Finance Act, 2021

KPMG Analysis of the Finance Act, 2021

July 2021

Preamble

The Finance Act, 2021 (the Act) was signed into law by the President on 29 June 2021 and thereafter gazetted on 1 July 2021.

The Act has introduced a number of changes that will align Kenya with international best practices such as introduction of Country by Country Reporting for Multi National Enterprises (MNEs) as well as the introduction of more stringent regulations on thin capitalization.

The Act has also introduced a number of changes designed to enhance the tax base by getting more transactions into the ambit of taxation and increasing the tax on other transactions. It is also clear from the changes to the scope of digital services tax that the government sees this as a potential area for revenue growth.

Some of the enactments appear to be reactions by the Kenya Revenue Authority (KRA) to the recent spate of disputes that it has lost at the Tax Appeals Tribunal and the High Court. One example is the taxation of export of services which has been litigated in a number of cases and has now been amended to deny taxpayers refund of input VAT.

There are notable provisions that have been enacted to cushion Kenyans from the harsh effects of the pandemic on the economy. Some of the provisions include the removal of the 10 year limit for the utilization of tax losses . Additionally, the Act now allows the Commissioner to refrain from assessing or recovering unpaid tax from a taxpayer where there is any other reason occasioning inability to recover the unpaid tax.

The COVID-19 pandemic has impacted the Government’s ability to meet its expenditure requirements amid pressure for additional resources to service the current debt load. This informs the additional tax revenue mobilization measures contained in the Act, to finance the ambitious FY 2021/22 budget of KES 3.6 trillion.

We provide in the ensuing pages our analysis of the proposed changes.

Income Tax

Income Tax

Expansion of tax rebate for apprenticeships

Enacted provision: An employer who hires at least 10 university or technical and vocational education training students for a period of six months or more in a particular year of income, shall be eligible for tax rebate in the year subsequent to the year of such engagement. Previously, an employer would qualify for this rebate if they hired at least 10 university students.

Implication: The expansion increases the pool from which employers can draw apprenticeships and still qualify for the tax rebate. With the current emphasis on technical and vocational training to solve the unemployment problem, this is a welcome move as it will encourage employment of not only those with university education, but also those that have technical and vocational training.

Effective date: 1 January 2022

Removal of the "mining right" hurdle

Enacted provision: Under the new provision, one does not require a mining right to claim capital allowances on machinery used to undertake mining operations.

Implications: This will enhance the investment in exploration activities due to the removal of the requirement to obtain a mining right which might, in the long run, lead to the discovery of minerals.

Effective date: 1 January 2022

Limitation of benefit on Double Taxation Agreements

Enacted provision: The new provision provides that if an arrangement for relief from double taxation results in reduced tax being payable in Kenya by a person who is a resident of the other contracting state, such benefit shall not accrue to the person if fifty percent or more of the underlying ownership of the person is held by a person or persons who are not residents of the other contracting state. Previously, the restriction would apply if fifty percent or more of the underlying ownership of the person is held by an individual or individuals who were not residents of the other contracting state.

Limitation of benefit on Double Taxation Agreements ...cont'd

Implication: The amendment seeks to align with international best practices on beneficial ownership. This implies that an assessment of who the ultimate beneficial owner is, whether at individual or corporate level, should be carried out prior to applying the reduced tax rate or exemption as prescribed by the Double Taxation Agreement.

Effective date: **1 July 2021**

Move towards Private Electricity Companies

Enacted provision: The Act removes the requirement that electricity must be supplied to the National Grid for the generation of the same to fall under the definition of "manufacture", which is a prerequisite to qualify for investment deduction on equipment, machinery and buildings used in manufacture.

Implication: A person investing in electricity generation for private business use, or for sale to persons of their choice, will now qualify for investment deduction on qualifying costs.

This is an additional incentive for private companies seeking to generate electricity for private use or for direct sale to their customers without going through the national grid. It will encourage the growth of small renewable energy power plants, which is an important step towards increasing competition and reducing the cost of electricity.

Effective date: 1 January 2022

Income Tax

Capital allowances claimable over shorter periods

Description	New* (%)-All on Straight Line (SL) basis
Investment Deduction	
Buildings used for manufacture*	50 for first year and 25 per year on residual
Hotel Buildings	50 for first year and 25 per year on residual
Hospital buildings*	50 for first year and 25 per year on residual
Petroleum or gas storage facilities*	50 for first year and 25 per year on residual
Educational building*	10
Commercial building*	10
Machinery used for manufacture	50 for first year and 25 per year on residual
Ships	50 for first year and 25 per year on residual

Description	New* (%)-All on Straight Line (SL) basis
Aircrafts	50 for first year and 25 per year on residual
Heavy earth moving equipment	25
Motor vehicle*	25
Computer & computer peripheral hardware, calculators, copiers	25
Furniture & Fittings	10
Telecommunications equipment	10
Filming equipment purchased by a local producer	25
Software	25

The capital allowances rate as enacted in the Tax Laws (Amendment) Act, 2020 will continue to apply. However, as opposed to the capital allowances being claimed on a reducing balance basis, the enacted Act provides that these capital allowances will be claimed on a straight line basis. This is a welcome move since it will accelerate the rate at which taxpayers can claim capital allowances.

- Cost of land excluded from the qualifying cost and qualifying cost for saloon cars is KES 3,000,000 up from KES 2,000,000

Effective date : 1 January 2022

Income Tax

Definition of "farm works"

Enacted provision: The Act has defined "Farm works" under the Second Schedule to mean: farmhouses, labour quarters, any other immovable building necessary for the proper operation of the farm, fences, dips, drains, water and electricity supply works and other works necessary for the proper operation of the farm

Implication: This provides clarity on what will be applicable for capital allowances in relation to farm works and correct the deletion which was done after the repeal of the Second Schedule by the Tax Laws Amendment Act, 2020

Effective date: 1 January 2022

Investment Deduction on bulk storage and handling facilities supporting SGR operations

Enacted provision: Investments made before 31 December 2022 on the construction of bulk storage (100,000 metric tonnes and above) and handling facilities to support the Standard Gauge Railway operations will qualify for Investment Deduction of 150%

Implication: Investments made in bulk storage and handling facilities to support the SGR operations will continue enjoying 150% investment deduction, which is different from other categories of investment allowances which qualify for other allowance rates.

Effective date: 1 July 2021

Claiming of Investment Deduction

Enacted provision: The new provisions in the Second Schedule state that the investment deduction shall be 100% where:

a. the cumulative investment value in the preceding three years outside Nairobi City County and Mombasa County is at least two billion shillings: Provided that where the cumulative value of investment for the preceding three years of income was two billion shillings on or before the 25th April, 2020, and the applicable rate of investment deduction was one hundred and fifty per cent, that rate shall continue to apply for the investment made on or before the 25th April, 2020;
b. 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
c. the person has incurred investment in a special economic zone.

Implication: Previously, investments of at least KES 200 million made outside the municipalities of Nairobi, Mombasa and Kisumu qualified for 150% investment deduction. Following the overhaul of the capital allowances by the Tax Laws (Amendment) Act, 2020, such investments qualified for investment deduction at 50% in the first year and 25% in the subsequent year. For investments made prior to 25 April 2020, it appears that there is an intention to provide people who had invested on items qualifying for investment deductions on the knowledge of gaining a 150% capital allowance to be allowed to enjoy this rate, subject to meeting the condition of KES 2 billion cumulative investment over the last three years.

Effective date: 1 January 2022

Income Tax

Civil Works Definition reinstated

Enacted provision: The new provision defines civil works under the definition of manufacture to include:

1. roads and parking areas;
2. railway lines and related structures;
3. water, industrial effluent and sewage works;
4. communications and electrical posts and pylons and other electricity supply works; and
5. security walls and fencing.

Implication: The Tax Laws Amendment Act, 2020 overhauled the Second Schedule to the Income Tax Act but the new Second Schedule did not define civil works.

Civil works comprise a significant part of investment required to carry out manufacturing, and it is reasonable that they are considered for investment deduction.

Effective date: 1 January 2022

Aligning of capital allowance rate for machinery used in the extractive sector

Enacted provision: Under the new provision, the rate of capital allowance for machinery first used to undertake operations under a prospecting right shall be 50% in the first year of use and 25% per year, on a straight line basis for the balance.

Implications: This will align the capital allowances provided for companies in the extractive industry under the Ninth Schedule to those under the Second Schedule to the Income Tax Act.

Effective date: 1 January 2022

Clarity on what qualifies as an infrastructure bond

Enacted provision: The Act has now defined infrastructure bond 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 systems or a communication network

Implication: The new provision is a welcome move as it provides clarity of the nature of infrastructure the Government intends to construct using the proceeds of the infrastructure bonds.

This also confirms the government's commitment towards improving sports and port facilities.

Effective date: 1 July 2021

New thin cap ratio for licensee/contractor for mining/exploration

Enacted provision: The new provision will align interest restriction for contractors or licensee for mining and petroleum operation to other sectors.

Implication: Contractors or licensees for mining and petroleum operations will now enjoy more favourable interest restriction terms. The upshot of this is that it will create room for such companies to use more debt to finance their operations.

This move also encourages investment in mining and petroleum operations and hopefully create more employment opportunities as well as expand the tax revenue base for the government.

Effective date: 1 January 2022

Income Tax

Imposition of Income Tax – Businesses conducted over electronic networks

Enacted provision: Income tax will now be imposed on income accruing from businesses carried out over the internet or an electronic network, including through a digital marketplace.

The Act also contains a new definition for a digital marketplace. A "digital marketplace" is an online platform which enables users to sell or provide services, goods or other property to other users.

Implication: The Finance Act, 2019 amended Section 3(2) of the ITA to impose income tax on income accruing through a digital marketplace.

This provision will bring into the ambit of income tax, multiple businesses that are conducted through the internet without employing online platforms. This will bring into the ambit of taxation, merchants who use social media platforms to market their products and services and generate income.

The change comes at a time when many businesses are struggling to reduce operational costs and grappling with the increase in applicable taxes and may therefore be frowned upon by Medium, Small and Micro Enterprises (MSMEs).

There is a high likelihood that this new tax will be transferred to the consumer and will result in an increase in prices of goods and services rendered over the internet and electronic networks.

Effective date: 1 July 2021

Resident persons off the hook on DST

Enacted provision: This will limit the imposition of the digital service tax (DST) to non-resident persons only.

Implication: The introduction of DST in 2020 was meant to increase the tax revenue base by taxing the increasing number of businesses operating through digital marketplaces.

This provision will offer relief to residents who are already subject to tax on the income that they derive from the digital platforms.

Further, this proposal aligns the taxation of income accrued through digital marketplaces with international best practices.

Effective date: 1 July 2021

Incomes Exempt from DST

Enacted provision: Non-resident businesses that transmit messages via cable, radio, fiber, TV broadcasting, VSAT, internet, satellite or other such methods of communication will be exempt from DST.

Further, income subject to withholding tax will be exempt from DST.

Implication: This provision will offer relief to businesses in the communications sector as well as persons who receive income that is subject to withholding tax.

Ultimately, it is hoped that there can be a fine balance between revenue collection and maintaining businesses as a going concern without incapacitating them with huge tax liabilities.

However, it is important to note that this exemption was already provided for under the Digital Services Tax Regulations, 2020.

Effective date: 1 July 2021

Income Tax

Tax Losses – Removal of the 10 year limit

Enacted provision: The Act has removed the 10-year limit provided to utilize taxable losses.

Implication: The change will enable taxpayers to offset taxable losses against future profits until they are fully exhausted.

The removal of the 10-year limit to utilize allowable losses is a welcome move especially considering that many businesses have been negatively impacted by the COVID-19 pandemic and are unable to generate sufficient taxable profits to offset against tax losses from prior years.

The amendment is important given the introduction of minimum tax that is based on gross revenues as opposed to profits. It should be noted, however, that the High Court has temporarily suspended the collection of minimum tax pending the hearing of petitions brought against the introduction of the new tax.

Effective date: 1 July 2021

Minimum tax exemptions

Enacted provision: The Act has introduced new provisions exempting certain taxpayers from the minimum tax.

The exemption will apply to:

a) business whose retail price is controlled by the Government;

b) insurance business;

c) manufacturing business where cumulative investment in the preceding four years from the date of assent is at least ten billion shillings;

d) Taxpayers licensed under the Special Economic Zones Act, 2015; and

e) Distribution business whose income is wholly based on a commission

Implication: Though the operation of minimum tax is currently suspended, the exemptions provide welcome reprieve to the businesses that have been exempted.

Effective date: 1 July 2021

Overhaul of thin capitalization provisions

Enacted provision: The Act has introduced new provisions governing interest payments that are not deductible for corporation tax purposes.

Gross interest paid or payable to related non-resident persons or third parties in excess of thirty per cent (30%) of earnings before interest, taxes, depreciation and amortization (EBITDA) will be disallowed. Additionally, any income exempt from tax shall be excluded in the calculation of EBITDA.

This provision will apply to:

a) Interest on all loans;

b) Payments that are economically equivalent to interest; and

c) Expenses incurred in connection with raising the finance.

The Act has also clarified that the new thin capitalization provisions will not apply to:

- banks or financial institutions licensed under the Banking Act; and
- micro and small enterprises registered under the Micro and Small Enterprises Act, 2012;

Implication: The changes represent a significant overhaul of the current provisions relating to “thinly capitalized” companies. Currently, interest payments are disallowed proportionately if the sum of all loans are more than three times the aggregate of positive revenue reserves and share capital.

Highly geared entities will be adversely affected by the changes envisaged due to the low threshold (30%) for disallowing interest payments.

The exceptions to the new provisions are a positive move, especially banks which would have been adversely affected if the earlier provision in the Finance Bill, 2021 was not amended to exclude them.

Effective date: 1 January 2022

Income Tax

Income from registered trusts

Enacted provision: Previously, apart from annuities paid free of tax, income paid out by a trustee to a beneficiary was deemed to be already taxed at the appropriate rate as per the ITA. The Act has now specified that in the case of a registered trust, the provision will only apply to:

a) any amount that is paid out of the trust income on behalf of any beneficiary and is used exclusively for the purpose of education, medical treatment or early adulthood housing;

b) income paid to any beneficiary which is collectively below ten million shillings in the year of income;

c) such other amount as the Commissioner may prescribe from time to time

Implication: The change will lead to taxation of income from registered trusts paid out to beneficiaries that do not fall under the categories outlined above.

Effective date: 1 July 2021

Income from settlement

Enacted provision: The Act has amended the definition of "settlement" in relation to payment made to the settlor or the benefit of the child of the settlor being considered as income of the settlor and no one else.

The new provision specifies, that in relation to transfer of assets, the term "settlement" will apply to those transferred through a registered family trust.

Implication: Transfer of assets through a registered family trust will fall under the provision but it is unclear how other transfer of assets resulting from a settlement but done through other means will be treated from a tax perspective.

Effective date: 1 July 2021

Registered family trusts – Income tax exemption

Enacted provision: The Act has now exempted from income tax:

- property, including investment shares, which is transferred or sold for the purpose of transferring the title or the proceeds into a registered family trust.
- the income or principal sum of a registered family trust.
- any capital gains relating to the transfer of title of immovable property to a family trust.

Implication: This will encourage more and more people to register family trusts for purposes of succession without exposure to adverse tax consequences.

Effective date: 1 July 2021

Income Tax

Insurance Relief – NHIF Contributions

Enacted provision: The Act has extended insurance relief to include National Health Insurance Fund (NHIF) contributions.

Implications: This is a welcome move as it would cover a majority of Kenyans who pay NHIF contributions but are unable to enjoy the insurance relief afforded on premiums paid to other life insurance schemes. The new provision will also lead to higher net pay for employees due to the insurance relief being applied on NHIF contributions deducted through the payroll.

Effective date: 1 January 2022

Income Tax

Control in body corporates

Enacted provision: The Act has amended the interpretation section of the ITA to include a new definition of control.

Per the proposal, "control" has been defined as follows:

1. A person has direct or indirect ownership of at least 20% of the voting rights in a company;
2. A person has advanced a loan to another person and that constitutes at least 70% of the book value of the borrower's total assets, save for a loan from an unrelated financial institution.
3. A guarantee by a person constitutes at least 70% of the total indebtedness of the other person save for a guarantee by an unrelated financial institution;
4. A person has the power to appoint more than half of the board of directors or at least one director or executive member of the governing board;
5. A person owns or has exclusive rights over intellectual property on which another person wholly depends for the manufacture or processing of goods or articles or business;
6. A person or their assignee supplies at least 90% of the purchases of the other person, and the Commissioner upon assessment, deems influence on pricing or other conditions relating to such supply;
7. A person or their assignee purchases at least 90% of the sales of another or influences pricing or conditions related to the sales; and
8. A person deals or relates with another in a way which the commissioner deems to constitute control.

Implication: This provision reduces the threshold for control from 25% to 20% and will broaden the definition of control, which previously included shareholding and voting power that influences the conduct of affairs of a body corporate.

The Act has also corrected the omission of definition of control which was deleted by Tax Laws Amendment Act, 2020. The provision is an appreciation of the fact that over time, suppliers, consumers, financiers and guarantors have increasingly exercised control over business affairs as well as taken positions in governance boards.

This will consequently increase the compliance burden for the affected taxpayers in a bid to comply with the transfer pricing legislation in Kenya.

Effective date: 1 July 2021

What constitutes a Permanent Establishment?

Enacted provision: The Act deleted the definition of a permanent establishment (PE) under the Income Tax Act and replaced it as follows:

1. A fixed place of business through which a business is carried on;
2. A building site, construction, assembly or installation project or any supervisory activity, provided that the same continues for more than 183 days;
3. Provision of services including consultancy services through employees or other personnel where those services continue for more than a period exceeding in aggregate, 91 days in any twelve month period;
4. An installation or structure used for exploration of natural resources provided that such activity continues for a period of 91 days or more; and
5. A dependent agent of a person acting on behalf of the principal in respect of activities undertaken in Kenya including habitually concluding contracts or playing a material role in the conclusion of contracts that are routinely concluded without material modification.

These provisions will not apply where the activities are of a preparatory or auxiliary character.

Implication: The new definition provides clarity on the activities that will culminate in a PE for a non-resident entities and the relevant qualifying durations. The prescription on the activities that do not constitute a PE is in line with the OECD Model Tax Convention on Income and Capital.

Consultants providing services on behalf of non-residents and players in the extractive industry will now result in a PE within 91 days. The new definition also introduces other activities such as a warehouse, farm, plantation and a sales outlet.

The provision also seeks to counter the artificial avoidance of PE status through the splitting of contracts, by aggregating the time spent on the various connected activities on construction and installation projects in determining the duration of a project.

The risk of crystallising a PE will therefore increase, requiring persons to constantly monitor the time spent by employees and consultants in Kenya and the potential tax obligations. Taxpayers will also be required to assess their controlled transactions and ensure that transfer pricing outcomes are aligned with value creation.

Effective date: 1 July 2021

Income Tax

Multinational Enterprises – Additional reporting

Enacted provision: The Act has introduced a requirement for the ultimate parent entity (UPE) of a multinational enterprises group (MNE) to submit a return to the Commissioner detailing the group's financial activities in Kenya as well as in other jurisdictions where the group has a taxable presence.

An "Ultimate Parent Entity" is defined as an entity that:

- Is resident in Kenya for tax purposes;
- Is not controlled by another entity; and
- Owns and controls a multinational enterprise group.

"Multinational Enterprise Group" is defined as a group that includes two or more enterprises that carries on business through a PE or through any other entity in another jurisdiction.

The return submitted to the Commissioner shall include information relating to the amount of revenue; profit or loss before tax; income tax paid; income tax accrued; stated capital; accumulated earnings; number of employees and tangible assets other than cash or cash equivalents with regard to each jurisdiction in which the group operates. The return should be submitted not later than 12 months from the last day of the group's financial year.

The provision will apply to MNE Groups that have gross turnover exceeding the prescribed revenue threshold. The Act is silent on the threshold and has not provided the relevant reporting template. We expect additional guidelines to operationalise this proposal.

Multinational Enterprises – Additional Reporting…cont'd

Implication: This change has been introduced with a view to align with the OECD Base Erosion and Profit Shifting (BEPS) Action 13 on Country-by-Country (CbyC) reporting. This provision currently applies to multinational groups whose UPE is based in Kenya.

CbyC reporting seeks to enhance transparency of MNEs tax matters as well as enable tax authorities in different jurisdictions to share relevant tax information with each other. Kenya is a signatory to The Multilateral Convention on Mutual Administrative Assistance in Tax Matters which entered into force on 1 November 2020. The Convention is the most comprehensive multilateral instrument available for all forms of tax co-operation to tackle tax evasion and avoidance. Once the necessary frameworks are in place, it is expected that the information will be used by the KRA to collaborate with other countries on the exchange of information as well as carrying out transfer pricing risk assessments.

The introduction of CbyC reporting will result in additional transfer pricing documentation and reporting requirements for MNEs. This will not only lead to increased compliance costs on reporting, but also increased tax and transfer pricing audits from the KRA.

Effective date: 1 January 2022

Withholding tax

Income Tax

Withholding tax in the mining and petroleum sector

Enacted provision: The Act has increased the withholding tax rate for the fees paid to a non-resident for the provision of services to a licensee or contractor in respect of mining or petroleum operations from a rate of 5.625% to 10%.

It is important to note that the earlier rate of 5.625% was arrived at by factoring the non-resident corporation tax rate of 37.5% multiplied by the estimated revenue of 15%. However, no formula has been provided in arriving at the rate of 10%.

Implication: The change will increase the cost of operating in the extractive sector in Kenya.

This will be a significant consideration especially at a time when the country is looking for a new principal investor and operator for the Turkana oil project.

Effective date: 1 July 2021

Income Tax

Withholding tax on disbursement of deemed income to trustee beneficiaries

Enacted provision: The Act has introduced withholding tax at the rate of 25% in respect to the disbursement of deemed income to trustee beneficiaries of a registered trust that do not fall under the below category:

- any amount paid out of the trust income on behalf of any beneficiary which 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; and
- such other amount as the Commissioner may prescribe from time to time.

Implication: The change introduces taxation on deemed income from registered trusts paid out to beneficiaries that do not fall under the above categories.

The withholding tax rate introduced of 25% implies that the income after tax receivable by trustee beneficiaries of a registered trust will be 75%, reflecting a significant impact on the net receivable income.

Effective date: 1 July 2021

Value Added Tax

Value Added Tax Act

Clarity on supply of imported services

Enacted provision: The Act amends the conditions for a supply to be considered as a supply of imported services. The amendment provides that among other conditions, in the case of a registered person, the person would not have been entitled to a full amount of input tax payable if the services had been acquired by that person in a taxable supply.

In addition, this aligns the treatment of imported services with the amended definition by clarifying that both registered and non-registered persons are considered to have made a supply to themselves if they import a taxable supply.

Implication: This amendment clarifies the ambiguity on the definition of supply of imported services in the case of persons not registered for VAT. It is now clear that both registered and non-registered persons will be deemed to have made a supply of imported services, consequently they will be liable to account for reverse VAT, where applicable.

Effective date: 1 July 2021

Expanded scope for digital services

Enacted provision: The Act expands the definition of digital services to include supplies made over the internet or an electronic network in addition to those made through a digital marketplace.

Further, it expands 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.

Implication: This expands the definition of digital services chargeable to VAT by adding those made over the internet or an electronic network. In addition, the expansion of the definition of the digital marketplace extends the base for purposes of determining what comprises digital services for purposes of chargeability to VAT.

Effective date: 1 July 2021

Clarity on deductibility of input VAT

Enacted provision: The Act seeks to amend Section 17 of the VAT Act that provides for deduction of input VAT to the extent that the input VAT was acquired to make taxable supplies. It deletes the reference that the input VAT restriction is only limited to the provisions of Section 17 but will now include the provisions of the entire VAT Act and Regulations.

Implication: This clarification means that prior to the deduction of input VAT, businesses should ensure that the purchase was incurred to make a taxable supply despite any other provisions of the VAT Act and Regulations. This has been the practice. However, the wording of the VAT Act currently may be interpreted to mean that the requirement for the purchase to have been incurred to make a taxable supply as not applicable when considering the other provisions of the VAT Act and Regulations.

Effective date: 1 July 2021

Additional restriction on claiming input VAT

Enacted provision: The Act has expanded the restriction on claiming of input VAT to the leasing or hiring of passenger cars or mini buses, entertainment, restaurant and accommodation services. As currently worded, the VAT Act only refers to acquisition of these supplies.

Implication: The amendment implies that input VAT incurred in relation to the procuring of passenger cars or mini buses and entertainment, restaurant and accommodation services in any form including leasing, hiring and purchasing is not deductible.

The amendment provides clarity on the deductibility of VAT relating to leasing or hiring of these supplies.

Effective date: 1 July 2021

Value Added Tax - Tax rate changes

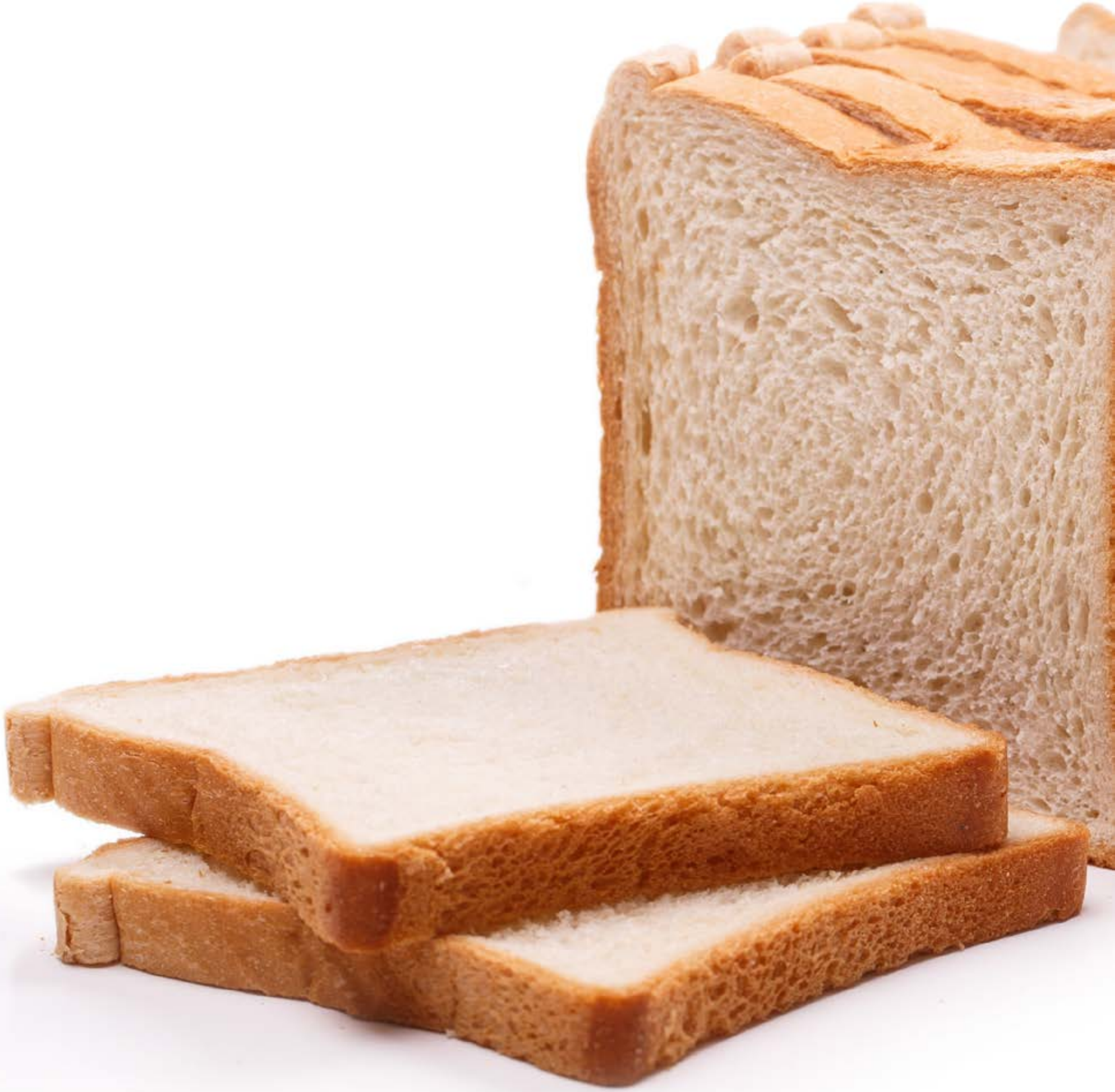
a) Tax rate changes (Services – Zero rated to exempt)

Details	New rate	Old rate
The exportation of taxable services	Exempt	0%

The change of VAT rate on the exportation of taxable services from zero-rated to exempt will mean that companies will not be able to claim input VAT incurred in the supply of exported services.

This comes at a time where KRA had a different interpretation from taxpayers on what constitutes an export of service, leading to KRA's rejection of taxpayers' refund claims. As a result, the rejection of the various taxpayers' claims, coupled with multiple KRA assessments for VAT on exported services, inevitably led to a lot of cases at the Tax Appeals Tribunal and the High Court, a great number of which KRA has lost. Therefore, the amendment may be viewed as a measure taken by KRA to address the recent losses at the various courts. Further, this move is likely to deter investments in Kenya as a service centre due to the fact that the companies would not be able to recoup their input VAT.

Effective date: 1 July 2021



Value Added Tax - Tax rate changes

b) Tax rate changes (Services – exempt to zero rated)

Details	New rate	Old rate
Transportation of sugarcane from farms to milling factories.	0%	Exempt

The exemption of sugarcane transportation comes at time that the government is trying to revive the sugar industry and therefore the zero-rating of these items will contribute towards the reduction of costs in the sugarcane sector.

Effective date: 1 July 2021

c) Tax rate changes (Services –exempt to zero rated)

Item	New rate	Old rate
The transportation of goods originating from Kenya to a place outside Kenya.	0%	16%

This is amendment will reduces the cost of exports originating from Kenya.

Effective date: 1 July 2021

d) Tax rate changes (goods – exempt to zero rated)

Details	New rate	Old rate
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.	0%	Exempt

Coupled with the proposal to continue zero rating the supply of ordinary bread, the zero-rating of maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour will effectively reduce the cost of production thereby increasing the consumption of bread and meals which are considered to be staple foods for the ordinary Kenyan.

Previously, the Finance Act 2020 had suspended the exemption of maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour for 6 months till 1st January 2021 in order to cushion this sector from the effects of Covid-19.

It is also important to note that the Finance Act corrected a drafting error which had retained ordinary bread under exempt items despite being reclassified to zero-rated status by the Finance Act, 2017.

Value Added Tax - Sanitization of exempt supplies tariff classification

The Acts cleans up of various tariff classifications in the First Schedule to the VAT Act as some of the items under this Schedule had drafting errors. Some of the drafting errors included erroneous tariff codes and duplications of items with similar tariff codes. We tabulate the amendments as below:

Description (Exempt)	**Prior description (Exempt)**
Syringes, with or without needles of tariff no. 9018.31.00.	Disposable plastic syringes of tariff No. 9018.31.10
	Other syringes with or without needles of tariff No. 9018.31.90
3001.90.00 Other - Heparin and its salts	3001.90.10 Heparin and its salts.
3001.90.00 Other - Other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included	3001.90.90 - Other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included
3002.12.00 Antisera and other blood fractions 3002.13.00 Immunological products unmixed, not put up in measured doses or in forms or packings for retail sale 3002.15.00 Immunological products put up in measured doses or in forms or packings 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	3002.10.00 - Antisera and other blood fractions and modified immunological products, whether or not obtained by means of biotechnological processes
Super absorbent polymer (SAP) of tariff number 3906.90.00	Super absorbent polymer (SAP) of tariff number 39.06.90.0
IP super soft fluff pulp - for-fluff 310 treated pulp 488*125mm (cellulose) of tariff number 4703.21.00	IP super soft fluff pulp - fr-fluff 310 treated pulp 488*125mm (cellose) of tariff number 4703.21.0
Perforated PE film 15-22 gsm of tariff number 3921.90.00	Perforated PE film 15-22 gsm of tariff number 3921.190.0
Spun bound non-woven 15-25gsm of tariff number 5603.11.00	Spunbound non-woven 15-25 gsm of tariff number 56.03.1190.8
Airlid paper with super absorbent polymer 180gsm/67 of tariff number 4803.00.00	Airlid paper with super absorbent polymer 180gsm/67 of tariff number 48.03.00.0
Airlid paper with super absorbent polymer 80gsm/67 of tariff number 4803.00.00	Airlid paper with super absorbent polymer 80gsm/67 of tariff number 48.03.00.0

Items under paragraph 33 and 34 of the First Schedule to the VAT Act which comprise of syringes and disposal plastic syringes have been deleted as these items are covered under tariff no. 9018.31.00. Therefore, these items still remain exempt supplies.

Effective date: 1 July 2021

Value Added Tax - Sanitization of exempt supplies tariff classification

Updated description (Exempt)	**Prior description (Exempt)**
Pressure sensitive adhesive of tariff number 3506.91.00	Pressure sensitive adhesive of tariff number 3506.91.90
Plain polythene film/LPDE of tariff number 3921.19.10	Plain polythene film/LPDE of tariff number 39.21.190.0
Plain polythene film/PE of tariff number 3921.19.10	Plain polythene film/PE of tariff number 39.21.190.0
PE white 25-40gsm/release paper of tariff number 4811.49.00	PE white 25-40gsm/release paper of tariff number 48.44.51.10.0.
ADL 25-40gsm of tariff number 5603.11.00	ADL 25-40gsm of tariff number 56.03.1190.8.
Elasticized side tape of tariff number 5402.44.00	Elasticized side tape of tariff number 5402.4410.
12-16 gsm spun bound piyropo nonwoven cover stock/12 gsm spun bound pp non-woven SMS hydrophobic leg cuffs of tariff number 5603.11.00	12-16 gsm spunbound piyropononwoven coverstock/12gsm spunbound PP non-woven SMS hydrophobic leg cuffs of tariff number 56.03.1190.8.
Polymetric elastic 2/3 strands of tariff number 3919.90.10	Polymetric elastic 2/3 strands of tariff number 3919.90.90.10.

Duplicated items

The Act deletes the following items from the list of exempt items as they are duplicated under similar tariff coding:

a) Paragraph 75: Airlid paper without super absorbent polymer 180gsm/67 of tariff number 48.03.00.0

b) Paragraph 76: Airlid paper without super absorbent polymer 80gsm/67 of tariff number 48.03.00.0.

c) Paragraph 85: Plain polythene film/PE of tariff number 39.20.10.10.

d) Paragraph 86: PE white 25-40gsm/release paper of tariff number 48.10.99.00.

e) Paragraph 87: 12-16 gsm spunbound piyropononwoven coverstock/15gsm spunbound PP non-woven SSMMS hydrophobic leg cuffs of tariff number 56.03.1190.

Similarly, the tariff coding for these items has been corrected under the Finance Act. The deletion of the duplicated items and clean up of the erroneous tariff codes is set to align the VAT Act tariff classifications with the East African Community Common External Tariffs.

Effective date: 1 July 2021

Value Added Tax - Sanitization of exempt supplies tariff classification

VAT Exemptions on infant milk

The current VAT Act provides for exemption of infant milk under the following tariff codes listed below:
0402.99.10 Milk, specially prepared for infants
0402.91.10 Milk, specially prepared for infants
0402.29.10 Milk, specially prepared for infants
0402.21.10 Milk, specially prepared for infants

However, these tariff codes are not aligned with the EAC Common External Tariff. The Act deletes these tariff codes and add to the list of exempt items the codes as tabulated below:

New provisions	Deleted provisions
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	0402.99.10 Milk, specially prepared for infants 0402.91.10 Milk, specially prepared for infants 0402.21.10 Milk, specially prepared for infants

Implication: This amendment ensures that the correct tariff codes are captured in relation to VAT exemption of value added milk. There is a possibility that the importation/production of infant milk could fall under the description of "other milk". However, this is subject to different interpretations. It is also interesting that the item " 0402.29.10 Milk, specially prepared for infants" has not been deleted and therefore it is still arguable that the infant milk is still exempt.

The Act further expands the categories of the following items while maintaining them under the list of exempt items:

Tariff Number	Description	New Rate	Old Rate
3003.31.00	Insulin	Exempt	Exempt
9018.90.00	Blood giving set and infusion sets	Exempt	Exempt

Effective date: 1 July 2021

Value Added Tax - Change of Tax Rate - Standard Rated to Exempt

Tariff Number	Description	New Rate	Old Rate
2106.10.00	Protein concentrates and textured protein substances	Exempt	16%
2106.90.10	Food preparations specially prepared for infants	Exempt	16%
2106.90.99	Other - Food preparations not elsewhere specified or included	Exempt	16%
2936.27.00	Vitamin C and its derivatives	Exempt	16%
3004.43.00	Other medicaments, containing alkaloids or derivatives containing norephedrine or its salts	Exempt	16%
3004.60.00	Other, containing antimalarial active principles described in Subheading Note 2 to this Chapter	Exempt	16%
2106.90.91	Food supplements	Exempt	16%
3002.11.00	Malaria diagnostic test kits	Exempt	16%
9021.10.00	Orthopaedic or fracture appliances	Exempt	16%
9021.50.00	Other artificial parts of the body: Pacemakers for stimulating heart muscles, excluding parts and accessories	Exempt	16%
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: Other	Exempt	16%
9019.20.00	Airway Guedel and Ambu bags	Exempt	16%

Effective date: 1 July 2021

Value Added Tax - Change of Tax Rate - Standard Rated to Exempt

Description	New rate	Old rate
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 in accordance with the Energy Act, 2019, production sharing contracts in accordance with the Petroleum Act, 2019, or a mining license in accordance with the Mining Act, 2016, upon recommendation by the Cabinet Secretary responsible for matters relating to energy, the Cabinet Secretary responsible for matters relating to petroleum, or the Cabinet Secretary responsible for matters relating to mining, as the case may be.	Exempt	16%
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 to the Commissioner by the Cabinet Secretary responsible for matters relating to energy.		
Taxable goods supplied to persons that had an agreement or contract with the Government prior to 25th April 2020 and the agreement or contract provided for exemption from value added tax: 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.		
Medical ventilators and the inputs for the manufacture of medical ventilators upon recommendation by the Cabinet Secretary responsible for matters relating to health.		
Physiotherapy accessories, treadmills for cardiology therapy and treatment of tariff number 9506.91.00 for use by licensed hospitals upon approval by the Cabinet Secretary responsible for matters relating to health.		
Dexpanthenol of tariff number 3304.99.00 used for medical nappy rash treatment by licensed hospitals upon approval by the Cabinet Secretary responsible for matters relating to health.		
Medicaments of tariff numbers 3003.41.00, 3003.42.00, 3003.43.00, 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 upon approval by the Cabinet Secretary responsible for matters relating to health.		
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 upon approval by the Cabinet Secretary responsible for matters relating to health.		
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, upon approval by the Cabinet Secretary responsible for matters relating to health.		
Other instruments and appliances, including surgical blades, of tariff number 9018.49.00, 9018.50.00 9018.90.00 used in dental sciences upon approval by the Cabinet Secretary responsible for matters relating to health.		
Ozone therapy, oxygen therapy, aerosol therapy, artificial respiration or other therapeutic respiration apparatus upon approval by the Cabinet Secretary responsible for matters relating to health.		
Other breathing appliances and gas masks, excluding protective masks having neither mechanical parts nor replaceable filters upon approval by the Cabinet Secretary responsible for matters relating to health.		

Value Added Tax - Change of Tax Rate - Standard Rated to Exempt

Description	New rate	Old rate
Artificial teeth and dental fittings of tariff numbers 9021.21.00, 9021.29.00 and artificial parts of the body of tariff numbers 9021.31.00, 9021.39.00, 9021.50.00 and 9021.90.00 upon approval by the Cabinet Secretary responsible for matters relating to health.	Exempt	16%
Apparatus based on the use of x-rays, whether or not for medical, surgical or dental of tariff numbers 9022.12.00, 9022.13.00, 9022.14.00 and 9022.19.00 upon approval by the Cabinet Secretary responsible for matters relating to health.		
Apparatus based on the use of alpha, beta or gamma radiations, whether or not for medical, surgical or dental of tariff numbers 9022.21.00, 9022.29.00, 9022.30.00 and 9022.90.00, upon approval by the Cabinet Secretary responsible for matters relating to health.		
Discs, tapes, solid-state non-volatile storage devices, "smart cards" and other media for the 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 upon approval by the Cabinet Secretary responsible for matters relating to health.		
Weighing machinery (excluding balances of a sensitivity of 5 cg or better), of tariff number 8423.31.00, including weight operated counting or checking machines; weighing machine weights of all kinds upon approval by the Cabinet Secretary responsible for matters relating to health.		
Fetal Doppler-Pocket (Wgd-002) Pc and pulse oximeter-finger held (Gima brand) Pc of tariff number 9018.19.00 upon approval by the Cabinet Secretary responsible for matters relating to health.		
Sterilizer Dry Heat (Wgd-001-Grx-05A) Pc, autoclave steam table tops of tariff number 8419.20.00 upon approval by the Cabinet Secretary responsible for matters relating to health.		
Needle holders and urine bags, of tariff heading 3926		
Tourniquets of tariff number 3926.90.99 for use by licensed hospitals upon approval by the Cabinet Secretary responsible for matters relating to health.		
The transfer of assets and other transactions related to the transfer of assets into real estate investment trusts and asset-backed securities.		
Taxable supplies including fish feeding and handling, water operations, cold storage, fish cages, pond construction and maintenance, and fish processing and handling, imported or purchased for direct and exclusive use on the recommendation of the relevant state department		
Pre-fabricated biogas digesters		
Biogas		
Sustainable fuel briquettes for household and commercial use.		
The supply of denatured ethanol of tariff number 2207.20.00.		
Tractors other than road tractors for semitrailers.		

Effective date: 1 July 2021

Value Added Tax - Change of Tax Rate - Standard Rated to Exempt

Due to the Covid-19 pandemic, the government has exempted medical equipment and inputs used to manufacture equipment such as ventilators, breathing appliances and medicaments. This move will lower the cost of production due to the lower cost of importation which will lead to the increase in capacity to fight the pandemic.

The exemption of 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 to the Commissioner by the Cabinet Secretary for Energy is also a welcome move as it will promote the development of clean energy sources. Further the exemption of pre-fabricated biogas digesters , biogas and sustainable fuel briquettescomes will additionally provide an alternative source of cheaper and clean energy.

The return of VAT concessions on 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 in accordance with the Energy Act, 2019, production sharing contracts in accordance with the Petroleum Act, 2019, or a mining license in accordance with the Mining Act, 2016, upon recommendation by the Cabinet Secretary for Energy, the Cabinet Secretary for Petroleum, or the Cabinet Secretary for Mining will also reduce the cost of investment and operations in this capital intensive industry. This is now likely to encourage future investments in these sectors which have seen some of the biggest players abandoning projects due to the escalating costs.

The exemption of fish production costs is a boost to fish farming which is being advocated as an alternative source of livelihood in Kenya. The exemption will reduce the cost of production of inputs used in fish processing plants and fish farming equipment. This exemption is a welcome move as it will enhance food security in the country.

The exemption of tractors other than road tractors for semitrailers from VAT is a good gesture, especially for the agriculture industry which has been negatively impacted by the Covid 19 pandemic. This will spur growth in the industry due to the reduced costs of agriculture production.

The exemption of the supply of denatured ethanol of tariff number 2207.20.00 which is an input used in the manufacture of sanitizers will lower the cost of production hence in increasing the capacity in fighting against the Covid-19 pandemic.

Effective date: 1 July 2021

Excise Duty

Excise Duty

Introduction of new definitions

Enacted provision : The Act introduces definitions of "compound' and possession", terms that have been used within the Excise Duty Act 2015. Currently, these terms are not defined.

Compound has been defined to mean: ''to communicate any flavor to, or to mix any ingredient or material with, spirits, but not so as to denature the spirits.'' This meaning aligns with that assigned under the Compounding of Potable Spirits Act.

Possession has been defined to mean: ''having, owning or controlling any excisable goods including;

a) Having in one's possession any excisable goods
b) Knowingly having any excisable goods in the actual possession or custody of any other person
c) Having any excisable goods in any place, whether belonging to or occupied by oneself or not, for the use or benefit of oneself; or
d) Having any excisable goods for the use or benefit of another person.''

Provided that if there are two or more persons and any of them with the knowledge or consent of the others has any excisable goods in his custody or possession, such goods shall be deemed to be in the custody and possession of all them.

Implication: The Act removes any ambiguity on what these terms mean by introducing the definition in the Second Schedule of the Act.

This subsequently brings clarity on the application of these terms throughout the Act for the purposes of compliance.

Effective date: 1 July 2021

Rebates to internet data providers

Enacted provision : The Act introduces a new provision to allow the offset of excise duty paid on purchase of bulk data which is subsequently resold against the excise duty payable by the licenced internet data provider.

This rebate shall only be available where the internet data services are supplied to the final consumer.

Implication: This move will provide relief to internet data services providers and may subsequently reduce the cost of internet to the final consumers.

Effective date: 1 July 2021

Excise Duty

Excise duty on locally manufactured white chocolate

Enacted provision: The Act has amended the Excise Duty Act by reintroducing excise duty on white chocolate, chocolate in blocs, slabs or bars of tariff Nos 1806.31.00, 1806.32.00 and 1806.90.00

Through the Finance Act, 2019, locally manufactured white chocolate was excluded from the purview of excise duty. The Act now introduces excise duty on the above locally manufactured goods as tabulated below:

Particulars	Rate
White chocolate (blocs, slabs or bars) of above mentioned tariff Nos	209.88/kg

Implication: The Act introduces excise duty on all supplies of white chocolate whether imported or local.

The additional cost may negatively impact the consumption and manufacture of these products.

This move may also discourage the local manufacturing of these goods as this proposal will not cushion the local companies from the competition of cheaper imports.

Effective date: 1 July 2021

Excise duty exemption of glass bottles imported from the EAC countries

Enacted provision: The Act has amended the Excise Duty Act by exempting from excise duty glass bottles imported from countries within the EAC.

Excise duty on imported glass was first introduced by the Business Laws (Amendment) Act, 2020, which amended the First Schedule to the Excise Duty Act, 2015, by imposing duty at 25%.

Implication: This is a welcome move for manufacturers who use imported glass from EAC countries to package their products. However, it effectively means that any glass bottles imported from outside the EAC shall still be subject to excise duty at the rate of 25%.

Effective date: 1 July 2021

Excise Duty

Change to the Excise Duty Rates

Enacted provision : The Act has amended or introduced excise duty on the following items:

Particulars	New Rate	Old Rate
Jewellery of tariff 7113 and Imported Jewellery of tariff 7117	10%	Nil
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 manufacture tobacco substitutes that have been homogenized and reconstituted tobacco, tobacco extracts and essences	KES 1,200 Per Kg	Nil
Articles of plastic of tariff heading 3923.30.00	10%	Nil
Imported pasta of tariff 1902 whether cooked or not cooked or stuffed (with meat or other substances) or otherwise prepared, such as spaghetti, macaroni, noodles, lasagne, gnocchi, ravioli, cannelloni, couscous, whether or not prepared	20%	Nil
Imported furniture of any kind used in offices, kitchen, bedroom and other furniture of tariff number 9403	25%	Nil
Imported eggs of tariff heading 04.07		
Imported onions of tariff heading 07.03		

Effective date: 1 July 2021

Particulars	New Rate	Old Rate
Telephone and internet data services	20%	15%
Imported potatoes, potato crisps and potato chips of tariff heading 07.01	25%	Nil
Imported sugar confectionary of tariff heading 17.04 not containing cocoa	35/kg	20.99/kg
3907.91.00 unsaturated polyester	10%	Nil
3907.50.00 Alkyd		
3905.91.00 Emulsion VAM		
3903.20.00 Emulsion-styrene Acrylic		
3905.19.00 Homopolymers		
3906.90.00 Emulsion B.A.M		

Implication: The additional cost may negatively impact the consumption and purchase of these products.

The introduction of excise duty on jewelry is part of the tax base expansion while the introduction of tax on nicotine products intended for inhalation without combustion is a reaction to changing trends in the tobacco industry to diversify from traditional cigarette products.

On the other hand, the increase of excise duty on telephone and internet data services from 15% to 20% will increase communication costs, but it provides an easy avenue for the government to collect more taxes.

Excise Duty

Excise duty on plastics aims to further discourage use of plastics following the ban on use of polythene bags, and is a move to conserve the environment.

Excise duty on imported furniture, eggs, onions and potatoes is a move to widen the government's revenue base, while at the same time protecting local industry by encouraging local production of these products.

Excise duty on unsaturated polyester, alkyd, emulsions and homopolymers, is a move by the government to widen its revenue base, and will see the price of the products go up further aggravating the hardships caused by the Covid 19 pandemic.

Effective date: 1 July 2021

Excise duty introduced on betting, gaming, competition and lottery (excluding charitable lottery)

Enacted provision: The Act introduces excise duty on betting and gaming at a rate of 7.5% of the amount staked, and on price competition at a rate of 7.5% of the amount paid or charged to participate in a prize competition. Further lottery (excluding charitable lottery) is now excisable at a rate of 7.5% of the amount paid or charged to buy the lottery ticket. Excise duty on betting was initially introduced in the year 2019 but was removed in July 2020 through the Finance Act 2020 following lobbying by betting firms.

Implication: With the reintroduction of the excise duty on betting at 7.5%, and the expansion of the revenue base by bringing into the purview of excise duty gaming, lottery, and prize competition at 7.5%, the country may experience an exit from the market of the key industry players citing an unsustainable and unfavourable business environment.

Effective date: 1 July 2021.

Introduction of Excise Duty on fees and commissions earned on loans

Enacted provision : The Act amends the definition of "other fees" by deleting the words '*fees or commissions earned in respect of a loan*."

Previously, other fees were defined to include any fees, charges or commissions charged by financial institutions, but excluded from excise duty, interest on loan or return on loan or fees or commissions earned in respect of a loan. Effectively this meant that fees and commission earned on loans were not within the purview of excise duty.

In the recent past, the Tribunal has issued judgements relating to chargeability of excise duty on loan related fees. In these judgements, the Tribunal has consistently held that loan related fees such as loan administration fees are not chargeable to excise duty.

Implication: In recent disputes between various financial institutions and KRA, the Tax Appeal Tribunal has ruled that fees paid in respect of a loan qualify as interest and in our view the enacted provision aligns with this thinking.

Effective date: 1 July 2021

Excise Duty

Excise Duty Remission now subject to parliamentary approval

Enacted provision: The Act introduces a sub -section 3A to Section 7 of the Excise Duty Act to the effect that any excise duty remission by the Cabinet Secretary shall be laid before the National Assembly for approval or annulment within 21 days of tabling. Previously, there has been no requirement for approval of duty remission by the parliament in respect of beer or wine made from sorghum, millet or cassava or any other agricultural products, (excluding barley), grown in Kenya.

Implication: The move gives the National Assembly powers to decide on what products qualify for duty remission, and is a welcome move as it limits the possibility of bias if the decision is left to the Cabinet Secretary.

Effective date: 1 July 2021

Illuminating kerosene products now exempt from excise duty

Enacted provision : The Act amends the Second Schedule to exempt illuminating kerosene supplies to licensed or registered manufacturers of paint, resin or shoe polish in such quantities as the Commissioner may approve.

Implication: This is a welcome move as it will also make paints cheaper, reducing the cost of construction.

Effective date: 01 July 2021

Exemption of ring back tune from duty

Enacted provision : The Act amends the Second Schedule to exempt from tax excisable services supplied in Kenya by a mobile telecommunication service provider on the sale of a ring back tune to a subscriber.

Implication: This can be seen as a move to encourage innovation especially among artists by making this product cheaper.

Effective date: 1 July 2021

Tax Procedures Act and other Miscellaneous Acts

Tax Procedures Act

Scope of TPA to include Miscellaneous Fees and Levies Act

Enacted provision: The Act has amended the definition of "tax law" in the Tax Procedures Act (TPA) to include the Miscellaneous Fees and Levies Act, 2016 (MFLA).

Implication: The inclusion of the MFLA as part of the scope of the TPA will facilitate consolidation and harmony in the administration of tax laws.

Effective date: 1 July 2021

Financial institutions to report to KRA

Enacted provision: The Act has introduced a mandatory requirement for financial institutions to conduct due diligence procedures and report to the Commissioner reportable accounts in accordance with the Common Reporting Standards (CRS).

The new requirement will to come into effect once the Cabinet Secretary, National Treasury, has published the CRS Regulations.

The requirement to report applies to financial institutions that are resident in Kenya and foreign branches located in Kenya.

The Act also to imposes a penalty of **KES 100,000** for each false statement or omission, or an imprisonment of a term not exceeding 3 years or both.

A reporting financial institution that fails to file the return will be subject to a fine of **KES 1,000,000**.

Implication: Globally, CRS filings have been a useful tool for revenue authorities to enhance compliance and disclosure, effectively curbing revenue leakage.

Effective date: 1 July 2021

Restricted disclosure of information exchanged pursuant to international tax agreement

Enacted provision: The Act restricts disclosure of information obtained by the government under multilateral tax agreements except in accordance with the conditions specified in the agreements.

Implication: The provision will buttress the privacy and confidentiality obligations contained in the TPA and other relevant legislation including Data Privacy Act.

Effective date: 1 July 2021

Tax Procedures Act

Abolition of amnesty on tax on rental income

Enacted provision: The Act has deleted Section 37A of the TPA which bars the Commissioner from recovering taxes, interests and penalties for rental income before or during 2013 year of income.

Implication: This is a cleanup of the TPA to remove the amnesty whose period has since expired. In addition, the open voluntary tax disclosure programme would cover such income.

Effective date: 1 July 2021

Reporting currency for non-resident digital service suppliers

Enacted provision: The Act amends the TPA to exempt non-residents carrying on business through a digital marketplace from the requirement to keep their books of accounts, records, paper registers, tax returns or tax invoices in Kenyan shillings. Therefore, such persons can maintain records in convertible foreign currency.

Implication: This will simplify compliance for non-resident entities that are subject to the Digital Service Tax by allowing them to keep records and issue tax invoices in convertible foreign currency.

The is likely to improve efficiency in the administration and payment of DST by non-resident entities.

Effective date: 1 July 2021

Due date for electronic filings

Enacted provision: The TPA provides that when a date for submitting or lodging a tax return, application, document, payment of tax, or for the taking any other action falls on a weekend or public holiday, then the due date shall be the previous date.

The Act now provides that the due date for the above shall remain the date specified in the relevant tax law (if done in electronic form) as opposed to the previous date.

Due date for electronic filings…cont’d

Implication: This amendment is a welcome clarification. This provision will allow for the filing of returns and objections on weekends or on public holidays where the due dates for filings or payment of taxes fall on weekends or public holidays.

Effective date: 1 July 2021

Relief from liability due to difficulty in recovery of taxes

Enacted provision: The Act amends the TPA by allowing the Commissioner to refrain from assessing or recovering unpaid tax from a taxpayer where there is any other reason occasioning inability to recover the unpaid tax.

Further, the Act introduces a requirement for the Commissioner to submit a report to the Cabinet Secretary containing the details and amounts of taxes abandoned on grounds of doubt or difficulty in recovery of tax.

Implication: This provision will expand the grounds upon which the Commissioner may abandon tax due to doubt or difficulty. This is a welcome relief to taxpayers who have been issued with assessments that would be prejudicial to the future operations of their businesses.

Effective date: 1 July 2021

Elimination of exemption from Withholding VAT

Enacted provision: The Act has deleted the provisions of the TPA which allow the Commissioner to exempt a supplier from Withholding VAT if the supplier proves that they are going to be in a continuous credit position for a period of not less than 24 months.

Implication: The amendment removes exemption from withholding VAT. This is likely to improve the government’s cashflow position but will result in cashflow challenges for taxpayers whose VAT is withheld, especially those in a perpetual refund situation.

Effective date: 1 July 2021

Tax Procedures Act

Offsetting tax liabilities against verified refunds

Enacted provision: The Act empowers the Commissioner to apply a refund against any other outstanding tax liability owed by the taxpayer. In such a case, once the Commissioner notifies the taxpayer of its intention to offset the verified refund application against existing tax liabilities, no interest and penalties shall accrue on the refund amount.

Where the refund applied is less than the outstanding tax, then the remainder of the outstanding tax continues to accrue interest and penalties.

Where the Commissioner ascertains that the taxpayer has overpaid tax, the Commissioner can now apply the overpaid tax against the taxpayer's future tax liabilities.

Implication: This amendment will alleviate the interest burden on taxpayers as KRA will first utilize the refund against any outstanding tax and in addition pursue penalties and interest on outstanding tax. The amendment to allow the Commissioner to offset the overpaid tax against the tax payer's future tax liabilities gives the tax payer a choice between a cash refund or allowing the Commissioner to offset the overpaid tax against future taxes.

Effective date: 1 January 2022

Intervention from relevant authorities in collection of DST

Enacted provision: The Act amends the TPA to permit the Commissioner to seek the intervention of a relevant authority in the collection of tax where a person provides services through a digital marketplace.

Implication: This is a strong tool that gives the Commissioner significant power to compel compliance with DST obligations.

Effective date: 1 July 2021

PIN requirement for vendors in a digital marketplace

Enacted provision: The Act has amended the First Schedule to the TPA by including the carrying out of business over the internet or an electronic network including through a digital market place in the list of transactions for which a PIN is required.

Implication: This amendment seeks to support the full roll out of DST and ensure that there is no revenue leakage from carrying out business over the internet , an electronic network or over a digital marketplace

Effective date: 1 July 2021

Miscellaneous Fees and Levies Act (MFLA)

Refund of excess IDF & RDL

Enacted provision: The Act provides for refund of overpaid Import Declaration Fee (IDF) and Railway Development Levy (RDL) and the imposition of penalties and interest on unpaid sums.

Implication: This is in line with the overall amendment of the scope of the TPA to include the MFLA. Going forward, taxpayers will be able to obtain a refund for overpaid RDL and IDF but should also be cautious of the penalties and interest as provided by the TPA, which would apply in the event on non-payment.

Effective date: 1 January 2022

Exemption of goods in public interest or promotion of investment

Enacted provision: The Act exempts goods from IDF and RDL where the Cabinet Secretary determines that the goods imported are for public interest or they are for promotion of investment of more than **KES 5 Billion.**

Implication: The exemption is an incentive for investors in strategic industries which may be considered to be of public interest or in promotion of key sectors. This is likely to fuel new investments into the country.

Effective date: 1 July 2021

Exemption of adulteration levy

Enacted provision: The Act exempts a licensed or registered manufacturer of paint, resin or shoe polish from the adulteration levy.

Implication : The amendment ensures that inputs for paint, resin and shoe polish manufacturing remain affordable.

Effective date: 1 July 2021

Section 2

- Stamp Duty Act
- Capital Markets Act
- Insurance Act
- Kenya Revenue Authority Act
- Retirement Benefits Act
- Central Depositories Act

Stamp Duty Act

Exemption of Stamp Duty on a gift inter *vivos* to a registered family trust

Enacted provision: The Act has amended Section 52 of the Stamp Duty Act to exempt from Stamp Duty the conveyance or transfer of a gift made during the life of the grantor to a registered family trust. The Act has also amended Section 117 by exempting the registered family trust from Stamp Duty.

Implication: The amendment is likely to encourage people estate planning , especially when considered together with the reduced income tax rate on incomes distributed to beneficiaries of a trust.

Effective date: 1 July 2021

Capital Markets Act

Time Limit for determination of matters at the Capital Markets Tribunal

Enacted provision: The Act amends the Capital Markets Act to provide a definite time period within which the Capital Markets Tribunal shall hear and determine an appeal.

Under the Act, the Tribunal shall hear and determine an appeal before it within **90 days** from the date of filing of the appeal.

Implication: The amendment is likely to improve efficiency in the capital markets and ensure speedy dispute resolution.

Effective date: 1 July 2021

Insurance Act

Regulation of insurance brokers and introduction of an annual fee for insurers

Enacted provision: The Act has amended the Insurance Act to provide for the regulation of foreign reinsurance brokers by amending the definition of brokers which previously excluded the brokers who are not resident in Kenya.

Effective date: 1 July 2021

The Act further provides for an annual fee to be paid by a registered person who is licensed as an insurer under the Act.

Implication: The regulation of insurance brokers is likely to enhance the Insurance Regulatory Authority's supervision on insurance industry players.

Effective date: 1 January 2022

Removal of requirement of Kenya Reinsurance Corporation to certify reinsurance contracts

Enacted provision: The Act has amended the Insurance Act to remove the requirement to have the Kenya Reinsurance Corporation certify reinsurance contracts.

Implication: The amendment is perhaps informed by the realization that there are several reinsurance players in Kenya and therefore any regulation of reinsurance contracts is a role for the regulator as opposed to an active market player.

Effective date: 1 July 2021

Regulation of Closed Insurance Funds

Enacted provision: The Act has amended the Insurance Act to provide for the continuation of the operation of a closed fund insurance business without the need for registration but subject to the insurer furnishing the Commissioner with information as may be required and honouring existing policies.

The Act imposes a fine not exceeding **KES 200,000** and a further fine of **KES 10,000** for each day in which the insurer fails to honour its policy obligations.

Further, the Act requires that the assets of a closed fund shall not be disposed off except with the permission of the Commissioner.

Implication: The regulation of closed funds will protect policyholders and provide an avenue for the orderly winding up of closed funds businesses.

Effective date: 1 July 2021

Kenya Revenue Authority

Reward to KRA informers

Enacted provision: The Act has amended the Kenya Revenue Authority Act, 1995, to increase the maximum reward to informers.

The increased rewards are as follows:

- In the case of information leading to the identification of unassessed duties or taxes – **1%** of the duties or taxes so identified or **KES 500,000** (up from **KES 100,000**), whichever is the less; and

- in the case of information leading to the recovery of unassessed duties or taxes, 5% of the taxes or duties so recovered or **KES 5,000,000** (up from **KES 2,000,000)**, whichever is the less.

Implication: The amendment enhances the incentives that KRA may pay persons who disclose information that leads to recovery of taxes.

Effective date: 1 July 2021

Retirement Benefits Act

Registration and regulation of corporate trustees

Enacted provision: The Act has amended the Retirement Benefits Act, 1997, to provide for the registration and regulation of corporate trustees that provide services to pension schemes.

Implication: The amendment will expand the scope of regulation of the Retirement Benefits Authority to include corporate trustees. This proposal is likely to increase the public's confidence in the corporate trustees who manage their retirement benefits.

Effective date: 1 July 2021

Extension of time of filing pension scheme accounts

Enacted provision: The Act has amended the Retirement Benefits Act, 1997 so as to provide an additional three months for trustees to file audited accounts where the delay is justified. Where an extension is provided, the trustees are not subject to late submission penalty.

Implication: The amendment will enhance compliance by trustees because in some instances, the audited accounts are not ready within the six months period that is provided under the Act.

Effective date: 1 July 2021

Post-retirement medical fund

Enacted provision: The Act has amended the Retirement Benefits Act,1997 so as to provide for a post-retirement medical fund which shall be within a scheme and from which the costs of medical benefits shall be met in accordance with the medical fund rules.

Implication: The amendment is geared towards ensuring that retirees are able to access quality healthcare.

Effective date: 1 January 2022

Retirement Benefits Act

Appointing KRA to collect unremitted pension contributions

Enacted provision: The Act has amended the Retirement Benefits Act, 1997 to allow Trustees and the Retirement Benefits Authority to appoint KRA as an agent to collect unremitted pension contributions from the employer.

Defaulting employers will be required to remit the pending contributions within 21 days failure to which KRA will issue agency notices to the employer's bank, attach the employer's bank account and remit the attached funds to the Scheme within 30 days.

Implication: The amendment will increase the chances of recovering unremitted contributions from defaulting employers. Consequently, pension schemes will have sufficient funds to deploy in debt and capital markets, increasing liquidity in the economy.

Effective date: 1 July 2021

Central Depositories Act

Disclosure of Beneficial Owners

Enacted provision: The Act has amended the Central Depositories Act, 2000, to enhance the regulation of investors in the capital markets such that all purchases and sales of deposited securities and other dealings made in respect thereof, include the identity of the buyer and seller of each of those deposited securities or, in the case of other dealings, the identity of the persons executing such dealings and the persons in whose favour the dealings are executed.

The Act introduces a new provision allowing a beneficial owner or legal owner to appoint an authorized nominee for the purpose of opening a securities account and where such nominee is acting for more than one beneficial owner, the Act requires that the nominee should open an omnibus account.

Implication: The amendment will enhance due diligence procedures and documentation on the identity of investors. The amendment aligns with the recent changes under the Companies Act which requires companies to maintain details of beneficial owners. Disclosure of beneficial ownership is among the measures that the government is taking to combat tax evasion, fraud, money–laundering and financing of terrorism.

Effective date: 1 January 2022

Contacts

Peter Kinuthia
Director & Head of Tax
Tax & Regulatory Services
KPMG Advisory Services Limited
E: pkinuthia@kpmg.co.ke

Clive Akora
Director
Tax & Regulatory Services
KPMG Advisory Services Limited
E: cakora@kpmg.co.ke