into a financial derivatives contract with a resident person shall be subject to withholding tax at a rate of 15% of the gains. The Cabinet Secretary for National Treasury and Planning ("CS") has been empowered to publish regulations for better implementation of this proposal.	In a bid to expand the tax base, the CS National Treasury proposed to subject to tax gains accruing to a non-resident from financial derivatives at a rate of 15%. Payments made to non-residents are only subject to tax in Kenya if they are deemed as being derived from Kenya. The drafting of this proposal does not appear to deem such gains accruing to a non-resident from financial derivatives as being accrued or derived from Kenya. Further, the use of the term "gains" instead of "payments" introduces some confusion as to whether the withholding tax is applicable on the gross payment to the non resident or the gain made by the non resident. Financial derivative trading is still relatively new in Kenya and its uptake is limited. Introduction of taxes may inhibit the growth of the NEXT Nairobi Securities Exchange derivatives market which was launched in 2019 to facilitate trading of derivatives in Kenya. The proposal is effective 1 January 2023.
Deductibility of foreign exchange losses as a trading receipt	The ITA currently provides for deduction of foreign exchange losses as an expense with the exception of foreign exchange losses realized with respect of a loan from a person who, alone or together with four or fewer other persons, is in control of that company if the highest amount of all loans by that company outstanding at any time during the year of income is more than three times the sum of the revenue reserves and the issued and paid up capital of all classes of shares of the company	The Finance Bill proposes deduction of foreign exchange losses as an expense with the exception of foreign exchange losses realized by a company whose gross interest paid or payable to related persons and third parties exceeds thirty percent of the company's earnings before interest, taxes, depreciation and amortization in any financial year.	The proposed amendment is aimed at bringing uniformity in the ITA following deletion of the thin capitalisation provisions and its replacement with the use of fixed profit ratios (i.e Earnings Before Interest Tax, Depreciation and Amortization("EBITDA")) to determine deductibility of foreign exchange losses. We note that only banks or financial institutions licensed under the Banking Act are exempted from this provision. This exemption was not extended to Micro Finance Institutions similar to what was done for the amendment relating to interest deductibility restrictions.

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Trusts	**Income taxable on beneficiaries** Any income chargeable to tax received by a trust is generally taxed on the trustee(s), as trustee or paid on behalf of the beneficiaries of the trust. As a result, amounts that are subsequently paid to the beneficiaries of the trusts will be deemed to have already borne income tax. *Section 11(3A) restriction* The Government introduced legislation through Finance Act 2021, restricting the tax paid income of beneficiaries from registered trusts to the following: • amounts 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 ten million shillings in the year of income; • other amounts the Commissioner may prescribe from time to time. The Third Schedule of the ITA was also amended introducing a 25% tax on deemed income of beneficiaries paid out of a trust. **Family Trust** The Finance Act 2021 further also introduced exemption on the taxation of income of registered Family Trust. Capital Gain Tax (CGT) and stamp duty exemption will also be applicable on the transfer of property where the property is transferred to the registered family trust. This appears to be precursor to the enactment of the Trustees (Perpetual Succession) Amendment Act, 2021 which legally recognised the concept of Family Trusts in Kenya.	The Bill proposes to reverse the restrictions introduced through Section 11(3A) on registered trusts. As such any income received by a beneficiary from a registered trust will be deemed to have already been taxed. The Bill further proposes to repeal the exemption from tax of income accrued in or derived from Kenya by a registered Family Trust. CGT and stamp duty exemption on property transfer have been retained.	The proposed amendment removes the restrictions on the amount and nature of the payments that can be paid out free of tax to beneficiaries. This reverts back to the pre-Finance Act 2021 position. Concerns still remain around the 25% tax on deemed income paid to beneficiaries which appears to be in conflict with the general taxation of trust income under the ITA. This provision should be expunged as it seeks to apply a second layer of taxation on income that has otherwise already been taxed at the level of the trust (trustee). The income tax exemption for family trusts that was introduced in 2021 was viewed as a progressive move by the Government to encourage the adoption of family trusts as a vehicle to consolidate and safeguard family property and ease the process of generational transfer. The withdrawal of the exemption after less than a year is rather surprising and does not reflect well on the certainty/stability of the fiscal environment in the country.

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Digital Service Tax	The ITA currently provides for a digital service tax ("DST") payable by non-resident person(s) 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. DST is currently applicable at the rate of 1.5% of the gross transaction value.	The Bill proposes inclusion of a caveat to the current ITA provision on DST that it shall not apply to a non-resident person with a permanent establishment ("PE") in Kenya. The Bill also proposes to increase the DST rate from the current 1.5% to 3%	The proposed exemption for non-residents with a permanent establishment in Kenya from DST is in line with the principle the National Treasury sought not to tax income already subject to in Kenya. This principle assumes that there is a strong direct correlation between the income attributable to a PE and the income earned by the head office and hence foregoing the DST charge would be compensated by the income tax collected from the PE. This is however unlikely to be the case in respect of large digital companies. The proposed increase in the DST rate from 1.5% to 3% appears to be quite high as it represents the doubling of a tax rate within 12 months of its introduction. A more gradual increase in the DST rate would have been more consistent with a tax policy that provides a measure of tax certainty to taxpayers.
Deductibility of donations to charitable organizations	Deduction of donations as an expense is currently limited to donations made to charitable organizations registered under the Societies Act or Non-Governmental Organizations Co-ordination Act, 1990 and whose income is exempt from tax under Paragraph 10 of the First Schedule to the ITA or any project approved by the cabinet secretary responsible for finance	The FB provides for deduction of any donation in that year of income to a charitable organization whose income is exempt from tax under Paragraph 10 of the First Schedule to the ITA or any project approved by the Cabinet Secretary responsible for matters relating to finance	Donations to trusts and companies limited by guarantee will now be deductible provided the said entities are exempt from tax under Paragraph 10 of the First Schedule to the ITA. Currently, such tax deductions are restricted to donations made to entities registered under the Non-Governmental Organizations Coordination's Act or Societies Act. This is a welcome move in recognition of the pivotal role played by charitable societies in Kenya.
Exemption of microfinance institutions from interest restriction	The ITA currently limits deductibility of interest expense incurred by microfinance institutions to 30% of Earnings Before Interest Tax, Depreciation and Amortization("EBITDA").	The Bill proposes to exempt microfinance institutions licensed under the Microfinance Act, 2006 from the interest restriction.	The proposed change will go a long way in aligning tax treatment of interest expense across the financial sector. Currently, Banking institutions and Small and Medium Enterprises are the only entities exempt from such interest restrictions. We note that there was no amendment to the restriction of interest on financing provided by non related parties (e.g third party banks). This remains a provision that continues to penalise third party financing which is a legitimate cost wholly and exclusively incurred in the production of income.

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Ascertainment of gains or profits of business in a preferential tax regime.	The ITA currently provides that where there are dealings between a resident entity operating in a preferential tax regime and a related resident person not in the preferential tax regime, which leads to no profits/gains or less gains for the related party not resident in the preferential tax regime than would ordinarily be the case absent the relationship, the gains or profits of that resident person from that business shall be deemed to be the amount that might have been expected to accrue if the course of that business had been conducted by independent persons dealing at arm's length. The ITA further defines "preferential tax regime" to mean any legislation, regulation or administrative practice which provides a preferential rate of taxation to such income or profit, including reductions in the tax rate or the tax base.	The Bill proposes to increase the scope of dealings subject to the preferential tax regime provision to include where a resident person carries on business with • A non-resident person located in a preferential tax regime;or • An associated enterprise of a non-resident person in a preferential tax regime; • Or permanent establishment of a non-resident person operating in Kenya where the non resident person is located in a preferential tax regime The Bill also proposes amendment to the definition of the term "preferential tax regime to include foreign jurisdictions which: • Does not tax income; • Taxes income at a rate less than 20%; • 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, its beneficial owners of income or capital, financial disclosure or regulatory supervision	The proposed amendment seeks to expand the definition of the term "preferential tax regime" to cover foreign jurisdictions where there is no tax or nominal tax. In respect of transactions with related parties, such transactions would have been caught under the current transfer pricing provisions. However, it is important to note that the proposed definition as to what constitutes a "preferential tax regime" is quite broad and could capture genuine third party transactions thus expanding the scope of transactions which the KRA could review when testing the arm's length principle. There is no clarity as to the impact of the extension of the arm's length principle to third parties. In particular it is unclear whether this means that taxpayers would be required to maintain transfer pricing documentation in relation to third parties. Such a consequence would impose an impractical and burdensome obligation on taxpayers and would run contrary to the idea that taxpayers can freely transact with non resident parties regardless of the domicile of such non resident parties. The proposal is effective 1 January 2023.
Requirement for members of a Multinational Enterprise ("MNE") Group to file Country-by-Country Reports ("CbCR").	The ITA limits the requirement for CbCR filing to only Ultimate Parent Entities ("UPEs) of an MNE group that are **resident in Kenya.** As drafted, the provisions would not cover an MNE Group whose UPE is resident outside of Kenya effectively making MNE Groups whose ultimate holding company is tax resident outside of Kenya to fall out of scope for CbCR reporting.	The Finance Bill expands the scope of CbCR reporting to cover UPEs that are tax resident in Kenya and also: • Constituent Entities; and • Surrogate Parent Entities resident in Kenya that have been appointed by the MNE Group.	The proposed amendment will cover MNE groups that have a Constituent Entity or Surrogate Parent Entity that is resident in Kenya. This means that subsidiaries that are MNE members that meet the revenue threshold may now be required to file a CbCR return in Kenya. We provide below additional comments on circumstances in which such entities may be required to file.
Definition of Ultimate Parent Entity ("UPE")	The ITA currently contains a UPE definition identical to the one proposed by Finance Bill 2022. This UPE definition requires that the entity is not controlled by any other entity within the MNE group and that it is also tax resident in Kenya.	The UPE definition proposed in the Finance Bill 2022 is identical to the UPE definition contained in the ITA.	It is noted that maintaining the requirement that the UPE is resident in Kenya will create contradictions and inconsistencies to other sections which do not require the MNE Group to have a UPE resident in Kenya in order for the filing requirement to be operational.

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Requirements to file CbCR reports by UPEs, Constituent Entities and Surrogate Parent Entities	The ITA limits CbCR filing requirements to UPEs resident in Kenya.	The Finance Bill proposes CbCR filing requirements for both UPEs and Constituent Entities resident in Kenya. Further, the filing deadline of 12 months after the end of the financial year has only been made in reference to the UPE.	The proposals contain three types of entities that may file a CbCR - the UPE, the Constituent Entity and the Surrogate Parent Entity. However, the filing requirement appears to have erroneously been limited to a UPE and Constituent Entity while the filing deadline appears to have been limited to only cover the UPE. It is recommended that filing requirements and deadlines are extended to also cover the Surrogate Parent Entity and the Constituent Entity.
Turnover threshold for MNEs in scope for CbCR reports – KES 95 billion	The current CbCR provisions contained in the ITA do not cover the revenue threshold for MNEs.	The Finance Bill proposes the CbCR threshold to cover MNE Groups with a consolidated turnover of KES 95 billion. This is approximately EUR 750 million.	The proposal to have the threshold at KES 95 billion is a welcome move and is in line with the OECD's recommendation that the threshold should be at EUR 750 million or the local currency near equivalent. This is because CbCR reporting was intended to cover the largest MNEs groups in the world who control approximately 90% of corporate tax revenues and hence represents a good balance between reporting burden and benefit to tax administrations. It is noted that Zambia and South Africa have adopted the OECD threshold in EUROs while Nigeria has adopted the Naira equivalent as at the date of enactment.
Requirement by a Constituent Entity of an MNE Group with a turnover of more than KES 95 billion to notify the Commissioner of the entity within the MNE groups that is responsible for the CbCR report	Currently, the ITA does not impose CbCR requirements on a Constituent Entity and there is therefore no provision in the ITA that requires a Constituent Entity to notify the Commissioner which entity within the MNE is required to file a CbCR report.	The proposal requires a Constituent Entity of an MNE Group with a turnover of more than KES 95 billion to notify the Commissioner in the form that the Commissioner may specify, whether the Constituent Entity is the Ultimate Parent Entity or a Surrogate Parent Entity. Where it is neither of these two, it is required to notify the Commissioner of the identity of the Ultimate Parent Entity or Surrogate Parent Entity. This notification is required to be done by the last day of the reporting financial year of the MNE Group.	This provision is intended to furnish the Commissioner with information as to whether the Constituent Entity resident in Kenya has responsibility for filing the CbCR report or whether the filing requirement is with another member of the MNE group . This responsibility would be with either the UPE or the Surrogate Parent Entity. To ease the administrative burden, it would be preferable for this notification to be done as part of the annual corporate income tax return. The annual corporate income tax is due 6 months after the end of the financial period of the taxpayer . This is before the CbCR return which is proposed by the Finance Bill to be due 12 months after the end of the financial period of the taxpayer. There would therefore be no gaps with a notification at the time of filing the return as the Commissioner will have information on which entity within the MNE group has the CbCR reporting obligation prior to the due date for filing the CbCR return.

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Prescription of the circumstances in which a Constituent Entity of an MNE that is resident in Kenya is required to file a CbCR return.	The ITA did not contain any such provisions as it only envisaged a UPE resident in Kenya to have CbCR filing obligations.	The proposal is for a Constituent Entity to file the CbCR return only in the following exceptional circumstances: • Where a non-resident surrogate parent entity has not filed the CbCR with the competent authority of its tax jurisdiction • The jurisdiction of the non-resident surrogate parent entity does not require filing of CbCR • The competent authority of the jurisdiction of the non-resident surrogate parent entity does not have an agreement for exchange of information with Kenya • The competent authority of the jurisdiction of the non-resident surrogate parent has notified Kenya of a systemic failure	CbCR reporting requirements are intended to primarily fall on an UPE as it is the UPE that ordinarily has information on the economic activities of the members of the MNE Group in different jurisdictions. It is intended that the UPE should share this information with the competent authorities through government-to-government mechanisms such as bilateral tax treaties or tax information exchange agreements (TIEAs). Noteworthy that Kenya is a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes under the OECD and would be able to access such information. The purpose of this provision is for CbCR regulations to only fall on a Constituent Entity resident in Kenya in the exceptional circumstances where either the UPE or Surrogate Parent Entity has not filed the CbCR, or Kenya does not have an exchange of information agreement with the jurisdiction of the UPE or the Surrogate Parent. It is noted that the prescription of the circumstances in which a Constituent Entity resident in Kenya files a CbCR only refers to circumstances where the filing requirements are with the Surrogate Parent Entity and the Surrogate Parent Entity has not filed. The prescription of these circumstances should be expanded to also cover instances where UPEs have filing requirements but have not filed.

Income Tax Act amendments

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Requirement to file a master file and a local file.	There are currently no requirements to file a master file. With regard to the local file, the current requirement is for taxpayers to prepare a transfer pricing documentation report and submit this to the Commissioner upon the Commissioner's request. There is currently no prescription on the frequency of preparation of transfer pricing documentation.	The Bill proposes to introduce a requirement by an Ultimate Parent Entity or Constituent Entity to file a master file and a local file with the Commissioner in the manner in which the Commissioner specifies. This will be filed within 6 months of the last reporting financial year of the MNE group meaning it will be due together with the corporate income tax return.	OECD's BEPS Action 13 proposes a three-tiered standardized approach to transfer pricing documentation which includes preparation of a master file, a local file and CbCR. This approach will aid the Commissioner to gain visibility of the MNE's operations both in and outside Kenya. The adoption of the master / local file filing together with CbCR is therefore a full adoption by Kenya of the OECD's recommendations around transfer pricing documentation and tax transparency. Based on the proposed contents of the master file as contained in the Finance Bill, the master file is intended to give a high-level overview of the MNEs global operations while the local file provides more specific information on actual intercompany transactions. Given that Kenya already has transfer pricing documentation rules as contained in the income tax (transfer pricing) rules 2006 , it would be helpful for the local file requirements as mentioned in the Finance Bill to be linked to the TP rules so that entities do not have dual reporting requirements. In addition, as the purpose of the local file is to test compliance to the arm's length principle, the information to be provided should be expanded to include aspects such as comparability analysis and selection and application of the method. This is in line with the OECD Guidance on the contents of a local file. The Finance Bill now proposes that the local file and master file are filed within 6 months of the end of the financial period. It would be recommended that in order to reduce administrative burden, iTax's functionality is updated to have an option for uploading the master and local file together with the corporate income tax return. Finally, taxpayers will now be required to review and update where necessary the master file and local file on an annual basis hence increasing the compliance burden.

Income Tax Act amendments

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Increase in capital gains tax rate	The ITA currently imposes a capital gains tax at the rate of 5% on gains arising from transfers under the Eighth Schedule.	The Bill proposes to increase the capital gains tax from the current 5% to 15%.	The proposal seeks to increase the capital gains tax rate from 5% to 15% in a bid to shore up the tax collections by the KRA. This is likely to have an adverse impact on transfer of property especially as the tax legislation does not permit taxpayers to claim indexation allowance relief which allows the taxpayer to remove the effect of inflation on the value of assets . The proposal is effective 1 January 2023.
Investment Deduction Allowance	The ITA under the Second Schedule currently provides for investment allowance on capital expenditure incurred on machinery used for manufacture. The applicable rate being 50% in the first year of use and equal installments of 25% for years thereafter. Manufacture is defined by the Second Schedule to mean "the making, including packaging, of goods from raw or semi-finished goods, **or the generation of electrical energy for supply to the national grid,** or the transformation and distribution of electricity, but does not include design, storage, transport, administration or any other ancillary activity	The Bill proposes to amend the definition of the term manufacture under the Second Schedule to the ITA by deleting the words " **through the national grid"**	The intention of the proposal was to delete the phrase **"for supply to the national grid".** However it appears they are proposing to delete a phrase that was deleted by the Finance Act, 2021. If the proposal is amended and the correct phrase is deleted, the deletion of the requirement to supply the electrical energy to the national grid will be a welcomed move that will see several offgrid independent power producers as well as taxpayers who generate their own electrical energy qualify for investment deduction. This will have a significant impact on access to electricity across the country's remote areas as well as encourage businesses to generate their own electrical power.
Investment Deduction Allowance	The ITA further provides for investment allowance at the rate of 100% where: • The cumulative investment value in the preceding three years outside Nairobi City County and Mombasa County is at least two billion shillings provided that the rate of 150% applies to investments whose cumulative value for the preceding three years was two billion shillings on or before the 25th April 2020 • the investment value outside Nairobi City County and Mombasa County in that year of income is at least two hundred and fifty million shillings; or • the person has incurred investment in a special economic zone.	**The Bill proposes to limit application of this investment allowance rate to items listed in the Schedule. The Bill also proposes that the rates shall not apply to investments which due to the nature of their business have to be located in places outside Nairobi County and Mombasa County.**	The introduction of the limitation of the application of the 100% investment deduction rate limits the number of investments that are eligible to enjoy the investment allowance. Secondly, it opens leeway for KRA to misinterpret and abuse the provisions since there is no clarity as to what constitutes "the businesses must by their very nature have to be outside Nairobi or Mombasa". It is a highly subjectively worded section and provides little certainty to taxpayers as the provision can be interpreted broadly.

Tax Appeals Tribunal Act

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Payment of 50% of the disputed taxes before appeal to the High Court		The Bill proposes to amend the Tax Appeals Tribunal Act, 2013 to introduce a requirement for taxpayers to deposit with the Commissioner 50% of the tax in dispute tax in a special account at the Central Bank of Kenya before they file an appeal to the High Court against a decision of the Tax Appeals Tribunal("TAT"). The requirement to pay 50% of the dispute tax does not apply where the Commissioner is the one appealing to the High Court. Where all appeals have been exhausted and the court has ruled in favour of the taxpayer, the Commissioner is required to refund the monies deposited within 30 days after the determination of the court.	This proposal raises serious concerns, notably, the limitation of taxpayers' access to justice and their right of appeal. It creates a significant barrier for the taxpayer to appeal to the High Court as taxpayers are required to pay 50% of the disputed tax before appealing.A similar provision existed prior to the repeal of the VAT Act Cap No 476 where payment of the full amount disputed was demanded.This was later removed as it affected the ability for taxpayers to appeal against unfavorable VAT Tribunal decisions. Further, the proposed provision appears to usurp and fetter the powers of the High Court to make decisions in relation to the treatment of sums in disputes. Given that tax disputes can take several years to be resolved even before a single court, the provision is likely to significantly affect the cash flows of taxpayers. The deposit is only refunded upon exhaustion of all appeals which could include appeals to the Supreme Court of Kenya. It is noted that the provision may create certain disincentives in the dispute resolution process. It may incentivise KRA to raise exaggerated assessments with the view of collecting 50% of such assessments where it wins such a case at the TAT. It also provides the KRA with a powerful bargaining position in an alternative dispute resolution process as taxpayers may be intimidated to settle cases rather than pursue the litigation process. Finally, the provision also raises issues of fairness as it does not provide for interest at market rates that will be payable to the taxpayer in the event of a successful appeal.

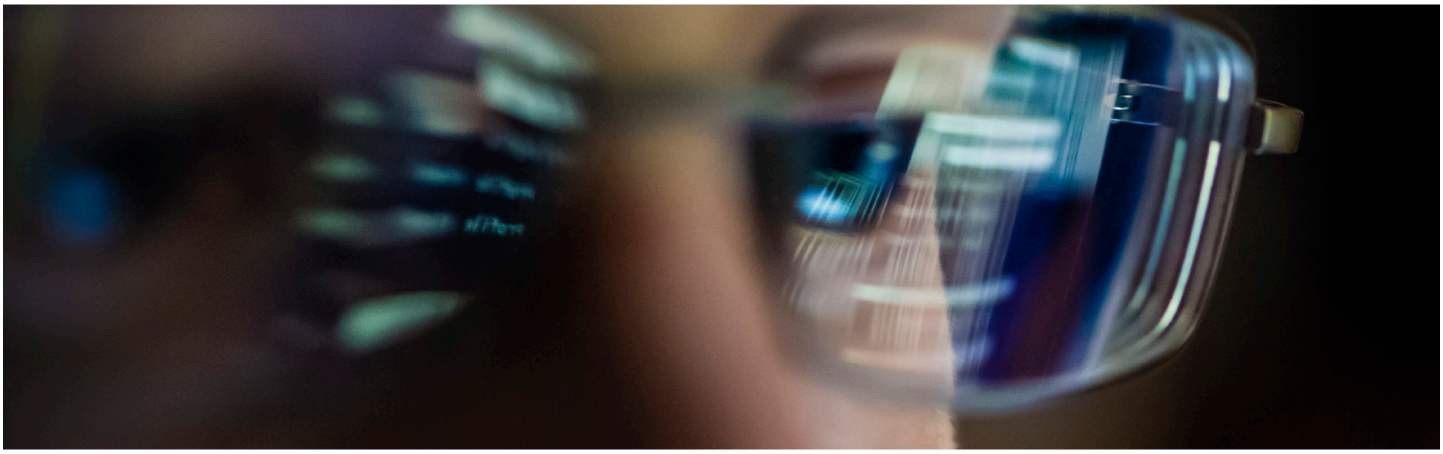
Tax Appeals Tribunal Act

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Offset or refund of overpaid tax	Section 47 of the TPA allows taxpayers to apply for a refund of overpaid tax within 5 years of the date which the tax was overpaid.	The Bill proposes to amend the current Section 47 of the TPA to allow taxpayers who have overpaid tax to apply to the Commissioner for the overpaid tax to offset the taxpayer's future tax liabilities or to apply for a cash refund of the overpaid tax. The KRA is required to make a determination on the taxpayer's application within 90 days.. Further, where a taxpayer has overpaid instalment tax under section 12A of the ITA ,the overpaid tax shall be offset against a taxpayer's future installment tax liability. Where the KRA fails to refund the overpaid tax within 2 years of an application for overpaid tax, the amount due will accrue interest at a rate of 1% per month. The Bill also allows refunds of overpaid tax, in the case of VAT, where applications are made within 6 months from the date of overpayment.	This proposal clarifies that taxpayers who have overpaid tax either have the option of applying for the tax overpayment to be utilised to offset future tax liabilities or apply for a cash refund. With regard to instalment tax overpayments, this proposal is welcome move, as a taxpayer will no longer be required to apply for offset as this should automatically be done by KRA. However, there is need for clarity on whether the automatic offset will only be applicable to future instalment tax liability payable in the same year. With regard to other tax overpayments (other than instalment taxes), the administrative costs on the taxpayer still remain a concern as the KRA can still subject the application for offset/ refund to an audit. Given that we operate a self assessment regime for the majority of the taxes in Kenya, the preference should have been to allow for automatic offset for all overpayments except in the case of refunds. The KRA would still retain the option of carrying out an audit within the stipulated 5 year timeline and where it is determined that the overpayment was invalid, KRA can demand the principal tax including penalties and interest through the various enforcement measures provided in the TPA. From a VAT perspective,this proposal is unfair to taxpayers. It would have been preferable to allow for applications to be lodged within a period of 5 years for overpaid VAT.
Input tax claims restricted to those incurred within 6 months upon amendment of Value Added Tax ("VAT") returns.	The TPA does not prescribe the period over which input tax is allowable for claim upon amendment of VAT returns.	The Bill proposes to include a provision, in relation to making amendments of VAT returns, stating that the input tax shall be allowable for a deduction within six months after the end of the tax period in which the supply or importation occurred.	This proposal seeks to regularise iTax's current configuration. New input tax claims cannot be introduced to an amended VAT return unless it is within the 6-month window.

Tax Appeals Tribunal Act

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Timeline for application for refund of VAT paid in error now capped at 6 months.	The VAT Act provides that, where, in respect of any supply, tax has been paid in error, the Commissioner shall refund such tax provided the application is made within 12 months from the date the tax became due and payable.	The Bill proposes to restrict the period to apply for VAT refunds to 6 months.	This proposal restricts the period of claims from the 12 months currently provided to 6 months which is an even shorter time period. In our view, the application for refund of VAT paid in error should be within the same timelines prescribed for other taxes, i.e., 5 years.
Refund of VAT paid in error on otherwise exempt or zero-rated supplies will be available only if circumstances leading to the payment were beyond the taxpayer's control.	Where VAT is erroneously paid on exempt or zero rated supplies, a refund may be obtained through the provision for refund of taxes paid in error as laid out in the VAT Act.	The Bill proposes to insert a new section 47B under the TPA as follows "The Commissioner may, upon approval by the Cabinet Secretary, refund a tax paid in error in any case where the supply is exempt or zero-rated under the Act but such exemption or the zero rating was not processed within the specified period due to circumstances beyond the control of the taxpayer."	This proposal appears to be targeted at situations where one needs approval or recommendations from relevant Ministries before the exemption or zero rating of certain supplies can apply. Taxpayers may experience delays in getting the relevant approvals/ recommendations through no fault of their own and as a result may end up paying the said taxes. This proposal will provide much needed relief for taxpayers in such situations.
Other taxes paid in error		The Bill proposes to allow taxpayers who have paid tax in error to seek a refund of the amounts subject to the provisions of the proposed Section 47. In the Bill, "tax paid in error" is defined to mean tax paid which the Commissioner is satisfied ought not to have been paid.	Currently there is no provision that expressly provides for refunds of taxes paid in error. Taxpayers currently apply for refunds of tax paid in error as tax overpayments. This is a welcome proposal as it will bring clarity with regard to recovery of tax paid in error.
Change of particulars for Trusts		The Bill proposes to require trusts to notify the Commissioner of any changes to the trust whether it is carrying out business or not.	The proposal clarifies the need for trusts to notify the Commissioner on any changes to their particulars.
Tax Personal Identification Numbers (PINs)		The Bill proposes to include registration of trusts as transactions for which a PIN is required.	Tax PINs will now be required for registration of trusts.

Tax Appeals Tribunal Act



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Security on property for unpaid tax	Section 40 of the TPA provides that the KRA may direct the Land Registrar in writing to register a security over the land or a building of a taxpayer who fails to pay tax as security for the unpaid tax.	The Bill proposes to empower the Commissioner to direct in writing the Land Registrar, the Registrar of Ships, Director General of the National Transport and Safety Authority ("NTSA") and any other person who the Commissioner is satisfied has authority to hold Property (collectively referred to as "Registrars") to register securities over properties owned by taxpayers as security for the unpaid tax. The Commissioner will be required to inform the taxpayer of their direction to the registrar within 7 days of the notification. Property is to be defined as land or building, aircraft, ship, motor vehicle, or any other property which the Commissioner may deem sufficient to serve as security for unpaid taxes. Under this proposal any restraints or securities registered before Commissioner's direction supersede the Commissioner's registration of a security. The Bill further proposes to empower the Commissioner or an authorized officer to recover unpaid tax by disposing the property subject to the security if the taxpayer does not pay the unpaid tax within two months of notification. The disposal to recover the unpaid tax would be either by public auction or private treaty. The taxpayer shall be required to bear costs associated with the Commissioner's recovery efforts. On disposal of the aforementioned property, the proposal stipulates that the tax priority of claims provided under the TPA should be adhered to.However, if the property is subject to a prior restraint or security, that prior restraint or security will have priority if the property is disposed of by the Commissioner	The proposal broadens the assets available to KRA that can be used as security for unpaid taxes to include ships, aircrafts, motor vehicles and any other properties that may be used as security for unpaid taxes. Currently, the only assets available to KRA as security for unpaid tax is land and buildings. The proposed provision also empowers the Commissioner to dispose of the properties if the tax is not paid within two months of the notification to the taxpayer. Although the disposal is to be done as provided for under the relevant Acts with respect to the property, we note that the timeline of two months does not align with the timeline provided for under the Land Act, 2012 and the Land Registration Act, 2012. The proposed provision seeks to protect security holders such as banks as any security registered prior will supersede the Commissioner's security. The amendment with regards to disposal of property is not aligned to the Insolvency Act regarding the priority of tax claims during the distribution of an insolvent company's assets to the company's creditors. Further, the High Court in the *Zarara Oil & Gas Company Limited (Miscellaneous Application E532 of 2021) [2021] KEHC 191 (KLR)* case has also ruled that treating KRA as a priority creditor by virtue of Section 34 of the TPA would undermine the basic principle underlying Insolvency.

Tax Appeals Tribunal Act

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Objection to tax decision	Section 51(4) of the TPA provides that the Commissioner should notify a taxpayer that their notice of objection has not been validly lodged. Section 51(6) of the TPA provides that the Commissioner may allow an application for extension of time to file a notice of objection. Section 51(7) of the TPA provides that the Commissioner is required to issue their objection decision within 60 days of receipt of the notice of objection or any further information the Commissioner may require.	The Bill proposes to require the Commissioner to inform the taxpayer that their notice of objection has not been validly lodged within 14 days. The Bill also proposes to require the Commissioner to inform the taxpayer of their decision on an application for extension of time within 14 days. The Bill further proposes to require the Commissioner to make an objection decision within 60 days from the date of receipt of a valid notice of objection.	The proposals with regard to objection to tax decisions is welcome as it will ensure efficiency in the dispute process. Taxpayers are to be notified of the validity of their notice of objection within 14 days. Further, the Commissioner will be required to consider and make decisions on applications for extension of time within 14 days. The Bill also seeks to reduce the amount of time it takes the Commissioner to issue a decision on a taxpayer's objection against a tax assessment. Currently, the Commissioner can request for documents from the taxpayer which extends the 60-day limit within which they are required to issue an objection decision. In this proposal,the Commissioner will be required to issue an objection decision within one cycle of 60 days of receiving a valid objection. The proposal will go a long way in ensuring efficiency in dispute resolution. Any requests by the Commissioner for further documentation will now have to be within the 60 day limit.

Value Added Tax amendments

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Amendment of the definition of "digital marketplace" within the VAT Act.	A "digital marketplace" is "an online platform which enables users to **sell or provide services, goods or other property** to other users."	"Digital marketplace" means "an online platform which enables users **to sell goods or provide services** to other users."	The proposed amendment will provide clarity. The supply of "other property" falling outside the supply of 'goods' and/or 'services' was not defined in the VAT legislation, which rendered the phrase superfluous.
Exclusion of digital marketplace supplies from the ambit of imported services.	The VAT Act provides under section 10(1) that if a supply of imported taxable services is made to any person, the person shall be deemed to have made a taxable supply to himself. Subsequent subsections prescribe how such a person should account for VAT on imported services.	The Bill proposes to introduce an additional provision to clarify that section 10(1) shall not apply to supplies made over the internet or an electronic network or through a digital marketplace as defined under section 5(7) of the VAT Act.	In our view, the proposed change will lead to a gap in revenue collection for business-to-business transactions. According to the Value Added Tax (Digital Marketplace Supply) Regulations, 2020 (Digital Marketplace Regulations), only persons making digital marketplace supplies in business-to-consumer transactions are expected to register and account for VAT in Kenya. Hence, in introducing this exclusion in section 10, business-to-business transactions by non-resident suppliers will fall outside the ambit of taxation.
Clarification on when input tax may be deducted.	Section 17(1) of the VAT Act provides that input tax on a taxable supply to, or importation made by, a registered person may, at the end of the tax period in which the supply or importation occurred, be deducted by the registered person, subject to the exceptions provided under the section, from the tax payable by the person on supplies by him in that tax period.	The Bill proposes to amend the section to read "input tax on a taxable supply to, or importation made by, a registered person may, at the end of the tax period in which the supply or importation occurred, be deducted by the registered person, **in a return for the period,** subject to the exceptions provided under this section, from the tax payable by the person on supplies by him in that tax period".	In our view the proposal seeks to cure a mischief in law that has led to taxpayers being allowed to claim input tax without filing VAT returns in dispute situations. In one such case, The Tribunal ruled that in the absence of any clear, certain and unambiguous legal provisions requiring the Appellant to file a VAT return in order to claim input deduction, the Appellant was entitled to deduct input tax incurred. The High Court has also held in another instance that section 17 is clear on the conditions provided for a Taxpayer to qualify for input VAT, and that the filing of VAT returns was not one of them.

Value Added Tax amendments

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Undefined documentation requirements by the Commissioner to validate deduction of input VAT.	The VAT Act provides a list of documents required for purposes of supporting input VAT claims including an original tax invoice, customs entry, customs receipt, credit note and debit note.	The Bill proposes to add to the already specified documents, "any other documentation that the Commissioner may require for the purposes of validating the input tax".	In our view, this additional requirement, which is subject to the Commissioner's discretion, will make accounting for input tax deduction an onerous exercise, similar to what taxpayers experienced during the validation process that followed objections to VAT Auto Assessments ("VAAs"). Then the Commissioner requested proof of payment, supplier confirmations, delivery notes, etc., over and above the prescribed documents. It is our view that the documents currently listed in the VAT Act suffice to allow for input tax deduction. This should especially be so seeing as KRA is implementing the Tax Invoice Management System ("TIMS") that will ensure sales information on electronic tax invoices will be relayed to KRA on a real/near real time basis. Else, the Bill should have proposed specific documents rather than giving the Commissioner powers to request for limitless documents.
Imposition of interest and penalties on import VAT to be similar to that applied on outstanding VAT on local supplies, and subject to the *in duplum* rule.	Late payment of import VAT attracts interest at the rate of 2% per month (typically compounded) as well as penalties at the rate of 5% and may, in aggregate, exceed the principal value of taxes due.	The Bill proposes that the provisions of the TPA, i.e., simple interest of 1% per month and late payment penalty of 5%, shall apply on late payment of import VAT. Further, the Bill proposes that in cases where interest becomes payable, it shall not, in aggregate, exceed the principal tax.	This is a welcome proposal as interest and penalties levied under the East African Community Customs Management Act, 2004, ("EACCMA") on outstanding duties, including VAT, tend to be punitive.
Provision for application of refund of tax paid in error deleted.	Section 30 provides that, where, in respect of any supply, tax has been paid in error, the Commissioner shall refund such tax provided the application is made within 12 months from the date the tax became due and payable.	Provision deleted.	The TPA has been amended to include this provision in a bid to have administrative requirements under one law.
VAT registration threshold does not apply to persons supplying imported digital services over the internet or an electronic network or through a digital marketplace.	Section 34(1) of the VAT Act provides that any person who has made or is about to make taxable supplies worth five million shillings or more in any period of twelve months, is liable for registration.	The Bill proposes a provision to clarify that section 34(1) shall not apply to persons supplying imported digital services over the internet or an electronic network or through a digital marketplace.	This is a welcome clarification without which the registration threshold would have applied given the Digital Marketplace Regulations could not prescribe rules that contradict the principal legislation.

Value Added Tax amendments

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Change in VAT status from exempt to standard rated	The following are VAT exempt: • Taxable goods for the direct and exclusive use in the construction and equipping of specialized hospitals; and • Taxable services for direct and exclusive use for the construction of specialized hospitals.	The Bill proposes to change the VAT status of the goods and services from exempt to standard rated (taxable at 16%). However, it also proposes to maintain any existing exemptions on goods and services for specialized hospitals, which are already approved by the Cabinet Secretary responsible for health, up until the relevant supply is made in full.	The proposed change will increase the cost of constructing and equipping specialized hospitals. In our view, the taking away of this exemption contradicts the Government's intention to improve the health sector.
Update of the VAT Act to remove defunct exemption on basic food items	The VAT Act, at paragraph 22 of Part A of the Second Schedule provides for zero rating of "The supply of maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour by more than ten percent in weight"	The Bill proposes to delete a paragraph in the First Schedule which states that the VAT exemption on the food items were, subject to paragraph 20 of the Second Schedule, suspended for 6 months from the date of assent of the Finance Act 2020 (30 June 2020).	We note that the paragraph 20 cited in the exemption clause was a temporary provision that allowed for zero rating of the food items for 6 months and the temporary provision lapsed at the end of 2020. However following the enactment of the Finance Act 2021, a permanent zero rating provision was introduced on the food items at paragraph 22 of the Second Schedule. In our view therefore, the deletion in the Exemption Schedule is aimed at cleaning up the law and averting confusion.
Exemption of pellets in addition to briquettes.	The VAT Act provides that sustainable fuel briquettes for household and commercial use shall be exempted from VAT.	The Bill proposes to include pellets in the exemption by amending the paragraph thus "Sustainable fuel briquettes **and pellets** for household and commercial use."	The proposal will widen the scope of exemption for sustainable fuel options which will further encourage the use of clean energy.
Introduction of VAT exemptions	The various supplies that the Bill proposes to exempt were subject to VAT at the standard rate of 16%.	The Bill proposes to exempt the following from VAT: • 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 health; • Medical oxygen supplied to registered hospitals; • Urine bags, adult diapers, artificial breasts, colostomy or ileostomy bags for medical use; • Input and raw materials used in the manufacture of passengers motor vehicles; • Locally manufactured passenger motor vehicles which are defined as "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."	In our view, these proposals are intended to cushion Kenyans against the effects of the ongoing pandemic and its ensuing social economic implications as the exemptions will ease the financial burden of various treatments. Further, the changes will boost local manufacturing by attracting additional investments to the automotive sector.

Value Added Tax amendments

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Change of status from zero rated to standard rated.	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 is zero rated.	The Bill proposes to delete this paragraph under the Second Schedule of the VAT Act.	This change is contrary to the Government's plan to improve health care. Further, it will increase the cost of firefighting for counties and other local authorities.

Excise Duty Act Amendments

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Commissioner to have discretionary powers in exempting products from annual inflationary adjustment	Section 10 of the EDA provides that the Commissioner may, with the approval of the Cabinet Secretary, by notice in the Gazette, adjust the specific rate of excise duty once every year to take into account inflation.	The Bill proposes to amend the section by adding a provision to the effect that "the Commissioner may, by notice in the Gazette and with the approval of the Cabinet Secretary, exempt specified products from inflation adjustment after considering the circumstances prevailing in the economy in that year in respect of such products."	The proposed change aims to empower the Commissioner to review the economic and social circumstances affecting certain products before effecting inflationary changes. However, in our view, it would have been better to hand over this discretionary role to the National Assembly, as opposed to the revenue authority. This proposal will be effective from 1 January 2023. Additionally, we would have expected the Government to propose a bi-annial inflationary adjustment.
Clarity in the definition of ex-factory selling price	The EDA in section 11(a) states that the ex -factory selling price of excisable goods shall be "if the excisable goods are sold by the manufacturer, other than to a purchaser in an arm's length transaction, the price payable by the purchaser".	The Bill proposes to amend the section by deleting the words "other than a purchaser" so that it will read ""if the excisable goods are sold by the manufacturer, in an arm's length transaction, the price payable by the purchaser"	In our view, this proposal will make the provision easier to understand by getting rid of duplicated terms.
Imposition of interest and penalties on Excise Duty for imports to be similar to that applied on outstanding Excise Duty on local supplies, and subject to the in *duplum* rule.	Late payment of Excise Duty on imports attracts compound interest at the rate of 2% per month as well as penalties at the rate of 5% and may, in aggregate, exceed the principal value of taxes due.	The Bill proposes that the provisions of the TPA, i.e., simple interest of 1% per month and late payment penalty of 5%, shall apply on late payment of Excise Duty on imports. Further, the Bill proposes that in cases where interest becomes payable, it shall not, in aggregate, exceed the principal tax.	This is a welcome proposal as interest and penalties levied under the EACCMA on outstanding duties, including Excise Duty, tend to be punitive.
Removal of electronic cigarettes and cartridges for use in electronic cigarettes from the ambit of specific Excise Duty rates.	The rate of Excise Duty on electronic cigarettes is Sh. 4,171.59 per unit while that on cartridges for use in electronic cigarettes is Sh. 2,781.43 per unit.	The Bill proposes to remove these items from the ambit of Excise Duty based on a specific rate per unit.	This proposal allows for the application of Excise Duty at an *ad valorem* rate of 40%. See subsequent section.

Excise Duty Act Amendments

Issue	#	Description	Excise Duty rate	Proposed rate	Comments/impact
Increases in the Excise Duty rates for various goods	**1.**	Fruit juices (including grape must), and vegetable juices, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter	Sh. 12.17 per litre	Sh. 13.30 per litre	In our view, the proposal to increase Excise Duty rates of excisable products by 10% to 100%, having factored in the recent inflationary adjustments published on 2 November 2021, is extremely punitive in spite of the drive to raise additional revenue through this tax head. *We note that amidst all the proposed increases, the Excise duty rate for “Cigars, cheroots, cigarillos, containing tobacco or tobacco substitutes” will decrease which is not typical for products in this category.
	2.	Cosmetics and beauty products of tariff heading No. 3303, 3304, 3305 and 3307	10%	15%	
	3.	Bottled or similarly packaged waters and other non-alcoholic beverages, not including fruit or vegetable juices	Sh.6.03 per litre	Sh. 6.60 per litre	
	4.	Beer, cider, perry, mead, opaque beer and mixtures of fermented beverages with non-alcoholic beverages and spirituous beverages of alcoholic strength not exceeding 6%	Sh. 121.85 per litre	Sh. 134 per litre	
	5.	Powdered beer	Sh. 121.85 per kg	Sh. 134 per kg	
	6.	Wines including fortified wines, and other alcoholic beverages obtained by fermentation of fruits	Sh. 208.20 per litre	Sh. 229 per litre	
	7.	Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 6%	Sh. 278.70 per litre	Sh. 335.30 per litre	
	8.	Cigars, cheroots, cigarillos, containing tobacco or tobacco substitutes*	Sh. 13,906.04 per kg	Sh. 13,296.6 per kg	
	9.	Cigarette with filters (hinge lid and soft cap)	Sh. 3,477.61 per mille	Sh. 3,825.99 per mille	
	10.	Cigarettes without filters (plain cigarettes)	Sh. 2,502.74 per mille	Sh. 2,752.97 per mille	
	11.	Other manufactured tobacco and manufactured tobacco substitutes; “homogenous” and “reconstituted tobacco”; tobacco extracts and essences”	Sh. 9,734.45 per kg	Sh. 10,707.88 per kg	

Excise Duty Act Amendments

Issue	#	Description	Excise Duty rate	Proposed rate	Comments/impact
Increases in the Excise Duty rates for various goods	**12.**	Motorcycles of tariff no. 8711 other than motorcycle ambulances and locally assembled motorcycles"	Sh. 12,185.16 per unit	Sh. 13,403.64 per unit	In our view, the proposal to increase Excise Duty rates of excisable products by 10% to 100%, having factored in the recent inflationary adjustments published on 2 November 2021, is extremely punitive in spite of the drive to raise additional revenue through this tax head. *We note that amidst all the proposed increases, the Excise duty rate for "Cigars, cheroots, cigarillos, containing tobacco or tobacco substitutes" will decrease which is not typical for products in this category.
	13.	Imported sugar confectionary of tariff heading 17.04	Sh. 36.74 per kg	Sh. 40.37 per kg	
	14.	White chocolate, chocolate in blocs, slabs or bars of tariff Nos. 1806.31.00, 1806.32.00, 1806.90.00	Sh. 220.31 per kg	Sh. 242.29 per kg	
	15.	Jewellery of tariff heading 7113 and imported jewellery of tariff heading 7117	10%	15%	
	16.	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	Sh. 1,259.64 kg	Sh.2,500 per kg	

Excise Duty Act Amendments

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Excise Duty now applicable on locally manufactured and imported glass bottles alike.	Excise Duty is applicable at the rate of 25% on imported glass bottles (excluding imported glass bottles for packaging pharmaceutical products). However, Excise Duty does not apply to glass bottles imported from any of the countries within the East African Community (“EAC”).	The Bill proposes to subject all glass bottles (whether imported or not) to Excise Duty at the rate of 25%. Glass bottles for packaging of pharmaceutical products will still be excluded.	The proposal is aimed at enhancing revenue collection for the Government by including locally manufactured glass bottles and doing away with the exclusion of glass bottles imported from the EAC which came about when the protectionist measure was first introduced and subsequently challenged at the East African Court of Justice.
More plastic items subject to Excise Duty	Excise Duty is applicable at the rate of 10% on “Articles of plastic of tariff heading 3923.30.00”.	The Bill proposes to add articles of plastic of tariff heading 3923.90.90, a residual tariff line for “other” articles, under the ambit of Excise Duty at the rate of 10%.	The proposal is not only aimed at discouraging the use of plastics, but at increasing Government revenue.
More potato products subject to Excise Duty	Excise Duty is applicable at the rate of 25% on “Imported potatoes, potato crisps and potato chips of tariff heading 07.01”.	The Bill proposes to expand the description of items subject to Excise Duty by revising it thus “Imported potatoes, potato crisps and potato chips of tariff heading 07.01 *and imported potatoes of tariff numbers 0710.10.00, 2004.10.00 and 2005.20.00”*	The proposal, which continues to propagate protectionism, will increase Government revenue.
New items added to the list of Excisable goods and services.	The various products proposed by the Bill were previously not subject to Excise Duty.	The Bill proposes to introduce Excise Duty on the following items at the specified rates: • Electronic cigarettes and other nicotine delivery devices - 40%; • Liquid nicotine for electronic cigarettes - Sh. 70 per millilitre; • Ice cream and other edible ice whether or not containing cocoa of tariff number 2105.00.00 - 15%; and • Fees charged on advertisement by television stations, print media, billboards and FM radio stations on alcoholic beverages, betting, and gaming, lottery and prize competitions - 15%.	In our view, the changes are largely meant to deter harmful practices by encouraging healthier diets and harmless recreation.

Excise Duty Act Amendments

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Increase of Excise Duty rates on specified services.	The EDA subjects betting, gaming, price competition and the lottery (excluding charitable lotteries) to Excise Duty at the rate of 7.5%.	The Bill proposes to increase the Excise Duty rates on the services from 7.5% to 20%	The change aims to discourage vulnerable groups, e.g., unwary youth from participation in betting, gaming, price competitions and the lottery, which are all very popular.
Exemption of excise duty on various goods.	The various products proposed by the Bill would otherwise be subject to Excise Duty.	The Bill proposes to exempt the following goods from Excise Duty: • Fertilized eggs of tariff numbers 0407.11 and 0407.19 imported by hatcheries, upon recommendation by the Cabinet Secretary responsible for matters relating to livestock. • Neutral spirit imported or purchased locally by registered pharmaceutical manufacturers upon approval by the Commissioner. • Locally manufactured passenger motor vehicles which will be defined similarly as in the VAT Act.	The application of Excise Duty on imported eggs only took effect from 1 July 2021 after which the Government realised that the new law had led to an insufficiency of eggs in the country. In our view, this is an example where tax changes are not well thought out prior to implementation and remedial measures are considered as an afterthought. The exemption of neutral spirit is meant to cushion pharmaceutical manufacturers from having to seek refunds as the process tends to take too long. The exemption of locally manufactured passenger motor vehicles from Excise Duty will spur growth in the automotive industry.

Miscellaneous Fees and Levies Act, 2016 amendments

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Clarification that refund of levies that remain unpaid by the Commissioner are also subject to penalties and interest as provided under the TPA.	Section 9B (b) of the MFLA provides that the provisions of section 47 of the TPA shall apply for purposes of the determination by the Commissioner of penalties and interests on fees that remain unpaid.	The Bill proposes to add the term "levies" in addition to "fees" within the provision.	In our view, this proposal will bring clarity that where the Commissioner has offset any unpaid tax against a refund and there are still outstanding levies, penalties and interest will continue to accrue on the outstanding levies.
Addition to goods subject to export levy	The item proposed by the Bill has previously not been subject to export levy.	The bill proposes to charge export levy at the rate of USD 175 per tonne on "Iron ores and concentrates, including roasted iron pyrites" of tariff number 2601.	In our view, this proposal is meant to safeguard the country's reserves of iron ore.
Reduction of export levy on raw hides and skins	The following goods are subject to export levy at the rate of 80% or USD 0.52 per kg: • 4101.20.00: Whole hides and skins, of a weight per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved • 4102.21.00: Raw skins of sheep or lamp (pickled, but not tanned, parchment-dressed or further prepared), without wool on whether or not split, other than those excluded by Note 1(c) to Chapter 41. • 4102.29.00: Other raw skins of sheep or lamb (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), with wool on, whether or not split, other than those excluded by Note (c) to Chapter 41. • 4103.20.00: Other raw hides and skins (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), whether or not debarred or split, other than those excluded by Note 1(b) or (c) to this Chapter, of reptiles.	The Bill proposes to change the rate of export levy on these goods from 80% or USD 0.52 per kg to 50% or USD 0.32 per kg	The proposed amendment is aimed at giving incentives to herders and pastoralists by encouraging exportation of raw hides and skins.

Miscellaneous Fees and Levies Act, 2016 amendments

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Reduction of export levy on raw hides and skins	• 4103.30.00: Other raw hides and skins (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), but not debarred or split, other than those excluded by Note 1(b) or 1(c) to this Chapter, of swine. • 4103.90.00: Other raw hides and skins other than of reptiles, swine, goats or kids. • 4104.19.00: Other tanned or crust hides and skins of bovine (including buffalo) or equine animals, without hair on, whether or not split, but not further prepared, in the wet state (including wet - blue). • 4301.60.00: Raw furskins of fox, whole, with or without head, tail or paws. • 4101.40.00: Hides and skins of equine animals. • 4101.50.00: Whole hides and skins, of weight exceeding 16kg. • 4101.90.00: Other, including butts, bends and bellies. • 4102.10.00: Raw skins of sheep or lamb (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), with wool on, whether or not split, other than those excluded by Note 1(c) to Chapter 41. • 4301.10.00: Raw furskins of mink, whole, with or without head, tail or paws. • 4301.80.00: Other raw furskins, whole, with or without head, tail or paws. • 4301.90.00: Heads, tail, paws and other pieces or cuttings, suitable for furriers' use. • 4302.11.00: Whole skins, with or without head, tail or paws, not assembled, of mink. • 4302.19.00: Other whole skins, with or without head, tail or paws, not assembled. • 4302.20.00: Heads, tails, paws and other pieces or cuttings, not assembled. • 4302.30.00: Whole skins and pieces or cuttings thereof, assembled.	The Bill proposes to change the rate of export levy on these goods from 80% or USD 0.52 per kg to 50% or USD 0.32 per kg	The proposed amendment is aimed at giving incentives to herders and pastoralists by encouraging exportation of raw hides and skins.

Miscellaneous Fees and Levies Act, 2016 amendments

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Change of period for adjustment for inflation for export levy.	The specific rate of export levy on goods specified in Part I of the First Schedule to the MFLA shall be adjusted for inflation at the beginning of every year.	The Bill proposes that the inflationary adjustment be done at a date not later than 1st October of every financial year.	In our view, this proposal will give room for adequate public participation regarding proposed inflationary adjustments.
Exemption from Import Declaration Fee ("IDF") and Railway Development Levy ("RDL") of inputs and raw materials used in the manufacture of pharmaceutical products	IDF and RDL apply on importation of inputs and raw materials used in the manufacture of pharmaceutical products at the rates of 3.5% and 2% respectively.	The Bill proposes to exempt from IDF and RDL inputs and raw materials imported by manufacturers of pharmaceutical products on the recommendation of the Cabinet Secretary responsible for matters relating to health.	In our view, this move is aimed at encouraging local manufacture of pharmaceutical products which advances one of the Big Four Agenda.

Employment taxes amendment

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Definition of the term fair market value.	The value of a benefit provided to an employee is measured as the higher of the cost to the employer or the fair market value of the benefit.	The Bill proposes to define the term fair market value to mean the comparable market price available in an open and unrestricted market between independent parties acting at arm's length and under no compulsion to transact, which is expressed in terms of money or money's worth.	The change will guide employers when providing non-cash benefits to employees in determining the taxable value of the benefits to avoid over or under declaration of taxes to the KRA.
Definition of the term permanent home.	Currently, the term "permanent home" is not defined in the ITA.	The Bill proposes to define permanent home to mean 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.	A permanent home is one of the tests applied in determining the tax residency status for individuals in Kenya. The proposed definition is a welcome move since it will introduce clarity in the legislation and enable Kenyans in the diaspora to easily determine their tax compliance requirements in Kenya.
Taxation of benefits from Employee Share Ownership Plans (ESOPs).	The ITA provides guidelines for the taxation of plans registered with the KRA as collective investment schemes within the meaning of the Capital Market Act, but does not provide guidelines for unregistered plans. As such, the taxable value of the benefits derived by employees from ESOPs is determined as follows: a) In the case of registered plans, the difference between the market value, per share, and the offer price, per share, at the date the option is granted by the employer. b) In the case of unregistered plans, the higher the cost to the employer and the fair market value of the benefit (where the fair market value is determined 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 option vest to the employee. Under both registered and unregistered plans, the benefit is deemed to accrue to the employee on the date the option vests.	As per the Bill, the taxable value of the benefit derived by employees from ESOPs shall be determined 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.	The Bill does not differentiate between registered and unregistered plans as far as the method for determining the taxable value of the benefit is concerned. Previously, employees under registered plans enjoyed more favorable tax treatment which ignored any appreciation of the share price between the date of grant and vesting. In addition, the tax point with respect to both registered and unregistered plans has been moved from the date of vesting to the date of exercise. The deferral of the tax point is a welcome move since employees will be in a position to fund their tax liability from the proceeds of selling the vested units. However, this also means that the taxable value of the benefit is likely to be higher where the underlying stock appreciates in value between the date of grant and the exercise date. This may be viewed by some as disadvantageous. For purposes of the provisions relating to taxation of ESOPs, the CS should also consider providing a definition of the term "exercise date".

Employment taxes amendment

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Amendment of the provisions relating to insurance relief	The ITA provides that a resident individual who proves, subject to other conditions, that he has paid a premium for an insurance made by him on his life, or on the life of his wife or of his child in a year of income and that the insurance is made with an insurance company which is registered in Kenya shall be entitled to an insurance relief currently at the rate of 15% of the premiums paid to a maximum of KES 60,000 per annum.	The Bill has proposed to substitute the term “wife” with “spouse”.	This will enable resident individuals to enjoy insurance relief with respect to premiums paid on life policies taken on the life of their significant others or partners in civil or customary marriages. To avoid any ambiguity in the interpretation and application of this provision, the CS should consider introducing a definition of the term “spouse”.
Harmonisation of the Commissioner’s powers to remit penalties under the Tax Procedures Act	The Commissioner may remit any penalty levied on an employer under Section 37 of the ITA for failure to deduct tax from employee emoluments, account for tax deducted, or supply the Commissioner with the prescribed certificate.	The Bill proposes to delete this provision.	Employers who wish to apply for the waiver or remission of any penalty charged under Section 37 of the ITA shall be required to apply in writing to the Commissioner under the general provisions relating to penalties as prescribed under Section 89 of the Tax Procedures Act.

Non-tax legislative changes

Some of the non tax legislative amendments contained in the Finance Bill, 2022 include the following:

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Definition of an investment Advisor **(Capital Markets Act)**	2. "Investment adviser" means any person (other than a bona fide officer, director, trustee, member of an advisory board or employee of a company as such) who, for remuneration - 3) pursuant to a contract or arrangement with a client, undertakes on behalf of the client (whether on a discretionary authority granted by the client or otherwise), the management of a portfolio of securities for the purpose of investment, where the total portfolio does not exceed the amount prescribed by the Authority from time to time;	Item (3) of the definition of 'investment adviser" has been deleted.	Currently, portfolio management falls under the categories of regulated services for which a service provider must be licensed. The proposal will have the effect of waiving the licensing requirement for portfolio management (including discretionary portfolio management).
Licensing Requirements of Securities Industry Licensees (Capital Markets Act)	29. Before granting any license or approval, the Authority in respect of a business that requires to be licensed or approved shall satisfy itself: a) that the applicant **is a company incorporated under the Companies Act, with such minimum share capital as the Authority may prescribe** or is duly constituted as a collective investment scheme; b) …. c) that at least one director and at least one employee who is the chief executive of the applicant company, have satisfied such minimum qualification requirements as may be prescribed	Before granting any license or approval, the Authority in respect of a business that requires to be licensed or approved shall satisfy itself: a) that the applicant is such legal entity as may be prescribed in the Regulations or is duly constituted as a collective investment scheme; b) …. c) that at least the director, chief executive officer or such other person who directs, conducts, manages or supervises the business of the applicant has satisfied such minimum qualification requirements as may be prescribed	Currently, all securities industry licensees have to be constituted as either companies limited by shares or as collective investment schemes. The proposal intends to open up the industry to alternative business forms such as partnerships in order to increase the number of providers of investment advisory services across the country. The proposal , if passed, will also allow single director companies to be licensed as investment advisors and only require a single person (whether a director or a Chief Executive Officer (CEO) or another person who manages the business) to satisfy minimum requirements for the entity to be a licensee of the Capital Markets Authority, rather than the previous provision requiring at least two people, being the director and the CEO, to satisfy minimum requirements before the company can be licensee under the Act.

Non-tax legislative changes

Issue	The current tax provision	Proposed change as per the Finance Bill, 2022	Comments/impact
Updating of the Insurance Act **(Insurance Act)**	10. (4) An insurer who, upon an investigation ordered under subsection (3)(a) is found to have disposed of any assets from a closed fund contrary to the provisions of section 21, or to have… (5) … (8) In this section the expression “closed fund” means a closed fund within the meaning of section 21	10. (4) An insurer who, upon an investigation ordered under subsection (3)(a) is found to have disposed of any assets from a closed fund contrary to the provisions of section 21A, or to have… (5) … (8) In this section the expression “closed fund” means a closed fund within the meaning of section 21A	The proposal has been introduced to cure a referencing issue. Section 21, which defines a “closed fund” was repealed by the Companies and Insolvency Legislation (Consequential Amendments) Act, 2015. The section referred to in the proposed amendment (section 21A), however, does not exist under the current Insurance Act.
Penalties on non-delivery of unclaimed financial assets **(Unclaimed Financial Assets Act)**	None	33A The Authority may, with the approval of the Cabinet Secretary waive payment of any of the penalties and fines under section 33, whether 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.	The proposal has been introduced to empower the Cabinet Secretary to waive the penalties and fines payable for non-delivery of unclaimed financial assets in justifiable circumstances.
Voluntary Disclosure Programme **(Unclaimed Financial Assets Act)**	None	A Voluntary Disclosure Programme (VDP) has been proposed under which a relief from penalties and interest relating to non-delivery of unclaimed financial assets shall be provided for 12 months from the date of commencement of the section.	The proposal has been made to encourage compliance with the Act by extinguishing any accumulated penalties and interest payable by holders of unclaimed financial assets that haven’t delivered them to the Unclaimed Financial Assets Authority.

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