

Tax and Regulatory Alert

Highlights of the Finance Bill, 2021

The Finance Bill, 2021 (the Bill) was published on 30 April 2021. The Bill proposes to amend the following Laws: Income Tax Act (ITA), Value Added Tax (VAT) Act, Excise Duty Act, Tax Procedures Act (TPA), the Miscellaneous Fees and Levies Act, 2016, Capital Markets Act, Insurance Act, Kenya Revenue Act, Retirement Benefits Act and Central Depositories Act.

In this year's Bill, few new taxes have been introduced in contrast to the previous years where a raft of new taxes including turnover taxes, minimum tax and the digital services tax were legislated into existence. While no new income taxes have been introduced, an excise tax has been proposed in respect of the Betting industry. This continues the trend of levying taxes on the Betting industry which is now one of the most highly taxed sector. Similar to previous years, the trend of reducing the scope of goods and services that are zero rated and VAT exempt continues in this Bill. This year has also seen some focus around tax procedures which are primarily geared towards increasing the scope of authority of the KRA and providing more powers to the Commissioner. These amendments under the Tax Procedures Act appear to be overly biased towards the KRA without taking into account the taxpayer's perspective and in some instances these provisions may be in conflict with other sections of the Tax Procedures Act and procedural rules contained in other statutes.

We provide below a detailed analysis of the changes proposed by the Bill.



Income tax amendments

The proposed changes in respect of the Income Tax Act (“ITA”) cover thin capitalisation rules, digital service tax and the limitation of treaty benefits provisions. Details of proposed changes are provided below.

Item	Current Provision	Proposed Amendment	Comments / Impact
Definition of “control”	The ITA does not have a definition of control.	<p>The term “control”, in relation to a person, has been defined to mean</p> <ul style="list-style-type: none"> (a) that the person, directly or indirectly, holds at least 20% of the voting rights in a company; (b) a loan advanced by the person to another person constitutes at least 75% of the total assets of the other person excluding loans from financial institutions; (c) a guarantee by the person for any form of indebtedness which constitutes at least 75% of the total indebtedness of the other person; (d) the person appoints more than 50% of the board of directors of another person; (e) the person is the owner of or has the exclusive rights over the know-how, patent, copyright, trade mark, licence, franchise or any other business or commercial right of a similar nature; (f) the person or a person designated by that person supplies at least 90% of the supply of the purchases of another person; (g) the person purchases or designates a person to purchase at least 90% of the sales of another person; or, (h) the person has any other relationship, dealing or practice with another person which the Commissioner may deem to constitute control; 	<p>The Tax Laws Amendment Act 2020 No.1 deleted the definition of the term control when it overhauled the second schedule. The Finance Bill proposes to introduce the new definition of the term control under Part 1 of the ITA which deals with definitions of various terms.</p> <p>The new definition is quite broad and exhaustive and extends to shareholding structure, board composition and voting rights but also take into account whether the entity is majorly financed by another person who is not a financial institution and whether the entity is solely reliant on know-how, patent, copyright, trade mark, licence, franchise which the other person is wholly dependent on to carry out his business.</p> <p>Further, the new definition considers whether an entity sells the majority of their supplies to one particular person or purchases its supplies from one particular person.</p> <p>There is a risk that the new definition may capture entities which are truly independent and do not have any ties/ relations to each other but due to the nature of their transactions one is deemed to have control over the other entity. This would include a captive contract manufacturer who supplies to one customer or a captive specialised services provider where there is only one customer.</p> <p>The widened definition of control expands the definition of related parties for the purpose of transfer pricing and the applicability of deemed interest.</p>

Income tax amendments

Item	Current Provision	Proposed Amendment	Comments / Impact
Definition of “infrastructure bond”	The current legislation does not have a definition of infrastructure bond.	“infrastructure bond” has been defined to mean a bond issued by the Government for the financing of a strategic public infrastructure facility including a road, hospital, port, sporting facility, water and sewerage system, or a communication network;	The new definition is prescriptive as to which bonds qualify as an infrastructure bond. It may have been preferable for the definition to have relied on the Government positively stating whether or not the bond is issued as an infrastructure bond. As it stands, the definition requires the taxpayer to investigate the purposes for which a bond is being issued by the Government to determine whether it qualifies as an infrastructure bond. This may be difficult where the purpose of the issue of such a bond is mixed (both infrastructure and non infrastructure needs) or where there is no explicit statement relating to the purpose of issue of the bond.
Definition of “permanent establishment”	<p>The term “permanent establishment” is defined to include-</p> <p>(a) a fixed place of business through which business is wholly or partly carried on;</p> <p>(b) a building site, or a construction or installation project which has existed for six months or more where that person wholly or partly carries on business; or</p> <p>(c) a dependent agent of a person who acts on their behalf in respect of any activities which that person undertakes in Kenya.</p>	<p>The term “permanent establishment” has been expanded to include-</p> <p>(a) a fixed place of business through which business is wholly or partly carried on;</p> <p>(b) a building site, construction, assembly or installation project or any supervisory activity connected to the site or project, but only if it continues for a period of more than one hundred and eighty-three days;</p> <p>(c) the provision of services, including consultancy services, by a person through employees or other personnel;</p> <p>(d) an installation or structure used in the exploration for natural resources;</p> <p>(e) a dependent agent of a person who acts on their behalf in respect of any activities which that person undertakes in Kenya;</p> <p>(f) excludes activities which are preparatory or auxiliary character.</p>	<p>The new definition of permanent establishment (“PE”) is borrowed from the current definition of a PE in the Organisation for Economic Co-operation and Development (“OECD”) Model Tax Convention.</p> <p>The definition of a PE in the Kenya Income Tax Act where there is no explicit charging provision bringing PEs to the Kenya charge of tax continues to remain an odd feature of the Kenya Income Tax Act.</p> <p>The new definition introduces a new concept of a service PE. Given that most payments from Kenya for services provided by a non resident are subject to withholding tax at rates of upto 20% on the gross service fee, the introduction of a service PE may result in a reduction of withholding tax collected and may also give rise to complicated analyses as to whether the services are subject to withholding tax or corporate income tax.</p> <p>The new definition also excludes certain activities which are preparatory and auxiliary in nature from creating a PE.</p> <p>In addition, the new definition of the fixed place of business PE lacks a threshold as to how long a business must be operating in Kenya to create a PE. In the absence of the activities being of a preparatory or auxiliary nature, there is a risk of creating a PE on inception of a business in Kenya.</p>

Income tax amendments

Item	Current Provision	Proposed Amendment	Comments / Impact
Requirement by entities with operations outside Kenya to file returns on activities in other jurisdictions.	The current legislation does not require a person to file a return on his activities in other jurisdictions.	An ultimate parent entity of a multinational enterprise group will be required to submit to the Commissioner a return describing the group's financial activities in Kenya, where its gross turnover exceeds the prescribed threshold, and in all other jurisdictions where the group has taxable presence.	<p>The new filing requirement is similar to the Country-by-Country Reporting ("CbCR") requirement for multinational enterprises ("MNEs") initiated by the OECD in the Base Erosion and Profit Shifting (BEPS) Action 13 Report. Action 13 aims at promoting cross border tax transparency and discouraging aggressive tax planning.</p> <p>The filing of such returns will increase transparency in the activities of Kenyan headquartered MNEs and the information obtained will assist KRA in conducting transfer pricing audits.</p> <p>The proposed provisions in the Bill only capture MNEs that are headquartered in Kenya hence most international corporations that have subsidiaries in Kenya will not be impacted by the proposed amendment. This appears contrary to the purpose of Action 13 which would be to provide the Kenya Revenue Authority visibility of MNEs that are headquartered outside of Kenya.</p>
Digital services tax	Charging section only applicable to digital marketplaces	Charging section amended to include business carried out over the internet or an electronic network	<p>The Bill has attempted to clarify the scope of the digital services tax ("DST") that was introduced in last year's Finance Bill. The bill proposes to amend the following items:</p> <ol style="list-style-type: none"> 1. To expand the charging section of the ITA to include income accruing from an 'online business' or an electronic network in addition to income accruing through a digital marketplace. <p>This amendment appears to seek to widen the tax bracket to include other online businesses that would not constitute a digital marketplace. However, the amendment fails to carry through to other sections of the ITA which state that DST is only applicable to income accruing from a digital marketplace.</p> <p>No definition is provided in the Finance Bill as to what constitutes an 'online business' and this introduces significant ambiguity to the DST regime.</p>

Income tax amendments

Item	Current Provision	Proposed Amendment	Comments / Impact
	Definition of a marketplace: means a platform that allow direct interaction between buyers and sellers of goods and services through electronic means	Definition of a marketplace: means an online platform which enables users to sell or provide services, goods or other property to other users	2. The definition of a digital marketplace has been amended to mean an online platform which enables users to sell or provide services, goods or other property to other users. This amendment introduces the term users which replaces buyer and sellers. It is unclear how the amendment to the definition of a digital marketplace in the Finance Bill differs in substance to the current definition in the ITA. If the intention of the amendment was to bring within the DST ambit non-resident persons who sell their own services or goods online, such an interpretation may result in disputes as the amendment does not appear to achieve this objective.
	Applicable to both residents and non-residents	Applicable to only non-residents	3. The applicability of DST will no longer apply to resident persons. This is a relief for online platforms which accrue and derive income within the Kenyan legal entity as this allows such entities to only pay corporate income tax when they are profitable;
	Exemption of Income subject to WHT and Section 9(2) provided for in the DST regulations	Exemption of Income chargeable to WHT and Section 9(2) provided for in the ITA	4. Income subject to withholding tax and income derived by a non-resident from the transmission of messages is exempt from DST. This was included in the DST regulations but has now been included in the ITA; and
	DST due at the time of the transfer of the payment for the service to the service provider	DST due on or before the twentieth day of the month following the end of the month in which the digital service was offered.	5. DST is due on the twentieth day of the month following the end of the month in which the digital service was offered. This aligns the ITA to the DST regulations and removes the ambiguity previously experienced as accounting for DST on each transaction would have been difficult to implement.
Carry forward of tax losses	Losses can be carried forward for 10 years	Losses can be carried forward indefinitely	The limitation on the carryforward of losses has been removed. With the introduction of a minimum tax, the time limit for utilisation of losses would have further reduced the utility of the carry forward losses.

Income tax amendments

Item	Current Provision	Proposed Amendment	Comments / Impact
Interest restrictions (Thin capitalisation)	Interest can only be deducted to the extent that the ratio of interest to capital does not exceed a ratio of 3:1/2:1(extractive sector)	Interest can only be deducted to a maximum of 30% of EBITDA	<p>The Bill proposes to introduce recommendations from Action 4 of the OECD BEPS report. The proposed amendments replace the thin capitalization provisions with the use of fixed profit ratios (i.e Earnings Before Interest Tax, Depreciation and Amortization("EBITDA")) to determine the permissible level of interest deductibility. The Bill proposes to limit the deduction of interest expenses to a maximum of 30% of EBITDA. The rate proposed is the highest rate of the range of 10% - 30% recommended by the OECD.</p> <p>In addition to interest, the restriction will also apply to payments that are economically equivalent to interest and expenses incurred in connection with raising the finance.</p> <p>The new interest restrictions will be applicable to all entities i.e. branches and subsidiaries operating in Kenya and whether controlled by resident or a non resident person. Previously, the thin capitalisation provisions were only applicable to entities controlled by non-residents and were inapplicable to branches.</p> <p>Further, the bill also seeks to introduce the restriction of interest deductions to banks and financial institutions which are currently not subject to interest restriction. This amendment would have a very significant negative impact on the effective tax rate of banks where over 60% of their expenses consists of interest.</p>
Tax rebate for graduate apprenticeships	Only applicable to university graduates	Expanded to include apprentices from technical,vocational intuitions.	<p>The Bill proposes to expand the applicability of the tax rebate to employers which was previously restricted to university graduates to include apprentices provided to graduates from technical and vocational institutions. This amendment seeks to encourage employers to employ persons from these institutions as eligible employers will be allowed to deduct a tax rebate equal to fifty percent (50%) of the amount of salaries and wages paid to at least ten (10) apprentices. The rebate is in addition to the corporate tax deduction (100% of expense incurred) already allowed under Section 15 of the Income Tax Act for the expenditure incurred in relation to salaries and wages.</p>

Income tax amendments

Item	Current Provision	Proposed Amendment	Comments / Impact
Limitation of benefits clause	Underlying ownership is held by resident individual/s	Underlying ownership is held by resident person/s	<p>The Bill proposes to amend the restrictions imposed by the limitation of benefits ("LOB") clause contained in section 41 of the ITA, as a taxpayer will be allowed to claim treaty relief if it is owned by a company or association or body of persons, corporate or incorporate, resident in the other contracting state.</p> <p>Although the amendment does not relax the requirement that one has to look at the residency of the ultimate individual or individuals it does however take into account that not all companies are ultimately owned by individuals and in such instances the residency of the ultimate person will suffice.</p> <p>Unfortunately, the amendment does not go far enough as it still retains the restrictive nature of section 41(5) which unduly limits the application of double tax treaties in Kenya. It would be more practical if this provision was aligned with the 'principal purpose test' as described in Action 6 of the OECD BEPS Report.</p>
Capital allowances 1. The basis for computing capital allowance	Reducing balance	Straight line	<p>The Bill proposes to change the basis used for calculating depreciation from a reducing balance basis to a straight-line methodology. This is a welcome move as taxpayers can easily track capital allowances for each asset and utilize the capital allowances within a shorter period.</p> <p>In addition, assets can be depreciated completely (i.e. to zero). This is on the basis that the capital allowance is calculated based on the original cost of the asset and the tax deduction is claimed at a constant rate.</p>
2. Definition of manufacture applicable to electricity producers	The definition of manufacture is only applicable to electricity producers who supply electricity to the national grid	The definition of manufacture is applicable to all electricity producers	<p>The Bill proposes to amend the definition of manufacture to allow electricity producers who do not supply to the national grid to be eligible for investment allowances of 50% on the buildings and machinery used to generate electricity.</p>
3. Definition of civil works	No definition provided	<p>Civil works has been defined to include -</p> <ul style="list-style-type: none"> (i) roads and parking areas; (ii) railway lines and related structures; (iii) water, industrial effluent and sewerage works; (iv) communications and electrical posts and pylons and other electrical supply works; and (v) security walls and fencing. 	<p>The Bill reintroduces the definition of civil works previously deleted by the Finance Act 2020 when the new Second Schedule to the ITA was introduced.</p> <p>The definition provides clarity as to what civil works cost can be included in the cost of commercial buildings or buildings used for manufacturing for the purposes of claiming capital allowances. This clarity will reduce potential future disputes with KRA.</p>

Income tax amendments

Item	Current Provision	Proposed Amendment	Comments / Impact
4. Rate of depreciation applicable to machinery used under a prospecting right or exploration activities for persons in the extractive sector	100%/ 50% in the first year of use and 25% per year on reducing balance.	50% in the first year of use and 25% per year on reducing balance.	<p>The Bill proposes to erase the conflicting clauses in the current ITA and align the Ninth Schedule to the ITA to the Second Schedule to the ITA that deals with capital allowances.</p> <p>When the Tax Laws Amendment Act No. 1 overhauled the previous Second Schedule and replaced it with a new Second Schedule, the drafters failed to align the capital allowances applicable to machinery used for prospecting rights or exploration activities for persons in the extractive sector. The Ninth Schedule provided for tax deduction at a rate of 100% in the first year of use whereas the new Second Schedule provided for 50% in the first year of use and 25% tax deduction per year on reducing balance.</p> <p>The alignment of the Second and Ninth Schedule will result in reduced tax deductions being claimed on such machinery in each year of income.</p>
Withholding tax rate applicable to service fees in respect to mining or petroleum operations	5.625%	10%	<p>The Bill proposes to increase the withholding tax rate applicable to service fees derived by a subcontractor for provision of services to a person undertaking mining/petroleum activities.</p> <p>The underlying assumption behind the rate of 5.625% was that the subcontractor makes a profit margin of 15%. The increase in withholding tax rate to 10% now assumes the profit margin rate of a subcontractor to be 26.7%.</p> <p>With the challenges in the Oil and Gas Sector in Kenya, the increase in withholding tax rate increases the cost of doing business in Kenya.</p>
Withholding tax rate on management, training and professional fees paid by persons in the extractive sector	12.5%	10%	<p>The Bill proposes a reduced withholding tax rate applicable to management, training and professional fees paid by persons in the extractive sector.</p> <p>This amendment will align the withholding tax rates applicable to payments made to subcontractors for services rendered in respect of mining and petroleum operations and other management fees not falling within the definition of service fees.</p> <p>This is a welcome move as the difference in the two rates has resulted in multiple disputes between the tax authority and the taxpayers in this sector.</p>

Tax Procedures Act amendments

One of the notable observations is that the Finance Bill seeks to introduce Common Reporting Standards which will require financial institutions to identify reportable accounts and file with the KRA such information. We highlight below the changes proposed in the Finance Bill.

Item	Current Provision	Proposed Amendment	Comments / Impact
Inclusion of the Miscellaneous Fees and Levies Act, 2016 in the definition of 'tax law'.	Currently the scope of the TPA does not include the Miscellaneous Fees and Levies Act, 2016	The Bill proposes to include the Miscellaneous Fees and Levies Act, 2016 under the scope of the TPA.	The proposed amendment is welcome as both the taxpayers and KRA will rely on the same procedures covering other domestic taxes.
International Tax Agreements	N/A	<p>The Bill proposes to give effect to multilateral agreements and treaties relating to international tax compliance and prevention of evasion of tax or exchange of information as provided in the agreements and treaties.</p> <p>Under the proposed provision information shall not be disclosed except in accordance with the conditions specified in the agreements.</p>	<p>The Bill proposes to give effect to international tax agreements. This provision appears to be worded in a broader manner than section 41 of the ITA which gives effect to treaties relating to the avoidance of double taxation and section 41 A of the ITA which gives effect to Tax Information Exchange Agreements ("TIEA"). The proposed provision allows for the Government to enter into a wide range of tax related multilateral agreements and not just bilateral agreements as specified in sections 41 and 41A of the ITA.</p> <p>In contrast to section 41 and 41 A of the ITA that requires the CS to gazette double tax agreements and TIEAs, no such procedures are provided in the bill. In the absence of a clear procedure, it is unclear whether such agreements would be considered to have legal effect from the date of signing such agreements.</p> <p>Some of the critical agreements that the Government has recently signed include the Convention on Mutual Administrative Assistance in Tax Matters (the "Convention") which Kenya ratified on 22 July 2020. This Convention facilitates the flow of tax information between a network of revenue authorities and increases tax transparency.</p>



Tax Procedures Act amendments

Item	Current Provision	Proposed Amendment	Comments / Impact
Common Reporting Standards	N/A	The Bill proposes to introduce common reporting standard obligations for automatic exchange of financial account information	<p>The Bill seeks to introduce common reporting standards for the purpose of providing automatic exchange of financial banking information between the KRA and other tax authorities.</p> <p>It is however noted that Kenya has not yet signed the Common Reporting Standards Multilateral Competent Authority Agreement ("CRS Convention") on Automatic Exchange of Financial Account information to allow for the automatic exchange of such information under this Agreement.</p> <p>It also has not signed, in the alternative, any bilateral agreement with any country to allow for such exchange of information.</p> <p>The amendments would require banks to identify 'Reportable Accounts', collate information in a standard format and provide this information to the KRA. The KRA would systematically and periodically exchange such taxpayer information with authorities of countries that are signatories to the CRS Convention or the tax authority that is the subject of bilateral agreement.</p> <p>The proposed amendment (together with the signing of the CRS Convention or similar bilateral agreements) will create significant compliance obligations for financial institutions as they will be required to undertake a due diligence process to identify reportable accounts and report such accounts to the KRA. The obligations for financial institutions will be similar to the US Foreign Account Compliance Act ('FACTA') obligations that most Kenyan banks have had to comply with to allow for access to the US banking system.</p> <p>The proposal must be read in conjunction with Article 13 of the Constitution and the Data Protection Act of 2019 which will require the KRA to put in place stringent controls relating to the handling and storage of such data.</p>



Tax Procedures Act amendments

Item	Current Provision	Proposed Amendment	Comments / Impact
Increase of period within which the Commissioner may amend an assessment	Section 31(4)(b) and 31(6)(a) of the TPA provide that the Commissioner may issue an assessment within five years from the date of submission of a self-assessment return.	The Bill proposes to increase the period within which assessments may be amended by the Commissioner under Section 31(4) (b) and 31(6)(a) from five years to seven years .	<p>The proposed change seeks to increase the statute of limitations from 5 years to 7 years. The amendment allows the KRA to mobilize more revenue from taxpayers by increasing the period open for tax assessments.</p> <p>The proposed amendment increases uncertainty for taxpayers as the window for amendment of assessments would be open for longer periods. The increased time period may erode the administrative efficiency on the KRA by reducing the incentive for the KRA to audit a taxpayer in a timely manner.</p> <p>Finally, due to the additional two years of assessment, the quantum of assessments will increase proportionately to the detriment of taxpayers who may not have the cashflow to settle such significant assessments.</p> <p>To ensure alignment, the TPA should be amended to increase the period within which taxpayers can lodge a claim for a tax refund from five years to seven years.</p>
Increased document retention period	Section 23(1)(c) provides that persons shall retain documents for a period of five years from the end of the reporting period to which they relate.	The Bill proposes to increase the document retention period from five years to seven years .	<p>The increase in the document retention period aligns with the proposed increase in the period within which KRA may amend assessments under Section 31 of the TPA.</p> <p>The increased period for documentation retention increases the taxpayers' compliance burden as they must retain documents for longer periods and this will lead to unnecessary disputes with taxpayers.</p>
Unit of currency for non-resident persons carrying on business through a digital marketplace	Section 23(2) of the TPA provides that the unit of currency in books of account, records, paper registers, tax returns or tax invoices shall be in Kenya shillings.	The Bill proposes to allow non-resident persons (without resident personal representatives and permanent establishments) carrying on business through a digital marketplace to use convertible foreign currency as may be approved by the commissioner as the unit of currency in books of accounts, records, paper registers, tax returns or tax invoices.	<p>The proposal for non residents subject to DST to retain records in a convertible foreign currency is a welcome relief for such non-residents who will be able to submit their financial records (when required) in their currency of operation.</p> <p>The carve out of non-resident persons who file returns and make payments through a resident tax representative or a non-resident person with a permanent establishment in Kenya reduces the utility of the proposed amendment as many of the non residents would have engaged the services of a local tax representative or have a permanent establishment.</p>

Tax Procedures Act amendments

Item	Current Provision	Proposed Amendment	Comments / Impact
Relief because of doubt or difficulty in recovery of tax	Section 37(1) of the TPA provides that the Commissioner may abandon collection of taxes.	<p>The Bill proposes to include “any other reason occasioning inability to recover the unpaid tax” as a reason for the Commissioner to abandon collection of taxes.</p> <p>The Bill also proposes to place an obligation on the Commissioner to submit a report to the Cabinet Secretary on or before the 30 June and on or before 31 December of each year containing the details and amounts of taxes abandoned.</p>	<p>The amendment to section 37 (1) appears to provide the Commissioner with wide discretionary powers to waive taxes.</p> <p>This is a move away from the limited grounds for waiver of taxes that is currently provided for.</p> <p>The proposed obligation on KRA to submit reports to the Cabinet Secretary of taxes abandoned may enhance compliance with Article 210(2)(a) of the Constitution which requires maintenance of a public record of taxes and licensing fees waived and the reason for waiver.</p> <p>However, it is noted that, in any event, the requirement for prior approval by the Cabinet Secretary before the waiver of any taxes has been retained.</p>
Relief from tax in certain cases	<p>Section 37A of the TPA currently provides for an amnesty for rental income tax.</p> <p>Section 37A also provides that a person will be allowed a deduction of 40% of expenditure where a person has no documentation to support the expenditure.</p>	The Bill proposes to delete Section 37A of the TPA in its entirety. The amnesty for rental income was limited to years 2013 to 2015.	Although the amnesty for rental income was limited to certain years that may now be considered to have expired, landlords subject to rental income tax can still access relief in the form of remission of penalties and interest under the Voluntary Tax Disclosure Programme (“VTDP”).
Removal of Withholding VAT exemption provisions	Section 42A(4A) of the Tax Procedures Act allows the Commissioner to grant an exemption from Withholding VAT (“WH VAT”) if the supplier has demonstrated that they will be in a continuous VAT credit for a period of not less than twenty-four months.	The Bill proposes to delete section 42A(4A), removing the option for qualifying suppliers to apply to the Commissioner for exemption from the provision of WH VAT.	With the proposed amendment, taxpayers who will be in a perpetual VAT credit position because of the application of WH VAT will no longer have a reprieve. Taxpayers are however still eligible for a VAT refund of credits as a result of WH VAT subject to review and approval by the Commissioner as provided in the VAT Act. This will however have cash flow implications on taxpayers given that VAT refund claim payments are a tedious and time consuming process.
Refund of overpaid tax	Currently, Section 47(4) of the TPA does not provide for accrual of penalties and interest where an overpayment of tax is applied to offset taxes owed by the taxpayer.	<p>The Bill proposes to include a provision where an overpayment when applied in accordance with Section 47(4)(a) and (b), interest and penalties will not accrue on the amount applied to the payment of outstanding tax from the date of notification of the ascertainment that tax was overpaid.</p> <p>If there is outstanding liability after the application, the outstanding tax will continue to accrue interest and penalties.</p>	While it is acknowledged that interest and penalties should not accrue where the taxpayer has overpaid taxes, the point at which the interest and penalties cease applying should be the the date when the overpayment arises and not the date of notification by the KRA of the ascertainment of the overpayment.

Tax Procedures Act amendments

Item	Current Provision	Proposed Amendment	Comments / Impact
Due date for submission of notice of objection	Currently, there is no clear guidance within the TPA on when a notice of objection is due where the due date falls on a weekend or a public holiday.	The Bill proposes to include the notice of objection within the proviso in Section 77 of the TPA.	<p>The proposed amendment seeks to clarify that where a notice of objection is submitted electronically, and the due date falls on a Saturday, Sunday, or public holiday in Kenya, the due date shall remain the date specified under the law rather than the previous working day.</p> <p>This is a welcome relief for taxpayer's as it provides clarity on the due date regarding submission of notices of objections electronically.</p>
Penalties for non-compliance with common reporting standard obligations	N/A	<p>The Bill proposes to introduce the following penalties for non-compliance with common reporting standard obligations:</p> <ul style="list-style-type: none"> A penalty of KES 100,000 for each false statement or imprisonment for a term not exceeding three years. A penalty of KES 1,000,000 where a financial institution fails to file a return. A general penalty of KES 20,000 and an additional KES 20,000 per day for each day during which non-compliance continues for a period not exceeding sixty days. 	The penalties are supposed to ensure compliance by financial institutions with the common reporting standards obligations.
Assistance with collection of DST	N/A	The Bill proposes to empower the Commissioner to seek intervention of a relevant authority in the collection of tax where a person who provides services over the internet or an electronic network including through a digital marketplace has not fulfilled the person's tax obligations.	<p>The proposed amendment provides KRA with powers to enlist the assistance of other authorities in ensuring DST compliance by non-residents.</p> <p>The necessity for such assistance arises as DST is levied on non-residents who have no physical presence in Kenya. This makes it difficult for KRA to collect DST from non-residents who do not comply.</p> <p>Despite vesting such authority on the KRA, it is unlikely that the provision provides the requisite powers to KRA to compel an independent authority to take any actions against any person that comes under such an independent authorities' jurisdiction.</p> <p>It is noted that The Mutual Administrative Assistance in Tax Matters (the "Convention") provides for assistance in recovery of taxes. Under Article 11 of the Convention, the revenue authorities can request each other to take necessary steps to recover tax claims as if it were its own tax claim.</p>



Tax Procedures Act amendments



Item	Current Provision	Proposed Amendment	Comments / Impact
Concurrent civil and criminal proceedings	N/A	The Bill proposes to introduce a provision under which criminal and civil cases can be conducted concurrently where a matter is substantially both a criminal case and the civil case. Neither the criminal or civil proceedings will be a ground for stay, prohibition or delay of either the criminal or civil case.	<p>The amendment to the TPA introduces a provision to allow for the concurrent prosecution of a civil and criminal case in respect of the same tax matter.</p> <p>The provision raises concerns relating to the violation of a taxpayer rights especially in light of Section 80 of the TPA which provides that a person shall not be subject to both the imposition of a penalty and the prosecution of an offence in respect of the same act or omission in relation to a tax law. Further, section 80(2) provides that the KRA must elect between a penalty or prosecution of an offence where a person commits an act or omission that may be liable under a tax law to both the imposition of penalty and the prosecution of an offence.</p> <p>Finally it is noted that the determination of grounds of stay or prohibition of a civil or criminal case are governed by the Civil Procedure Rules and the Criminal Procedure Code and not the Tax Procedures Act. In particular section 193A of the Criminal Procedure Code allows for concurrent civil and criminal proceedings. It is unlikely that the courts of law will carve out an exemption for tax matters.</p>
Requirement for a tax pin to sell goods and services over a digital marketplace	N/A	The Bill proposes to include selling goods and services over a digital marketplace as a transaction for which a tax pin is required.	The proposed amendment seeks to ensure that vendors trading over digital marketplaces comply with their tax obligations.

Value Added Tax (VAT)

The Finance Bill, 2021 has proposed to amend the VAT Act, 2013 by, amongst other changes, exempting the exportation of taxable services. The Bill has also proposed to amend the definition of a “digital marketplace” to mean an online platform which enables users to sell or provide services, goods or other property to other users. The proposed changes, if passed, will come into effect as from 1 July 2021.

We provide details on the proposed changes below.

Item	Current Provision	Proposed Amendment	Comments / Impact
Widened scope of VAT on the digital economy	Section 5 (7) of the VAT Act, read together with section 5 (9) of the Act and the VAT (Digital Marketplace Supply) Regulations, 2020 brought to VAT charge supplies made through a digital marketplace. Further, Section 5 (9) of the VAT Act defines a “digital marketplace” to mean a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means.	The Bill proposes to amend Section 5 of the VAT Act as follows: I. <i>VAT shall be applicable to supplies made over the internet or an electronic network or through a digital marketplace</i> II. <i>“digital marketplace” means an online platform which enables users to sell or provide services, goods or other property to other users.</i>	The Bill proposes to bring to VAT charge supplies made over the internet or an electronic network in addition to supplies made through a digital marketplace. Whilst this amendment seeks to widen the scope of supplies subject to VAT and to align it with the VAT (Digital Marketplace Supply) Regulations, 2020, we note that electronically supplied services have been subject to VAT since September 2013. The Bill further proposes to remove the requirement for the direct interaction between buyers and sellers through electronic means from the definition of a digital marketplace. This is a much-needed change as it brings clarity into what constitutes a digital marketplace. We however note that the term ‘other property’ has not been defined. In our view, there is need for clarity on what constitutes supply of other property to avert any potential disputes as a result of varied interpretations.
Restriction of input tax incurred on hiring, leasing or acquisition of passenger cars or minibuses	Section 17 (4) (a) of the VAT Act restricts deduction of input tax if it relates to acquisition of passenger cars or mini buses and the repair and maintenance unless they are acquired by the registered person exclusively for the purpose of making a taxable supply in the ordinary course of a continuous and regular business of selling or dealing or hiring of passenger cars or minibuses.	In addition to the current restriction of input tax on acquisition of passenger cars or minibuses the Bill proposes to restrict deduction of input tax on hiring or leasing of the same	With this new proposal, business costs as relates to taxi services and hiring, or leasing of passenger cars or minibuses is set to increase. We note that there have been differing interpretations and disputes arising between the KRA and taxpayers as to whether the term acquisition includes hiring and leasing. The proposed amendment whilst will lead to increase in business costs will bring the much-needed clarity.
Elimination of group VAT registration option person for VAT purposes	Section 34 (9) of the VAT Act, 2013 provides that; <i>“The Cabinet Secretary may, in regulations, provide for the registration of a group of companies as one registered person for the purposes of the Act.”</i>	The Bill proposes to delete this provision.	Companies operating as part of a group face administrative burdens in terms of VAT filing and compliance for each entity within the group and in some instances, there are intra-group supplies which may result in VAT obligations. We expected the CS to introduce group VAT registration guidelines in order to ease the administrative burden and the associated costs and to improve the ease of doing business in Kenya. The deletion therefore means that group VAT registration will not be possible and each entity within the group needs to account for VAT accordingly.

Value Added Tax (VAT)

Item	Current Provision	Proposed Amendment	Comments / Impact
Regulations under the VAT Act to take effect after publication	Section 67 (2) of the VAT Act provides that regulations made under this section shall be tabled before the National Assembly for approval before they take effect.	The Bill proposes to delete this provision.	<p>If the Bill is passed into law, the Cabinet Secretary ("CS") will no longer require the approval of the National Assembly before any published regulations can take effect.</p> <p>This however begs the question as to whether the proposed deletion will pass the constitutional test given that the National Assembly is mandated to make tax laws. Further, according to the Statutory Instruments Act, all statutory instruments should be tabled before Parliament before they take effect. It remains to be seen whether going forward, the CS will table any Regulations before the National Assembly in line with the Statutory Instruments Act and the Constitution.</p>
Change in VAT status from exempt to standard rated	Exempt	VATable at 16%	<p>The Bill proposes to change the VAT status of the following goods from exempt to taxable at 16%.</p> <ul style="list-style-type: none"> 3920.10.10 Plain polythene film/PE 4803.00.00 Airlid paper without super absorbent polymer 80gsm/67 of tariff number 4803.00.00 Airlid paper without super absorbent polymer 80gsm/67 of tariff number 4810.99.00 PE white 25-40gsm/release paper 5603.11.00 12-16 gsm spun bound piyropo nonwoven cover stock /15gsm spun bound PP non-woven SMS hydrophobic leg cuffs <p>These changes are set to take effect from 1 July 2021 and with the introduction of VAT on the above items, it is expected there will be an increase in cost as suppliers pass on the VAT cost to consumers.</p>



Value Added Tax (VAT)

Item	Current Provision	Proposed Amendment	Comments / Impact
Change in VAT status of goods from standard rated to exempt	VATable at 16%	Exempt	<p>The Finance Bill has proposed to change the VAT status of the following goods from taxable at the standard rate to exempt.</p> <ul style="list-style-type: none"> 0402.21.00 Milk in powder, granules or other solid forms, of a fat content by weight exceeding 1.5% not containing added sugar or other sweetening matter 0402.29.00 Other milk in powder granules or other solid forms, of a fat content, by weight, exceeding 1.5% 0402.91.00 Other not containing added sugar or other sweetening matter 0402.99.00 Other milk 2106.10.00 Protein concentrates and textured protein substances 2106.90.10 Food preparations specially prepared for infants 2106.90.91 Food supplements 2106.90.99 Other – Food preparations not elsewhere specified or included 2936.27.00 Vitamin C and its derivatives 3002.11.00 Malaria diagnostic test kits 3002.13.00 Immunological products unmixed, not put up in measured doses or in forms or packing for retail sale 3002.14.00 Immunological products, mixed, not put up in measured doses or in forms or packing for retail sale 3002.15.00 Immunological products put up in measured doses or in forms or packing for retail sale 3002.19.00 Other – Antisera, other blood fractions and immunological products, whether or not modified or obtained by means of biotechnological processes 3004.43.00 Other medicaments, containing alkaloids or derivatives containing norephedrine or its salts 3004.60.00 Other, containing antimalarial active principles 9018.90.00 Blood giving set and infusion sets 9019.20.00 Airway Guedel and Ambu bags 9021.10.00 Orthopedic or fracture appliances 9021.50.00 Other artificial parts of the body; pacemakers for stimulating heart muscles, excluding parts and accessories 9025.19.00 Hydrometers and similar floating instruments, thermometers, pyrometers, barometers, hygrometers and psychrometers, recording or not and any combination of these instruments, thermometers and pyrometers not combined with other instruments. Needle holders and urine bags of tariff heading 3926

Value Added Tax (VAT)

Item	Current Provision	Proposed Amendment	Comments / Impact
Medical goods to be exempt from VAT upon the approval of the Cabinet Secretary responsible for matters relating to health	VATable at 16%	Exempt	<p>The goods highlighted below shall be exempt from VAT upon the approval of the Cabinet Secretary responsible for matters relating to health</p> <ul style="list-style-type: none"> • Medical ventilators and the inputs for the manufacture of medical ventilators • Physiotherapy accessories, treadmills for cardiology therapy and treatment of tariff number 9506.91.00 for use by licensed hospitals • Dexpathenol of tariff number 3304.99.00 used for medical nappy rash treatment by licensed hospitals • Medicaments of tariff number 3304.41.00, 3003.42.00, 3033.43.00, 3003.49.00, 3003.60.00 (excluding goods of heading 30.02, 30.05 or 30.06) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses • Diagnostic or laboratory reagents of tariff number 3822.00.00 on a backing, prepared diagnostic or laboratory reagents whether or not on a backing, other than those of heading 30.02 or 30.06, certified reference materials • Electro-diagnostic apparatus of tariff numbers 9018.11.00, 9018.12.00, 9018.13.00, 9018.14.00, 9018.19.00, 9018.20.00, 9018.90.00 • Other instruments and appliances of tariff number 9018.41.00 used in dental sciences, dental drill engines, whether or not combined on a single base with other dental equipment • Other instrument's and appliances including surgical blades of tariff number 9018.49.00, 9018.50.00, 9018.90.00 used in dental science • Ozone therapy, oxygen therapy, aerosol therapy, artificial respiration or other therapeutic respiration apparatus • Other breathing appliances and gas masks, excluding protective masks having neither mechanical parts nor replaceable filters • Artificial teeth and dental fittings of tariff numbers 9021.21.00, 9021.29.00 and artificial parts of the body of tariff numbers 9021.30.00, 9021.39.00, 9021.50.00 and 9021.90.00 • Apparatus based on the use of x-rays whether or not for medical, surgical or dental of tariff number 9022.12.00, 9022.13.00, 9022.14.00 and 9022.19.00 • Apparatus based on the use of alpha, beta of gamma radiations, whether or not for medical, surgical or dental of tariff number 9022.21.00, 9022.29.00, 9022.30.00 and 9022.90.00 • Discs, tapes, solid-state non-volatile storage devices, "smart cards" and other media for recording of sound or of other phenomena whether or not recorded of tariff number 8523.80.10, including matrices and masters for the production of discs but excluding products of Chapter 37; software

Value Added Tax (VAT)

Item	Current Provision	Proposed Amendment	Comments / Impact
			<ul style="list-style-type: none"> • Weighing machine (excluding balances of a sensitivity of 5 centigrams or better) of tariff number 8423.31.00, including weight operated counting or checking machines; weighing machine weights of all kinds • Fetal Doppler-pocket (Wdg-002) Pc and pulse oximeter-finger held (Gima brand) Pc of tariff number 9018.19.00 • Sterilizer Dry Heat (Wdg-001-Grx-05A) Pc, autoclave steam tabletops of tariff number 8419.20.00 • Tourniquets of tariff number 3926.90.99 for use by licensed hospitals <p>Whilst the change in status of medical products from standard rate to exempt is a welcome relief in the midst of the COVID-19 pandemic, it would have been a better approach if such medical supplies were zero-rated for VAT purposes to allow suppliers qualify for deduction of input tax incurred. This would effectively lower the cost of the products unlike VAT exemption where input tax incurred is not claimable and suppliers pass the additional VAT</p>
Reintroduction of VAT exemptions to Extractives Sector and Renewable Energy	VATable at 16%	<p>The Bill proposes to reintroduce exemption on the goods highlighted below upon the approval of the Cabinet Secretary responsible for the specific matters.</p> <ul style="list-style-type: none"> • Taxable goods, excluding motor vehicles, imported or purchased for direct and exclusive use in geothermal, oil or mining prospecting or exploration by a company granted a prospecting or exploration license upon recommendation by the Cabinet Secretary responsible for matters relating to energy, petroleum or mining, as case may be. • Specialized equipment for the development and generation of solar and wind energy, including photovoltaic modules, direct current charge controllers, direct current inverters and deep cycle batteries that use or store solar power, upon recommendation of the Cabinet Secretary responsible for matters relating to energy. 	<p>We note that previously these goods were exempt from VAT, but the exemptions were however deleted by the Tax Laws Amendment Act, 2020 and the Finance Act, 2020.</p> <p>The reintroduction of exemption is a welcome move as it encourages investors in these sectors given that the projects are capital intensive and the VAT incurred on the purchases is currently not recoverable.</p> <p>Further, exemption of equipment for development of solar and wind energy will encourage use of "clean energy" although the best approach would be to zero rate these supplies to ensure that the irrecoverable VAT is not passed on to the final consumer.</p>

Value Added Tax (VAT)

Item	Current Provision	Proposed Amendment	Comments / Impact
Introduction of a transitional clause for change of VAT status from taxable to exempt for taxable goods supplied to persons that had an agreement or contract with the Government	VATable at 16%	The Bill proposes to introduce exemption on taxable goods supplied to persons that had an agreement or contract with the Government prior to 25 April 2020 and the agreement or contract provided for exemption from VAT – provided that this exemption shall apply to the unexpired period of the contract or agreement and upon recommendation by the Cabinet Secretary responsible for matters relating to energy.	<p>This proposed change will allow existing projects, initiated prior to 25 April 2020 to procure goods under exemption for the remaining period of the agreement with the Government of Kenya.</p> <p>Consequently, these projects will continue to enjoy the benefits of exemption thereby making their implementation less costly.</p>
Change in VAT status of services from standard rated to exempt	VATable at 16%	Exempt	<p>The Finance Bill has proposed to exempt from VAT the transfer of assets and other transactions related to the transfer of assets into real estate investment trusts and asset-backed securities.</p> <p>We note that this service was previously exempt from VAT, but the exemption was deleted by the Tax Laws Amendment Act, 2020 thereby making it subject to VAT at the standard rate.</p>
The exportation of taxable services to be exempt from VAT	VATable at 0%	Exempt	<p>The change in status of exported services from zero rate to exempt means that taxpayers will not be entitled to deduct input tax incurred to make these supplies. This will increase the cost of doing business for companies exporting services from Kenya, make the country unfavorable to investors looking to be a regional hub and expose the country to the risk of investors leaving to more favorable jurisdictions.</p> <p>Further, the proposed change contravenes the ‘<i>destination principle</i>’ as per the provision of chapter 1.9 of the Organisation for Economic Co-operation and Development, International VAT/GST Guidelines which provides that ‘<i>Under the destination principle, exports are not subject to tax with refund of input taxes (that is, “free of VAT” or “zero-rated”).</i>’</p> <p>We expected the CS to introduce guidelines to provide clarity on the contentious issues and improve the ease of doing business.</p> <p>The exportation of services has been a contentious issue between Kenya Revenue Authority (“KRA”) and taxpayers who export taxable services. This is due to lack of clarity on the term “use and consumption” which has resulted in differing interpretations between the KRA and taxpayers. The lack of guidelines therefore means that the contention remains.</p>
The supply of ordinary bread to be exempt from VAT	VATable at 0%	Exempt	<p>We expect this to lead to an increase in the cost of bread since suppliers will not be eligible to recover input tax incurred. This contravenes the Government’s Big Four Agenda of ensuring food security for its citizens.</p>

Excise Duty

The Finance Bill, 2021 has proposed to amend the Excise Duty Act, no 23 of 2015 by subjecting to excise duty fees or commission earned in respect of a loan. The Bill has also proposed to reintroduce excise duty on betting activities. The proposed changes, if passed, will come into effect on 1st July 2021.

We discuss the details of the changes below.

Item	Current Provision	Proposed Amendment	Comments / Impact
Definition of 'compound' under the Excise Duty Act	Not defined	Align the definition of compounding to the Portable Spirits Act which defines 'compound' to mean <i>to communicate any flavour to, or to mix any ingredient or material with, spirits, but not so as to denature the spirits</i>	The change is welcome and will help reduce potential disputes with the tax authority on what constitutes 'compounding' with respect to spirits for excise duty purposes.
Definition of 'possession' under the Excise Duty Act	Not defined	Defined to mean having, owning or controlling any excisable goods including: <ul style="list-style-type: none"> • having in one's possession any excisable goods; • knowingly having any excisable goods in the actual possession or custody of any other person; • having any excisable goods in any place, whether belonging to or occupied by oneself or not, for the use of benefit of oneself; or • having any excisable goods for the use of benefit of another person: Provided that if there are two or more persons and any of them with the knowledge or consent of the other has any excisable goods in his custody or possession, such goods shall be deemed to be in the custody and possession of all of them.	Whilst this definition clarifies what 'possession' means under the Excise Duty Act, it may be subject to varied interpretations and may imply that other service providers handling excisable goods along the supply chain like logistics companies are liable to accounting for excise duty on goods in their possession. It would have been clearer if the definition clarified that the person liable to account for excise duty on excisable goods still remains as outlined under Section 5(3) of the Excise Duty Act who are: the licensed manufacturer of excisable goods, the licensed person making the supply of excisable goods or an importer of excisable goods.
Relief from excise duty paid on internet data services purchased for resale	Under the current provisions, licensed excise businesses are only allowed to offset excise duty paid on raw materials (both imported into Kenya and locally manufactured) from excise duty payable on the corresponding finished goods. No excise duty deduction is allowed to a supplier of internet data services who purchases internet data in bulk for resale. This therefore meant that the multiple incidence of excise duty was felt by the end user.	The Bill proposes to allow offsetting excise duty incurred by a licensed person on purchase of bulk internet data services for resale against excise duty payable by the person on supplying the internet data services to the final consumer	The offsetting of excise duty incurred on purchases against excise duty payable on the corresponding sales is a welcome move which should help reduce the price of internet data services charged to the final customers. Excise duty paid when purchasing the stock will no longer be a cost to the reseller hence should not be inbuilt into the price charged to the final consumer. This may have a knock-on effect by increasing internet accessibility consequently leading to economic growth, especially in the current circumstances where there is a shift from office working to working remotely including remote delivery of education/training services by schools, colleges and other education/training institutions. This is in line with the Government of Kenya's Digital Economy Blueprint framework.

Excise Duty

Item	Current Provision	Proposed Amendment	Comments / Impact
Sugar confectionary and chocolate manufactured locally to be subject to excise duty	Currently only imported sugar confectionary of tariff heading 17.04 is subject to excise duty at the rate of Kenya shillings 20.99 per and imported white chocolate, chocolate in blocs, slabs or bars of tariff numbers 1806.31.00, 1806.32.00 and 1806.90.00 is subject to excise duty at the rate of Kenya shillings 209.88 per kg.	The Bill has proposed to delete the word 'imported' from the current provision in relation to sugar confectionary and white chocolate, chocolate in bloc, slabs or bars. This means that both imported and locally manufactured sugar confectionary of tariff 17.04 and chocolate of the stated tariff numbers will be subject to excise duty.	<p>The proposed introduction of excise duty on locally manufactured sugar confectionary and chocolate is bound to increase prices of these items and may make them uncompetitive compared to the imported ones. This is because the production cost may be lower in the countries the imports were manufactured, as is usually the case.</p> <p>The resultant effect could be a decline in the market share and revenue of the local manufacturers hence an overall decline in tax revenue for the Government.</p>
Imported glass bottles not subject to excise duty	Currently, imported glass bottles are subject to excise duty at the rate of 25%.	The Bill proposes to exclude imported glass bottles from the purview of excise duty.	<p>This is a welcome move especially for glass bottle manufacturers in the region who look to export their products to Kenya.</p> <p>The East African Court of Justice in 2020 ruled that the imposition of excise duty at 25% on importation of glass bottles draws a distinction between excise duty applicable to locally manufactured goods and goods from a foreign country in the East African Community thus contravening provisions of the Customs Union Protocol and Common Market Protocol.</p>
Change from 'specific rate regime' to 'ad valorem rate regime' for motorcycles of tariff 87.11	Currently, imported motorcycles of tariff 87.11 other than motorcycle ambulances and locally assembled motorcycles are subject to excise duty at the rate of Kenya shillings. 11,608.23 per unit.	The Bill proposes to charge excise duty at the rate of 15% on imported motorcycles of tariff heading 87.11 excluding motorcycle ambulances and locally assembled motorcycles.	<p>This proposed change is aimed at enhancing revenue collection for the Government since ad valorem rate regime for excise duty ensures more excise duty is collected on excisable items of high value.</p> <p>This is aimed at boosting the local motorcycle assembly sector which will continue to enjoy exemption from excise duty. The high excise duty on importation of motorcycles is likely to discourage importation.</p>
Introduction of excise duty on jewellery and nicotine products	Currently these items are not subject to excise duty.	<p>The Bill has proposed to levy excise duty on jewellery and nicotine products as follows:</p> <ul style="list-style-type: none"> Jewellery of tariff heading 7113 and imported jewellery of tariff heading 7117 to be excisable at the rate of 10% <p>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 to be excisable at the rate of Kenya shillings. 5,000 per kg</p>	<p>This proposed change is aimed at enhancing revenue collection from jewellery made of precious metals or clad with precious metals, including imported imitation jewellery.</p> <p>With the innovation of new products containing nicotine or substitutes in the market, the introduction of the excise duty is aimed at discouraging their use and at the same time enhancing taxes for the government.</p>

Excise Duty

Item	Current Provision	Proposed Amendment	Comments / Impact
Reintroduction of excise duty on betting	The Finance Act, 2020 removed excise duty on betting activities with effect from June 2020.	The Finance Bill has proposed to reintroduce excise duty on betting activities at the rate of 20% of the amount wagered or staked.	The recent past has seen the introduction of excise duty on betting and removal of the same most recently is the Finance Act, 2020 which abolished excise duty on betting services with effect from 30 June 2020. The relief for the sector was short lived, it is anticipated the betting sector will proactively engage the government to reconsider the proposed duty.
Fees or commission earned in respect of a loan to be subject to excise duty	<p>The Excise Duty Act, 2015 defines "other fees" to include – "any fees, charges or commissions charged by financial institutions relating to their licensed activities, but does not include interest on loan or return on loan or fees or commissions earned in respect of a loan or any share of profit or an insurance premium or premium based or related commissions specified in the Insurance Act or regulations made thereunder."</p> <p>The Act further provides that 'other fees' charged by financial institutions shall be subject to excise duty at the rate of twenty percent.</p>	The Bill has proposed to amend the definition of "other fees" by deleting the words "fees or commission earned in respect of a loan" .	<p>Excise duty on 'other fees' has in the past been a contentious issue between the KRA and financial institutions due to lack of clarity on whether or not fees and commissions earned in respect of loans constitute 'other fees' subject to excise duty.</p> <p>The Finance Act 2019 clarified that 'fees and commissions earned in respect of a loan or any share of profit' are not subject to excise duty and this dissipated tax disputes.</p> <p>In our view with the proposed change, disputes between KRA and the banking sector are likely to reemerge regarding accounting for excise duty on these income streams.</p>



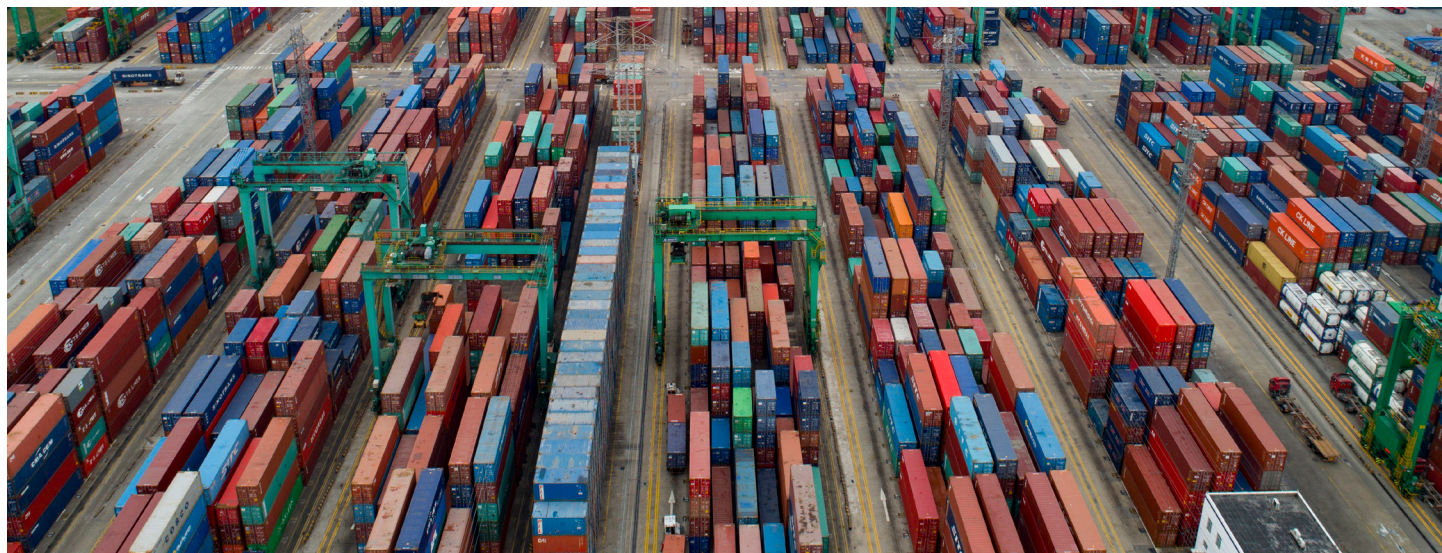
Employment taxes

The Bill is seeking to promote the uptake of the National Hospital Insurance Fund amongst Kenyans by offering insurance relief on the NHIF contributions made by individuals. We discuss the details of the changes below.

Item	Current Provision	Proposed Amendment	Comments / Impact
Insurance relief	<p>Insurance relief is granted to individuals in respect of insurance premiums paid in relation to an education policy with a maturity period of at least 10 years, a life or education policy whose term commenced on or after 1st January 2003, or a health policy whose term commenced on or after 1st January 2007.</p> <p>Insurance relief is provided against the tax payable to the KRA at a rate of 15% of the qualifying premiums paid, subject to a maximum of KES 5,000 per month or KES 60,000 per year.</p>	<p>The Bill proposes to extend insurance relief provision to include contributions made by individuals to the National Hospital Insurance Fund ("NHIF") effective 1st January 2022.</p>	<p>This is a welcome move since individuals making contributions to the NHIF will now enjoy a tax relief equal to 15% of their contributions subject to the existing limits.</p> <p>By way of example, individuals making NHIF contributions of KES 500 per month will enjoy a tax relief of KES 75, while those contributing KES 1,700 per month will enjoy a tax relief of KES 255 per month against the tax payable to the KRA.</p> <p>This move is likely to increase the uptake of the NHIF insurance cover amongst Kenyans which will boost the Government's efforts towards providing Universal Health Coverage in the country.</p>



Miscellaneous fees and levies



The Finance Bill, 2021 proposes to amend the Miscellaneous Fees and Levies Act, no 29 of 2016 by introducing an exemption from Import Declaration Fee (IDF) and Railway Development Levy (RDL) on imported goods valued at five (5) billion Kenya shillings or more where such goods are imported in the interest of the public or to promote an investment.

Further, the bill proposes to include a provision for seeking refunds on overpaid fees and levies or where the same is paid in error. The effective date for these changes if the bill is passed into law is 01 July 2021, unless specified otherwise in the sections herein.

We discuss in details the proposed changes below.

Item	Current Provision	Proposed Amendment	Comments / Impact
Taxpayers will now be eligible to apply for a refund of overpaid fees and levies or fees and levies paid in error in accordance with the provision of section 47 of the Tax Procedures Act	The current Miscellaneous fees and levies Act has not provided for a refunds mechanism to taxpayers in case of overpaid fees and levies or those paid in error.	The Bill has proposed to introduce an application of the provisions of section 47 of the Tax Procedures Act, 2015 as relates to application for refund of overpaid tax or tax paid in error. Further the Bill provides that section 47 of the TPA shall also apply for the purposes of determination by the Commissioner of penalties and interest on fees that remain unpaid. If the Bill is passed into law, this proposed change shall come into effect from 01 January 2022.	This is a welcome reprieve to taxpayers who may overpay or erroneously pay fees and levies to the KRA.
Goods valued at five billion shillings or more imported in the interest of the public or to promote an investment shall be exempt from IDF and RDL	Previously, goods as the CS may determine are in public interest, or to promote investments whose value shall not be less than two hundred million shillings were exempt from IDF and RDL. However, this provision was deleted by the Finance Act, 2020 which came into effect on 30 June 2020.	The Bill has proposed to exempt from IDF and RDL, such other goods the CS may determine their exemption is in the public interest, or to promote an investment and the value of which is five billion shillings or more.	This is a welcome move by the Government and is aimed at making Kenya an attractive destination to investors. This is in line with the Government of Kenya's Big Four Agenda and vision 2030 which is aimed at making Kenya a newly industrializing "middle income country".

Non-tax legislative amendments

1. Time limit for appeals at the Capital Markets Tribunal

The Bill proposes to introduce a time limit of 90 days (from the date of filing of the appeal) for the hearing and determination of appeals at the Capital Markets Tribunal. The limitation is intended to bring certainty with regard to the end of litigation, improving efficiency at the Tribunal and ensuring fair administrative action. However, the amendment is silent on whether status quo of a matter will continue pending determination of an appeal by the Capital Markets Tribunal.

2. Amendments to the Insurance Act

Definition of a “broker”

This definition excludes foreign reinsurance brokers. The Bill proposes to amend the definition of a broker to include insurance and reinsurance brokers that do not have a place of business, or a resident representative in Kenya but still carry out brokerage business in Kenya. This will bring foreign brokers that carry out business in Kenya within the regulation of the Insurance Act.

Closed Fund Business

The Bill also seeks to introduce closed fund business i.e. “the continuance of insurance business for the purpose of maintaining, without renewal, any policy or contract of insurance issued before the appointed date.” The Commissioner of Insurance will have the power to request for information from any insurer carrying on closed fund business and such information ought to be provided within 3 months.

Annual fee for licensed insurers

An annual fee has been introduced for licensed insurers. It however remains to be seen what the prescribed amount will be. This is similar to the approach adopted in the banking industry where licensees have an evergreen licence but are required to pay an annual fee.

3. Rewarding of informants

The Bill proposes to enhance the reward payable under the Kenya Revenue Authority Act for persons who provide information leading to the identification or recovery of unassessed taxes or duties. A person who supplies information leading to the identification of unassessed duties or taxes will stand to receive KES 500,000, an increase from the current KES 100,000.

On the other hand, an informant who provides information leading to the recovery of unassessed duties or taxes stands to gain KES 5 million up from the current KES 2 million. This

monetary incentive appears to be in line with the increased efforts by the Kenya Revenue Authority to close tax leakages, nub tax cheats and enhance tax compliance in order to finance government expenditure.

4. Registration and regulation of corporate trustees

Corporate trustees will now be registered and regulated under the Retirement Benefits Act. The Bill proposes to introduce a definition of a “corporate trustee” to refer *“a limited liability company incorporated under the Companies Act, 2015, which is, for the time being, empowered under any written law, its charter, memorandum of association, deed of settlement or other instrument constituting it or defining its powers to mainly undertake trusts, and includes a trust corporation.”*

Further the Bill provides for the requirements to be met by applicants to be registered as corporate trustees. An example of such requirements include meeting a minimum paid up capital that shall be prescribed by the Retirement Benefits Authority and not having been a corporate trustee of any scheme fund which has been deregistered, wound up or placed under interim administration due to any fault, either fully or partially, of the corporate trustee.

The Retirement Benefits Act currently only envisages individual trustees as trustees of scheme funds. The amendment is intended to also allow for corporate trustees. Trustees will have an option to seek an extension of time for the submission of audited accounts of the scheme to the Retirement Benefits Authority and the application for extension for a period not exceeding 3 months will be granted upon justification.

The Bill also proposes to amend the definition of “retirement benefits scheme” to include post-retirement medical cover as a benefit.

To give this effect, a “post-retirement medical fund” has been defined to mean *a fund established within a scheme into which contributions are made and from which the costs of medical benefits can be met as may be determined in accordance with the medical fund rules*. This is intended to provide medical cover to retirees and mitigate the burden of out of pocket medical expenses during the retirement period.

5. Appointment of authorized nominees

Under the Central Depositories Act, 2000, the Bill proposes to allow beneficial owners or legal owners of shares to appoint nominees for the purpose of opening a securities account or an omnibus account. This is intended to allow other authorized persons to invest on behalf of others in the securities market.

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