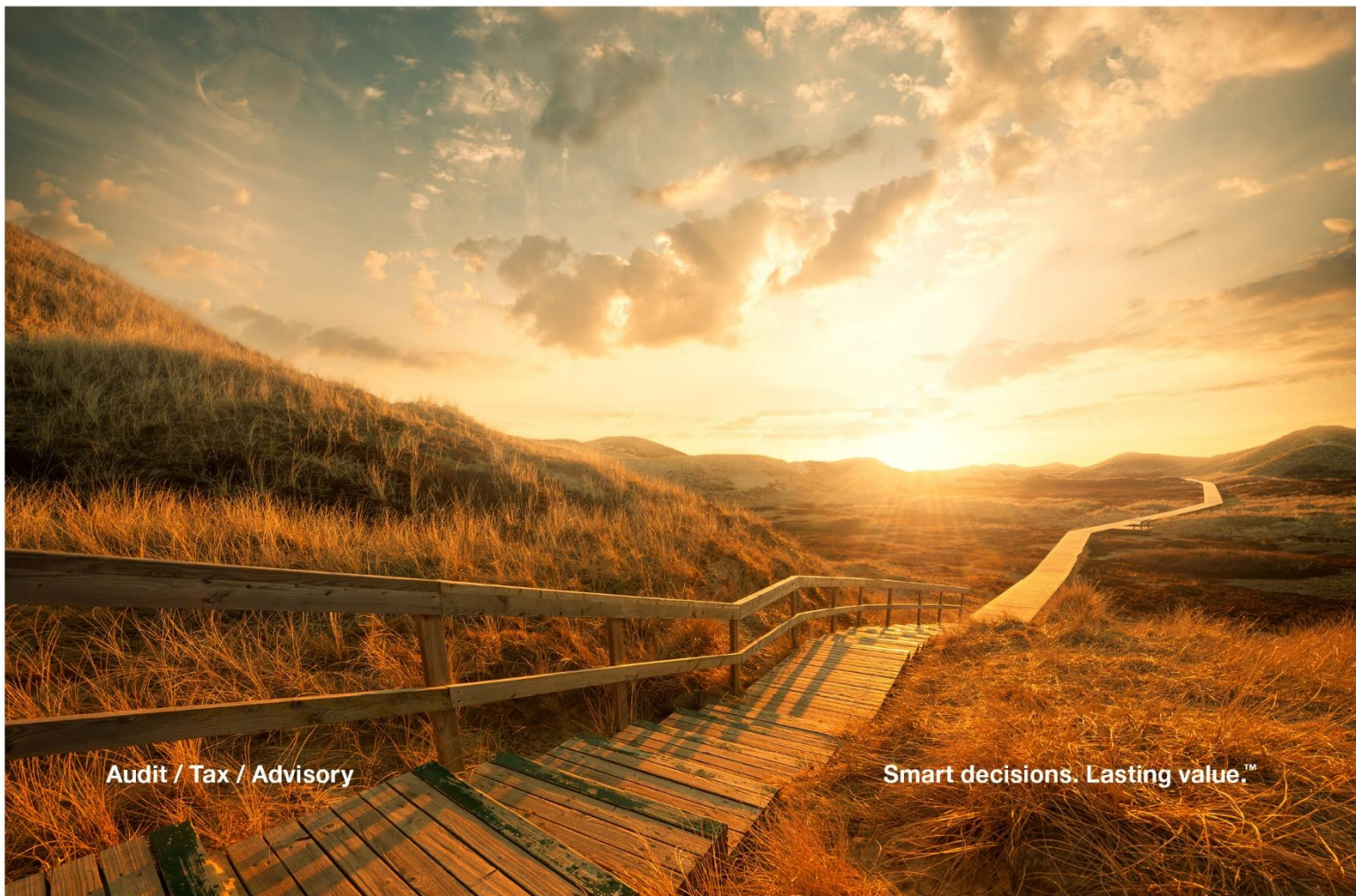


THE FINANCE BILL 2021

AMENDMENTS AND THEIR IMPLICATIONS

24th June, 2021



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Table of Contents

| | |
|--|----|
| SYNOPSIS | 3 |
| 1) INCOME TAX | 4 |
| 2) VALUE ADDED TAX (VAT) | 9 |
| 3. EXCISE DUTY | 21 |
| 4. TAX PROCEDURES ACT PROVISIONS | 24 |
| 5. MISCELLANEOUS FEES AND LEVIES ACT, 2016 | 27 |
| 6. CAPITAL MARKETS ACT | 28 |
| 7. INSURANCE ACT | 28 |
| 8. KENYA REVENUE AUTHORITY ACT, 1995 | 29 |
| 9. RETIREMENT BENEFITS ACT | 29 |
| 10. CENTRAL DEPOSITORIES ACT ON DISCLOSURE OF BENEFICIAL OWNERS | 30 |

SYNOPSIS

The Finance Bill, 2021 hereafter also referred to as the Bill, was tabled in the National Assembly on 5th May, 2021. The Bill is meant to amend the law relating to various taxes and duties, and align the Tax law to the latest changes in international tax practices, as well as the Organization for Economic Co-operation and Development (OECD) guidelines. Although some of the changes in the Bill were introduced in the Finance Bill of 2018 they were not presented to Parliament for approval, while others were reintroduced after deletion via the Finance Act of 2020. The proposed amendments affect the Income Tax Act (ITA), Value Added Tax (VAT) Act, Excise Duty Act, Tax Procedures Act, Miscellaneous Fees and Levies Act, Capital Markets Act, Central Depositories Act, the Kenya Revenue Authority Act, Insurance Act and the Retirement Benefits Act. The amendments shall become effective as from July 1, 2021 unless otherwise specified, and will have the following implications to the Kenyan taxpayer and national budget:

1. Expand the tax revenue base.
2. Align the tax procedures to international practice, base erosion profit sharing (Action 4), and the East African Common External Tarrif codes.
3. Increase shareholder control.
4. Eliminate tax contradiction and avoidance arising from misinterpretation in those businesses carried out through online platforms.
5. Allow for enhanced engagement of University and TVET graduates by providing incentives to employers.
6. Make it easier for a person to establish real estate investment trusts.
7. Limit tax refund claims by tax payers.
8. Make acquisition of PIN a mandatory requirement for a person intending to sell goods and services in Kenya.
9. Support growth of the ICT Sector by reducing excise duty payable by suppliers of internet data services to consumers.

10. Result in increase of prices of some products due to enhanced excise duty payable on imported goods. However, prices of some products like food supplements and medical supplies will reduce following exemption from VAT.
11. Clarify matters related to concurrent prosecution by delinking civil and criminal processes so that a case before one court shall not affect prosecution of the other.
12. Encourage whistle blowing by increasing reward incentives to informers.
13. Benefit retirees by covering their medical bills through the establishment of the proposed post-retirement medical fund.
14. Tighten the noose on tax evasion, fraud, money-laundering, and financing of terrorism.

1) INCOME TAX

a) The Definition of Control

The Bill proposes the amendment of Section 2 of the Income Tax Act on definition of the term '**control.**' The Bill also seeks to reduce the control from 25% to 20%. The current control is tied to shareholding and voting rights, but with the proposed amendment other stakeholders will be deemed to have control. The amendment will enable the tax procedure rules to come into play since the new control measures take effect on related party /controlled transactions. The expanded definition of the term control now encompasses the following circumstances:

- That the person, directly or indirectly, holds at least 20% of the voting rights in a company;
- Loan advanced by a person to another person constitutes at least 70% of the book value of the total assets excluding loans from financial institutions not associated with the person advancing the loan;
- A guarantee by a person for any form of indebtedness of another person constitutes at least 70% of the total indebtedness of the other person excluding guarantees from financial institutions not associated with the guarantor
- If the person appoints more than half of the board of directors of another person or at least one director or executive member of the governing board of that person;

- If the manufacture or processing of goods or articles or business carried out by one person is dependent on the use of know-how, patent, copy right, trade mark, license, franchise or any other business or commercial right of a similar nature, which the other person has exclusive rights to;
- If a person supplies or designates another person to supply at least 90% of the purchases of another person;
- If a person purchases or designates a person to purchase at least 90% of the sales of another person; and

If the Commissioner is of the opinion that the relationship, dealing or practice with another person influences pricing or constitutes control.

b) The Definition of Infrastructure Bonds

Under the proposed amendment, the term '**infrastructure bond**' shall be taken 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 current ITA does not have the definition of infrastructure bonds and interest on income accruing thereof is not subject to Corporation Tax.

The proposed amendment also, amplifies the definition of "Permanent Establishment" to match the OECD Model and includes:

- A fixed place of business through which a business is wholly or partly carried on;
- A building site, construction, assembly or installation project or any supervisory activity connected to the site of the project, provided that the same continues for more than 183 days;
- Provision of services including consultancy services through employees or other personnel where such services continue for more than a period exceeding, in aggregate, 91 days in any twelve-month period commencing or ending in the year of income;

- An installation or structure used for exploration of natural resources provided that such activity continues for a period of not less than 91 days; and
- 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.

The above provisions will however only apply if the activities are not of a preparatory or auxiliary character. The revised definition will help prevent any technical avoidance of Permanent Establishment status, and any income/profits arising from such activities will be subject to tax.

c) Imposition of Income Tax on Income Earned through a Digital Market Place

The proposed amendment modifies the definition of Digital Market Place to read: *“an online platform which enables users to sell or provide services, goods or other property to other users”*. Section 3 (2) of the bill defines proceeds from such a platform as *“Income accruing from a business carried out over the internet or an electronic network including through a digital marketplace”* and shall attract a digital service tax. However, the digital service tax shall only accrue to non-resident persons from the provision of services through a digital market place. The tax shall not be applicable to persons transmitting messages (Sec9 (2)) or to any foreign income subjected to withholding taxes (Sec 35.) This tax shall be transmitted to KRA on the following month after the end of the month of service delivery

W3sThe implication is that definition of a digital market place has been modified to eliminate any contradiction and tax avoidance arising from misinterpretation, and that the income accruing to a resident person conducting a business via the internet or electronic is excluded since tax will be charged on individual or corporate tax rates.

d) Management of Prior Year Losses

Currently the Income Tax Act allows for carrying forward of losses for a period of ten years. The new Bill proposes that these losses be carried forward indefinitely. The implication is that even though the taxpayers will be able to carry forward losses indefinitely, they will still be required to account for minimum tax (Suspended by high court) on gross revenue earned.

e) Thin Capitalisation

By definition, companies deemed to be thinly capitalised have their interest restricted. A company is deemed to be thinly capitalized under the following circumstances:

- The company should not be a bank or financial institution and is controlled by a non-resident person alone or together with four or fewer persons.
- The highest amount of debt held by the company at any time exceeds the sum of three times the equity.

The Finance Bill 2021 proposes to disallow interest expenses exceeding 30% of earnings before interest, taxes, depreciation and amortization to related and non-related parties. This restriction shall only apply to:

- Interest on all loans
- Expenses incurred in connection with raising finance
- Payments that are economically equivalent to interest

The income exempt under the first schedule shall be excluded in determination of interest before interest, taxes, depreciation and amortisation. This provision shall also apply to extractive industries for which this capitalization policy is limited to 2 times the equity.

The amendment is line with base erosion profit sharing, BEPS (Action 4) on limiting base erosion involving interest deductions, and proposes to discourage allocation of group debts by multinational companies to high tax jurisdiction countries in a bid to reduce taxable profits. It should be noted that prior to the amendment, interest restriction rules only applied to foreign controlled entities. The

amendment however, proposes to apply interest restriction rules to entities receiving loans from related and unrelated entities.

Thinly capitalised companies will therefore no longer enjoy the full reprieve of interest as a tax deduction.

f) Multinational Enterprises

A Multinational enterprise group is defined as a group that includes two or more enterprises which are established in different jurisdictions. Such groups include enterprises that carry out businesses through a permanent establishment or through any other parent entity in another jurisdiction. By definition, a parent entity is an entity that:

- for purposes of taxing resident in Kenya
- is not controlled by another entity: and
- owns or controls a multinational enterprise group.

Currently, the Income Tax Act does not require a Kenyan parent company to declare or file group company returns. The proposed amendment introduces a compulsory requirement that compels ultimate parent companies domiciled in Kenya to file their group returns.

g) Tax Relief on Contributions made to NHIF

The current Income Tax Act offers 15% health relief for private medical insurance secured. The Finance Bill 2021 proposes to further provide 15% medical relief on contributions made to NHIF, to benefit employees as from January 1, 2022.

h) Tax Rebate Scheme for Apprenticeship Program

The tax rebate scheme has been expanded to include technical and vocational education and training (TVET). Currently the rebate only applies to employers who engage 10 university graduates for 6-12 months. The proposed tax rebate will not only create room for more engagement of university graduates but also TVET graduates as the employers will enjoy the incentive.

i) Taxation of Extractive Industries

Machinery first used to undertake operations under a prospecting right and explorations is currently granted an allowance of 100%. In the Second Schedule of the Income Tax Act, the Finance Bill, 2021 proposes to change this allowance to 50% in the first year of use followed by equal instalments in the subsequent years.

The proposed amendment is meant to align the rate of depreciation in the 2nd Schedule with the rate in the 9th Schedule of the Income Tax Act with effect from January 1, 2022. However, for Withholding tax, the rate for service charge income for contractors and licensees is proposed to increase from 5.625% to 10%, while for management, training or professional fees under the extractive industry the Finance Bill 2021 proposes to decrease the rate from 12.5% to 10% for both residents and non-residents.

2) VALUE ADDED TAX (VAT)

The VAT Act (2013) provides that VAT shall be charged on any supply made over a digital marketplace. The Finance Bill 2021 proposes to amend Section 5 of the VAT Act *to charge supplies made over the internet or an electronic network or through a digital marketplace* in order to clear the ambiguity posed by digital transactions. Thus, any suppliers who sell goods/ services via websites, social media platforms or any other electronic device/ platform will be required to account for VAT.

Currently, digital marketplace is defined as a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means. The Finance Bill 2021 proposes amendment of the definition to make special reference to online platforms that enable users including vendors of intangible properties like software to sell or provide services, goods or other property to other users.

Section 17 of the VAT Act provides for deduction of input VAT on taxable supplies. The proposed amendment detests the reference that VAT restriction is only limited to provisions of Section 17 to

include the provisions of the entire VAT Act and Regulations. This clarification implies that prior to the deduction of VAT, businesses should ensure that the purchase was done to make a taxable supply vide any other provisions of the VAT Act and Regulations.

The Finance Bill 2021 also provides for additional restriction on claiming input VAT by extending the restriction to the leasing or hiring of passenger cars or mini buses, entertainments, restaurant and accommodation services. The current VAT Act only refers to acquisition of these supplies. The implication is that the 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 proposed amendment will therefore provide clarity on the deductibility of VAT relating to leasing or hiring of these supplies, and will require parliamentary approval to issue regulations.

a) VAT on Imported Services

The VAT Act (2013) provides for applicability of imported services to any person. The Finance Act 2019, did not align Section 10 (2) which still refers to a registered person to provide for the amendment made under Section 10 (1) on reverse VAT charged to any person.

The Finance Bill 2021 proposes to delete the term registered in an effort to align Section 10 (2) to 10(1) by streamlining Section 10 with respect to the applicability of reverse VAT on imported service.

b) Deletion of registration of group of companies for VAT purposes.

Currently, the Cabinet Secretary is at liberty to provide for the registration of group companies as one registered person for the purposes of the Act. The Finance Bill 2021, proposes to delete the current provision and provide for alignment of the provisions of the Act to the provisions of the other Acts like the Income Tax Act where every taxpayer accounts for the incomes and expenses that have accrued in their books as a separate entity.

c) Parliamentary Approval to Issue Regulations

The Current Act dictates that the Cabinet Secretary in charge of finance requires parliamentary approval to issue any regulation with respect to VAT. The Finance Bill 2021 proposes to give full authority to the Cabinet Secretary in charge of finance to issue guidelines on any aspect of VAT without parliamentary approval. This will facilitate efficiency in tax administration once these bureaucracies are removed even though the Cabinet Secretary can use this to pass punitive policies to tax payers.

d) Change of HS Codes

The Bill proposes to change the HS codes for the items listed in paragraphs 68 to 84 of the VAT Act. This change has no tax implication, but the amendment is meant to align with the East Africa Common External Tariff codes.

| SNSNOOS | Item | HS Code in VAT Act | Correct HS code |
|---------|---|--------------------|------------------------------------|
| S | | | |
| 1. | Heparin and its salts | 3001.90.10 | 3001.90.00 |
| 2. | human or animal substance prepared for therapeutic or prophylactic uses, not elsewhere specified or included | 3001.90.90 | 3001.90.00 |
| 3. | Antisera and other blood fractions and modified immunological products whether or not obtained by means of biotechnological processes | 3002.10.00 | 3002.12.00 & 3002.19.00 |
| 4. | Milk in powder, granules, or other solid forms, of fat content, exceeding 1.5% by weight | 0402.29.10 | 0402.29.00 |
| 5. | Super absorbent polymer (SAP) | 3906.90.0 | 3906.90.00 |
| 6. | IP super soft fluff pulp – for –fluff 310 treated pulp 488 X 125mm (cellulose) | 4703.21.0 | 4703.21.00 |
| 7. | Perforated PE film 15-22 gsm | 3921.190.0 | 3921.90.00 |
| 8. | Spun bound non-woven 15-25 gsm | 56.03.1190.8 | 5603.11.00 |
| 9. | Airlid paper with super absorbent polymer 180gsm/67 | 48.03.00.0 | 4803.00.00 |
| 10. | Airlid paper with super absorbent polymer 80gsm/67 | 48.03.00.0 | 4803.00.00 |

| SSS | Item | HS Code in VAT Act | Correct HS code |
|------------|---|---------------------------|------------------------|
| 11. | Pressure sensitive adhesive | 3506.91.90 | 3506.91.00 |
| 12. | Palin polythene film/LPDE | 39.21.190.0 | 3921.19.10 |
| 13. | Palin polythene film/PE | 39.21.190.0 | 3921.19.10 |
| 14. | PE white 25-40gsm/release paper | 48.44.51.10.0 | 4811.49.00 |
| 15. | ADL 25-40gsm of tariff number | 56.03.1190.8 | 5603.11.00 |
| 16. | Elasticized side tape | 5402.44.10 | 5402.44.00 |
| 17. | 12-16gsm spun bound piyropo nonwoven cover stock/12 gsm spun boundpp non-wovenn SMS hydrophobic leg cuffs | 56.03.1190.8 | 5603.11.00 |
| 18. | Polymetric elastic 2/3 strands | 3919.90.90.10 | 3919.90.10 |

e) Proposed Re-classification of Goods from Standard Rate of VAT to VAT Exempt Status

The Finance Bill 2021 proposes to exempt the 41 items listed below from VAT:

| No. | Item |
|-----|---|
| 1 | 2106.10.00 Protein concentrates and textured protein substances |
| 2 | 2106.90.10 Food preparations specially prepared for infants |
| 3 | 2106.90.99 Other – Food preparations not elsewhere specified or included |
| 4 | 2936.27.00 Vitamin C and its derivatives |
| 5 | 3002.11.00 Malaria diagnostic test kits |
| 6 | 3002.13.00 Immunological products unmixed, not put up in measured doses or in forms or packings for retail sale. |
| 7 | 3002.14.00 Immunological products mixed, not put up in measured doses or in forms or packings for retail sale. |
| 8 | 3002.15.00 Immunological products put up in measured doses or in forms or packings for retail sale. |
| 9 | 3004.43.00 Other medicaments, containing alkaloids or derivatives containing norephedrine or its salts. |
| 10 | 3004.60.00 Other, containing antimalarial active principles described in Subheading Note 2 to this chapter |
| 11 | 2106.90.91 Food supplements |
| 12 | 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 |
| 13 | 0402.91.00 Other not containing added sugar or other sweetening matter |
| 14 | 0402.99.00 Other milk |
| 15 | 9021.10.00 Orthopaedic or fracture appliances |

| | |
|----|---|
| 16 | 9021.50.00 Other artificial parts of the body: Pacemakers for stimulating heart muscles, excluding parts and accessories |
| 17 | 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 |
| 18 | 9019.20.00 Airway Guedel and Ambu bags |
| 19 | 9018.90.00 Blood giving set and infusion sets |
| 20 | Medical ventilators and the inputs for the manufacture of medical ventilators |
| 21 | Physiotherapy accessories, treadmills for cardiology therapy and treatment of tariff number 9506.91.00 for use by licensed hospitals |
| 22 | Dexpanthenol of tariff number 3304.99.00 used for medical nappy rash treatment by licensed hospitals |
| 23 | Medicaments of tariff numbers 3003.41.00, 3003.42.00, 3003.43.00,3003.49.00,3303.60.00 (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. |
| 24 | 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 |
| 25 | 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 |
| 26 | 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 drill engines whether or not combined on a single base with other dental equipment. |

| No. | Item |
|-----|---|
| 27 | Other instruments and appliances, including surgical blades, of tariff number 9018.49.00, 9018.50.00,9018.90.00 used in dental sciences. |
| 28 | Ozone therapy, oxygen therapy, aerosol therapy, artificial respiration or other therapeutic respirationapparatus. |
| 29 | Other breathing appliances and gas masks, excluding protective masks having neither mechanical parts nor replaceable filters. |
| 30 | Artificial teeth and dental fittings of tariff numbers 9021.21.00, 9021.29.00 and artificial parts of the bodyof tariff numbers 9021.31.00, 9021.39.00,9021.50.00 and 9021.90.00. |
| 31 | Apparatus based on the use of x-rays, whether or not for medical, surgical or dental of tariff numbers9022.12.00, 9022.13.00, 9022.14.00 and 9022.19.00. |
| 32 | 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 |
| 33 | Discs, tapes, solid-state non-volatile storage devices, “smart cards” and other media for the recording of sound or other phenomena, whether or not recorded of tariff number 8523.80.10, including matrices and masters for the production of discs. |
| 34 | Weighing machinery (excluding balances of a sensitivity of 5 cg or better) of tariff number 8423.31.00including weight operated counting or checking machines; weighing machine weights of all kinds. |
| 35 | Fetal Doppler-Pocket (wgd-002) and pulse oximeter finger held (Gima brand) Pc of tariff number 9018.19.00. |
| 36 | Sterilizer Dry Heat (Wdg-001-Grx-05A) Pc, autoclave steam table tops of tariff number 8419.20.00 |
| 37 | Needle holders and urine bags of tariff heading 3926 |
| 39 | Tourniquets of tariff number 3926.90.99 for use by licensed hospitals. |

| | |
|----|---|
| 40 | 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 Mining Act, 2016, upon recommendation by the Cabinet Secretary responsible for matters relating to mining, as the case may be. |
| 41 | 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. |

(f) Proposed Re-classification of Goods from VAT Exempt Status to Standard-rated

With the approval of the Finance Bill 2021, the following nine items shall be VATable at the standard rate of 16%: This will automatically trigger a price increase on these items

| No. | Item |
|-----|---|
| 1. | Disposable plastic syringes of tariff no. 9018.31.10 |
| 2. | Other syringes with or without needles of tariff no. 9018.31.90. |
| 3. | 0402.99.10 Milk, specifically prepared for infants |
| 4. | 0402.91.10 Other not containing added sugar or other sweetening matters specially prepared for infants. |
| 5. | Airlid paper without super absorbent polymer 180gsm/67 of tariff number 4803.00.0 |
| 6. | Airlid paper without super absorbent polymer 80gsm/67 of tariff number 4803.00.0 |
| 7. | Plain polythene film/PE of tariff number 3920.10.10 |
| 8. | PE white 25-40gsm/release paper of tariff number 4810.99.00 |
| 9. | 12-16 gsm spun bound piyropo nonwoven cover stock/15gsm spun bound PP non-woven SSMMS hydrophobicleg cuffs of tariff number 5603.1190. |

(g) Proposed Re-classification of Goods from Zero-rated Status to Standard rated

The Bill proposes to subject **ordinary bread** to VAT at the standard rate of 16% from the current rate of 0%. This will result in price increase of ordinary bread.

(h) Proposed Change of Export Services from Zero-rated Status to Exempt Status

The proposal through the Bill to exempt exported taxable services from VAT is aimed at limiting VAT refund claims by taxpayers providing services to non-resident persons. Exempting taxable services from VAT would be against the principle of equity, given that goods exported out of Kenya are zero-rated whilst importation of taxable services attracts reverse charge VAT in certain circumstances.

(1) VAT on Transfer of Assets

The Bill proposes to exempt from VAT transfer of assets and other transactions related to the transfer of assets into real estate investment trusts and assets-backed securities. Currently, this is standard rated. The amendment is aimed at making it cheaper for persons to establish Real Estate Investment Trusts (REITs) hence spurring growth in the real estate sector and boost affordable housing.

(2) Finance Act, 2021 - Items subject to VAT

As per the Finance Act 2021, items listed below shall be VATable

| NO. | Item | Current VAT Treatment | New Rate Effective From 01/07/2021 |
|-----|--|-----------------------|------------------------------------|
| 1. | The supply of liquefied petroleum gas. | Zero-rated | 16% |
| 2. | 8802.11.00 Helicopters of an unladen weight not exceeding 2,000 kg. | Exempt | 16% |
| 3. | 8802.12.00 Helicopters of an unladen weight exceeding 2,000kg. | Exempt | 16% |
| 4. | 8802.20.00 Aeroplanes and other aircraft, of unladen weight not exceeding 2000kg | Exempt | 16% |
| 5. | 8803.30.00 Other parts of aeroplanes or helicopters | Exempt | 16% |
| 6. | 8805.21.00 Air combat simulators and parts thereof. | Exempt | 16% |
| 7. | 8805.10.00 Aircraft launching gear and parts thereof; deck arrestor or similar gear and parts thereof. | Exempt | 16% |
| 8. | 8805.29.00 Other ground flying trainers and parts thereof. | Exempt | 16% |
| 9. | 8309.90.90 Aluminium pilfer proof caps with EPE liner. | Exempt | 16% |
| 10. | Other aircraft (for example, helicopters, aeroplanes); spacecraft (including satellites) and suborbital and spacecraft launch vehicles: <ul style="list-style-type: none"> • Of an unladen weight not exceeding 2,000kg • Of an unladen weight exceeding 2,000kg | Exempt | 16% |

3) Exemption from Withholding VAT

Currently Section 42A(4A) allows the Commissioner to grant an exemption from the provisions of Section 42A to taxpayers who demonstrate that due to operation of the specified Section they shall be in a continuous credit position. The Finance Bill 2021 proposes to delete Section 42A(4A).

Issuance of exemptions was limited following the reduction of the withholding tax rate to 2%. With this provision in the Bill however, taxpayers shall no longer enjoy exemptions and shall be forced to seek refunds of any credits. The Bill does not contain a transition clause but leaves taxpayers already issued with the exemption in confusion in as far as validity of the current exemption is concerned.

The Commissioner shall be allowed to seek intervention of other relevant authorities where a person fails to comply with Digital Service Tax (DST) obligation in Kenya.

Collaboration with other authorities shall enhance compliance and widen the tax base to the extent that the Commissioner shall be able to net in persons who transact in Kenya through the internet or a digital market place even where such persons do not register for DST in Kenya.

4) PIN Requirements for Vendors on Digital Market Place

Any person who wishes to transact in Kenya through a digital market place shall now be required to obtain a personal identification number (PIN) in order to conclude such transaction. Non –resident persons who wish to transact in Kenya shall only do so upon obtaining a PIN from the Kenya Revenue Authority.

The PIN requirement shall apply to all persons who wish to sell goods or services.

3. EXCISE DUTY

a) Definition of Possession

The Finance Bill 2021 defines “Possession” as having, owning or controlling any excisable goods. Possession encompasses:

- 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 or benefit of oneself; or
- 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 of them. This provision will provide clarity on the term possession for purposes of registration, refunds, exemption of excise duty, or any other compliance requirement.

b) Excise Duty on Supply of Internet.

The current provision does not provide for a deduction of excise duty paid on internet purchased for re-sale. The Finance Bill 2021 proposes that where excise duty has been paid in respect of internet data services by a licensed person who purchases the data in bulk for re-sale, the excise duty paid shall be offset against the excise duty payable by that person on internet data services supplied to the final consumer.

This move will support the growth in the ICT sector, and encourage investment in the supply of internet across the country, as well as make internet affordable.

c) Excise Duty on Imported Confectionary

Currently, excise duty is only applicable on imported sugar and confectionary at Kshs. 20/kg of tariff heading 17.04. The new Bill proposes to charge excise duty on all supplies whether imported or local.

The aim is to streamline excise duty on sugar confectionary both local and imported, and is meant to increase revenue collection with respect to excise duty tax.

d) Excise Duty on White Chocolate

Currently, excise duty is only applicable on imported white chocolate at Kshs. 200 per kg. of chocolate in blocs, slabs or bars of tariff Nos. 1806.31.00, 1806.32.00, 1806.90.00.

The Bill proposes to charge excise duty on all supplies whether imported or local. This will stamp out the discriminatory perception thereby increasing revenue collection by streamlining taxation on both local and imported products.

e) Excise duty on Imported Glass excluding Imported Glass Bottles for Packaging of Pharmaceutical Products

Excise duty is chargeable on imported glass bottles at 25% in accordance with the Business Law (Amendment) Act, 2020. This is however currently suspended by the East African Court of Justice. The Finance Bill 2021 proposes to exempt glass products from excise duty.

f) Excise Duty on Motor Cycles other than Motor Cycle Ambulances and Locally Assembled Motor Cycles.

Currently, excise duty is applicable on motor cycles at Kshs. 11,608.23 per unit. The Bill proposes to charge excise duty on the products at “15%” depending on the value of the motor cycle.

g) Jewellery of Tariff 7113 and Imported Jewellery 7117

Currently there is no excise duty applicable. The Finance Bill 2021 proposes to charge excise duty at the rate of 10%.

Introduction of excise duty on jewellery is consistent with the trend where the government has deviated from the perception of excise duty tax as a “sin tax” by now introducing the tax on other products as a way of expanding the tax base. Nevertheless, we note that duty shall be charged on imported jewellery. Therefore, it will not affect the local industry.

h) Products Containing Nicotine or Nicotine Substitutes intended for Inhalation without Combustion or Oral Application.

Currently no excise duty is applicable. The Finance Bill 2021 proposes to charge excise duty at Kshs. 5,000 per kg as a way of broadening funds mobilization base to increase revenue from taxes.

i) Excise Duty on Betting

Currently, there is no excise duty on betting. The Bill proposes to charge a 20% Excise duty on betting for the amount wagered or staked. The excise duty was first introduced by the Finance Act 2019 but the same was removed by the Finance Act 2020. The objective of this amendment is to expand the revenue collection on excise duty.

j) Excise Duty on Interest and Commissions on Loan

The current provision excludes interest and commissions on loans from the 20% excise duty.

The Finance Bill 2021 proposes the deletion of the exclusion of fees or commissions earned in respect of a loan in the definition of other fee. Processing fees on borrowing will therefore be subjected to 20% excise duty.

This proposal is aimed at expanding the tax base by introducing excise duty on fees and commissions in respect of a loan. This is likely to trigger an increase in the cost of credit since the financial institutions will consider transferring the cost to the customers (the borrower).

4. TAX PROCEDURES ACT PROVISIONS

a) International Tax Agreements

Under Section 6 of the Tax Procedures Act (TPA), confidentiality is limited to the administration of tax laws. Amendment of the confidentiality provision under Section 6 is set to include:

- Any multilateral agreements and treaties that have been entered into by or on behalf of the Government of Kenya relating to international tax compliance and prevention of evasion or exchange of information on tax matters. These shall have effect in the matter stipulated in such agreements or treaties.
- Notwithstanding any other provision of this Act or any other written law, the information obtained pursuant to agreements specified under sub section 1 shall not be disclosed except in accordance with conditions specified in the agreements. Sensitive information relating to individuals and businesses shall be disclosed to the Kenya Revenue Authority under the Common Reporting Standards framework. The Commissioner shall be bound to hold such information in confidence and use the information obtained to the extent contemplated under the tax laws.

b) Common Reporting Standard Obligation on Financial Institutions

Financial Institutions are not currently mandated to share or disclose information obtained or held relating to their customers. Financial institutions including custodial institutions, depository institutions, investment entities and specified insurance companies shall be obligated to comply with due diligence procedures and record keeping requirements as prescribed in the Common Reporting Standards regulations. Due to the nature of business, financial institutions are privy to information which is integral to the compliance goal of the KRA.

There are currently no requirements for country by country reporting in Kenya. The obligation shall apply to financial institutions which are located in Kenya including a branch of a financial institution that is not resident in Kenya where such branch is located in Kenya.

Such information will ensure there is minimal or zero tax evasion.

c) Penalties for Non-compliance with Common Reporting Standards obligation

A person who makes a false statement or omits information in a return shall be liable to a penalty of KES 100,000 for each false information or omission, or imprisonment for a term not exceeding three years or both.

A financial institution that fails to file an information return or a nil return shall be liable to a fine of KES 1,000,000 for each such failure.

A person who fails to comply with the Common Reporting Standards Obligation where no specific penalty is provided shall be liable to pay a penalty of KES 20,000 and KES 20,000 for each subsequent day of non-compliance.

(d) Record Keeping

With the current TPA, taxpayers are required to maintain records for a period of 5 years after the end of the reporting period. Section 23 has been amended to extend the record keeping period from 5 years to 7 years.

(e) Amendment Assessment

A person who receives an amended assessment shall be required to keep records relating to that assessment for a period of five years. Where the Commissioner issues an amended assessment, a taxpayer shall be required to keep records relating to the amendment for a period of 7 years. The proposal therefore only seeks to amend the book keeping period.

(f) Electronic Payments and Submission of Returns and Objections

Section 77 of the TPA does not contemplate electronic payments and or filings. The proposed Finance Bill 2021, outlines that if a person submits a return, objection or makes payment electronically, the due date shall remain the date provided under the specific tax law.

The provision will cushion against returns filed, payments, and objections made electronically that may be received at a date later than the due date provided in the specific tax law.

(g) Convertible Currency

Currently the provision requires all taxpayers to keep records in Kenya shillings. The Bill proposes the Amendment of Section 23(2) for non-resident persons transacting through a digital market place. Such persons shall be required to maintain their records in convertible foreign currency as may be approved by the Commissioner. Section 23(2) shall not apply to non-resident persons who file returns and remit payment through a local tax representative, or a non-resident person with a permanent establishment.

The amendment gives a leeway to non- residents who do not have tax agents in Kenya.

(h) Concurrent Prosecution

Section 108 of the Tax Procedures Act provides for payment of taxes despite prosecution of the taxpayer. The Finance Bill 2021 proposes to amend this section to the extent that prosecution in a criminal case shall not be used as grounds for stay of execution in a civil matter where prosecution relates to the same matter and vice versa.

The Bill therefore proposes to delink the civil and criminal processes so that a matter before one court shall not affect the prosecution of the other.

(i) Tax Liabilities Set Off against Refunds

If the commissioner approves a tax refund application, and applies the refund amount to set off against an outstanding liability, penalties and interest shall not accrue to the amount applied

to the payment of the outstanding tax. Where a taxpayer is owed a refund by KRA and there is a principal tax to be settled by the same taxpayer, no penalties shall accrue on the principal upon issue of a notification of refund approval.

5. MISCELLANEOUS FEES AND LEVIES ACT, 2016

a) Refund of Overpaid Tax and Penalties on Unpaid Tax

The provisions of Section 47 of the TPA shall be applicable to taxes paid in error or excess taxes paid in respect of the Miscellaneous Fees and Levies Act. This provision will allow any excess tax or tax paid in error be refundable or available for utilization against other taxes subject to compliance with Section 47 of the TPA. This will take effect from 01/01/2022.

b) Goods Exempt from Import Declaration Fees

These are Goods where the exemption may be determined by the Cabinet Secretary in the public interest or to promote investment provided their value shall not be less than KES 5 Billion. The Tax Laws Amendment Act, 2020 deleted the exemption on goods imported with an aim of promoting investment and whose value was not less than two hundred million shillings.

The Bill proposes to reinstate this provision and increase the threshold to Five Billion, a move which shall leave out a significant number of investors.

c) Exemption from Railway Development Levy

Since Goods may be exempted by the Cabinet Secretary in the public interest or to promote investment, provided their value shall not be less than KES 5 Billion.

The Tax Laws Amendment Act, 2020 had deleted the exemption on goods whose value was not less than 200M. The Bill proposes to reinstate this exemption and increase the value to Five Billion to align to the proposal on Import Declaration Levy

6. CAPITAL MARKETS ACT

The Bill proposes to amend the Capital Markets Act to provide for a definite time period within which the Capital Markets Tribunal shall hear and determine an appeal. Under the Bill, the Tribunal shall hear and determine an appeal before it within 90 days from the date of filing of the appeal.

This amendment will enhance efficiency in the capital markets and ensure speedy dispute resolution.

7. INSURANCE ACT

The Bill seeks to amend the Insurance Act (which previously excluded brokers who are not resident in Kenya) to provide for the regulation of foreign reinsurance brokers by amending the definition of a broker to mean: *“An intermediary involved with the placing of insurance business with an insurer or reinsurer for or in expectation of payment by way of brokerage commission for or on behalf of an insurer, policyholder or proposer for insurance or reinsurance, and includes a medical insurance provider”*

The Bill further seeks to provide for an annual fee to be paid by a registered person who is licensed as an insurer under the Act. The proposed provision will enhance the Insurance Regulatory Authority’s supervision of the insurance industry players and becomes effective from January 1 2022.

The Bill also seeks to amend the Insurance Act to remove the requirement to have the Kenya Reinsurance Corporation certify reinsurance contracts, and to provide for the continuation of the operation of a closed fund insurance business without the need for registration, subject to the insurer furnishing the Commissioner with information as may be required, and honouring existing policies.

The Bill further proposes to impose a fine not exceeding KES 200,000 and an additional fine of KES 10,000 for each day in which the insurer fails to honour its policy obligations.

With regards to assets, the Bill proposes that the assets of a closed fund shall not be disposed of except with the permission of the Commissioner. The proposed regulation of closed funds will protect policy holders and provide an avenue for the proper winding up of closed funds businesses.

8. KENYA REVENUE AUTHORITY ACT, 1995

Reward to KRA Whistle Blowers

The Bill proposes to amend the Kenya Revenue Authority Act, 1995, to increase the maximum reward to informers with effect from July 1 2021. The proposed increased rewards will be 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 Kshs. 5,000,000 (up from Kshs. 2,000,000), whichever is the less.

9. RETIREMENT BENEFITS ACT

The Bill seeks to amend the Retirement Benefits Act, 1997 to provide for the registration and regulation of corporate trustees that provide services to pension schemes. This 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.

The Bill also proposes to amend the Act 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. The proposed amendment will enhance

compliance by trustees since in some instances, the audited accounts are not ready within the six months' period that is provided for under the Act.

The Bill further proposes to amend the Act 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. The proposed amendment is geared towards ensuring that retirees are able to access quality healthcare.

10. CENTRAL DEPOSITORIES ACT ON DISCLOSURE OF BENEFICIAL OWNERS

The Bill proposes to amend 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 Bill therefore proposes to introduce a new provision allowing a beneficial owner or legal owner to appoint an authorized nominee for the purpose of opening a securities account. Where such nominee is acting for more than one beneficial owner, the Bill proposes that the nominee should open an omnibus account.

The proposed amendment seeks to enhance due diligence procedures and documentation on the identity of investors. The proposed amendment aligns the Central Depositories Act to the recent changes under the Companies Act which require 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. The changes in the Bill become effective from January 1 2022.