ANANT BHATT LLP
CERTIFIED PUBLIC ACCOUNTANTS

THE POWER OF EXPERIENCE ®

AUDIT | TAX | ADVISORY

ANALYSIS OF THE FINANCE BILL, 2022

FINANCE BILL, 2022 ANALYSIS UPDATE:

Anant Bhatt LLP has prepared a brief analysis for clients on the recently tabled Finance Bill, 2022 by the Government of Kenya.

ANANT BHATT LLP
CITY HOUSE, FIRST FLOOR
NYERERE AVENUE, MOMBASA
KENYA
TEL : 0726241555,041-2223682/6542
EMAIL : INFO@ANANTBHATT.COM

THE POWER OF EXPERIENCE ®
ESTABLISHED IN 1949
CPA KAMAL ANANTROY BHATT
MANAGING PARTNER
READ MORE AT:
WWW.ANANTBHATTLLP.COM

1 INTRODUCTION TO THE FINANCE BILL, 2022

- INTRODUCING THE FINANCE BILL, 2022

2 INCOME TAX ACT

- DEFINITION OF FAIR MARKET VALUE
- DEFINITION OF FINANCIAL DERIVATIVE
- DEFINITION OF PERMANENT HOME
- TAXATION OF GAINS ACCRUING TO A NON RESIDENT FROM FINANCIAL DERIVATIVES
- DEDUCTIBILITY OF FOREIGN EXCHANGE LOSSES AS A TRADING RECEIPT
- DIGITAL SERVICES TAX (DST)
- TRUSTS
- DEDUCTIBILITY OF DONATIONS TO CHARITABLE ORGANIZATIONS
- EXEMPTION OF MICROFINANCE INSTITUTIONS FROM INTEREST RESTRICTION
- ASCERTAINMENT OF GAINS OR PROFITS OF BUSINESS IN A PREFERENTIAL TAX REGIME
- MULTINATIONAL ENTERPRISE (“MNE”) GROUP TO FILE COUNTRYBY-COUNTRY REPORTS (“CBCR”)
- DEFINITION OF ULTIMATE PARENT ENTITY (“UPE”)
- REQUIREMENT TO FILE A MASTER FILE AND A LOCAL FILE
- INCREASE IN CAPITAL GAINS TAX RATE
- INVESTMENT DEDUCTION ALLOWANCE

3 TAX APPEALS TRIBUNAL ACT

- PAYMENT OF 50% OF THE DISPUTED TAXES BEFORE APPEAL TO THE HIGH COURT
- OFFSET OR REFUND OF OVERPAID TAX
- INPUT VAT CLAIMABLE ON AMENDMENT OF ASSESSMENTS
- TIMELINE FOR APPLICATION FOR REFUND OF VAT PAID IN ERROR NOW CAPPED AT 6 MONTHS
- OTHER TAXES PAID IN ERROR
- CHANGE OF PARTICULARS FOR TRUSTS
- TAX PERSONAL IDENTIFICATION NUMBERS (PINS)
- SECURITY ON PROPERTY FOR UNPAID TAX
- OBJECTION TO TAX DECISION

4 VALUE ADDED TAX (VAT) IMPACTS

- AMENDMENT OF THE DEFINITION OF “DIGITAL MARKETPLACE” WITHIN THE VAT ACT
- CLARIFICATION ON WHEN INPUT TAX MAY BE DEDUCTED
- UNDEFINED DOCUMENTATION REQUIREMENTS BY THE COMMISSIONER TO VALIDATE DEDUCTION OF INPUT VAT

- PROVISION FOR APPLICATION OF REFUND OF TAX PAID IN ERROR DELETED.
- CHANGE IN VAT STATUS FROM EXEMPT TO STANDARD RATED
- EXEMPTION OF PELLETS IN ADDITION TO BRIQUETTES
- INTRODUCTION OF VAT EXEMPTIONS
- CHANGE OF STATUS FROM ZERO RATED TO STANDARD RATED

5 EXCISE DUTY ACT AMENDMENTS

- COMMISSIONER TO HAVE DISCRETIONARY POWERS IN EXEMPTING PRODUCTS FROM ANNUAL INFLATIONARY ADJUSTMENT
- IMPOSITION OF INTEREST AND PENALTIES ON EXCISE DUTY FOR IMPORTS TO BE SIMILAR TO THAT APPLIED ON OUTSTANDING EXCISE DUTY ON LOCAL SUPPLIES, AND SUBJECT TO THE IN DUPLUM RULE
- REMOVAL OF ELECTRONIC CIGARETTES AND CARTRIDGES FOR USE IN ELECTRONIC CIGARETTES FROM THE AMBIT OF SPECIFIC EXCISE DUTY RATES
- INCREASES IN THE EXCISE DUTY RATES FOR VARIOUS GOODS
- EXCISE DUTY NOW APPLICABLE ON LOCALLY MANUFACTURED AND IMPORTED GLASS BOTTLES ALIKE
- MORE PLASTIC ITEMS SUBJECT TO EXCISE DUTY
- MORE POTATO PRODUCTS SUBJECT TO EXCISE DUTY
- NEW ITEMS ADDED TO THE LIST OF EXCISABLE GOODS AND SERVICES
- INCREASE OF EXCISE DUTY RATES ON SPECIFIED SERVICES.
- EXEMPTION OF EXCISE DUTY ON VARIOUS GOODS

6 IMPACT ON MISCELLANEOUS FEES AND LEVIES ACT

- CLARIFICATION THAT REFUND OF LEVIES THAT REMAIN UNPAID BY THE COMMISSIONER ARE ALSO SUBJECT TO PENALTIES AND INTEREST AS PROVIDED UNDER THE TPA
- ADDITION TO GOODS SUBJECT TO EXPORT LEVY
- REDUCTION OF EXPORT LEVY ON RAW HIDES AND SKINS
- CHANGE OF PERIOD FOR ADJUSTMENT FOR INFLATION FOR EXPORT LEVY
- EXEMPTION FROM IMPORT DECLARATION FEE ("IDF") AND RAILWAY DEVELOPMENT LEVY ("RDL")

7 MISCELLANEOUS LEGISLATIVE CHANGES

- DEFINITION OF AN INVESTMENT ADVISOR
- LICENSING REQUIREMENTS OF SECURITIES INDUSTRY LICENSEES
- UPDATING OF THE INSURANCE ACT
- PENALTIES ON NON DELIVERY OF UNCLAIMED FINANCIAL ASSETS
- VOLUNTARY DISCLOSURE PROGRAMME

1 INTRODUCTION OF THE FINANCE BILL, 2022

INTRODUCING THE FINANCE BILL, 2022

The Finance Bill, 2022 was tabled to the National Assembly on 12 April 2022 for the first reading. This comes just a few days after the reading of the National Budget by the Cabinet Secretary of National Treasury on 7th April 2022.

The proposals in the Bill are significant and may have an impact on the businesses of several taxpayers. It appears that the National Treasury is continuing to pursue a policy of revenue mobilisation by increasing tax rates, expansion of tax base and reduction of tax exemptions and incentives.

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

In the alert ahead, we provide an analysis of the changes proposed by the Bill.

NB: The effective date for these changes is 01 July 2022, unless specified otherwise in the sections herein.

2 INCOME TAX ACT

DEFINITION OF FAIR MARKET VALUE

The Finance Bill seeks to insert the following definition of the term "fair market value": **"fair market value" means the comparable market price available in an open and unrestricted market between independent parties acting at arm's length and under no compulsion to transact, which is expressed in terms of money or money's worth;**

The Income Tax Act includes several provisions which prescribe that the value or cost of a benefit or interest given in transactions be at fair market value.

The proposed definition also clarifies the interpretation of the value of mining rights or information which is prescribed as the fair market value at the time of disposal.

DEFINITION OF FINANCIAL DERIVATIVE

The Finance Bill seeks to introduce the definition of the term "financial derivative" as follows: **"financial derivative" means a financial instrument the value of which is linked to the value of another instrument underlying the transaction which is to be settled at a future date;**

The introduction of the definition of financial derivative is aimed at clarifying the sources of income which the Finance Bill seeks to bring to tax under Section 3 of the ITA with respect to income from financial derivatives.

DEFINITION OF PERMANENT HOME

The Finance Bill seeks to insert the definition of the term "permanent home" as below: **"permanent home" means a place where an individual resides or which is available to that individual for residential purposes in Kenya, or where in the opinion of the Commissioner the individual's personal or economic interests are closest.**

This is to clarify the interpretation of residence provided in the ITA which requires a resident to have a permanent home or be present in the country for specified periods of time and determines whether a person has a taxable presence in Kenya for a particular year.

TAXATION OF GAINS ACCRUING TO A NON RESIDENT FROM FINANCIAL DERIVATIVES

A financial derivative is defined as a financial instrument whose value is linked to the value of another instrument underlying the transaction which is to be settled at a future date.

Gains accruing to a non-resident person without a permanent establishment who has entered into a financial derivatives contract with a resident person shall be subject to withholding tax at a rate of 15% of the gains.

In a bid to expand the tax base, the CS National Treasury proposed to subject to tax gains accruing to a non-resident from financial derivatives at a rate of 15%.

Payments made to non-residents are only subject to tax in Kenya if they are deemed as being derived from Kenya. The drafting of this proposal does not appear to deem such gains accruing to a non-resident from financial derivatives as being accrued or derived from Kenya.

Further, the use of the term “gains” instead of “payments” introduces some confusion as to whether the withholding tax is applicable on the gross payment to the non resident or the gain made by the non resident.

The ITA currently does not have provisions on taxation of gains accruing to a non-resident from financial derivatives.

The proposal is effective 1st January 2023.

DEDUCTIBILITY OF FOREIGN EXCHANGE LOSSES AS A TRADING RECEIPT

The Finance Bill proposes deduction of foreign exchange losses as an expense with the exception of foreign exchange losses realized by a company whose gross interest paid or payable to related persons and third parties exceeds thirty percent of the company’s EBITDA.

The proposed amendment is aimed at bringing uniformity in the ITA following deletion of the thin capitalisation provisions and its replacement with the use of fixed profit ratios to determine deductibility of foreign exchange losses.

The ITA currently provides for deduction of foreign exchange losses as an expense with the exception of foreign exchange losses realized with respect of a loan from a person who, alone or together with four or fewer other persons, is in control of that company if the highest amount of all loans by that company outstanding at any time during the year of income is more than three times the sum of the revenue reserves and the issued and paid up capital of all classes of shares of the company.

DIGITAL SERVICES TAX (DST)

The Bill proposes inclusion of a caveat to the current ITA provision on DST that it shall not apply to a non-resident person with a permanent establishment ("PE") in Kenya. The Bill also proposes to increase the DST rate from the current 1.5% to 3%.

The proposed exemption for non-residents with a permanent establishment in Kenya from DST is in line with the principle the National Treasury sought not to tax income already subject to in Kenya.

This principle assumes that there is a strong direct correlation between the income attributable to a PE and the income earned by the head office and hence foregoing the DST charge would be compensated by the income tax collected from the PE. This is however unlikely to be the case in respect of large digital companies.

The proposed increase in the DST rate from 1.5% to 3% appears to be quite high as it represents the doubling of a tax rate within 12 months of its introduction.

TRUSTS

The Bill proposes to reverse the restrictions introduced through Section 11(3A) on registered trusts. As such any income received by a beneficiary from a registered trust will be deemed to have already been taxed. The Bill further proposes to repeal the exemption from tax of income accrued in or derived from Kenya by a registered Family Trust. CGT and stamp duty exemption on property transfer have been retained.

The proposed amendment removes the restrictions on the amount and nature of the payments that can be paid out free of tax to beneficiaries. This reverts back to the pre-Finance Act 2021 position.

Concerns still remain around the 25% tax on deemed income paid to beneficiaries which appears to be in conflict with the general taxation of trust income under the ITA. This provision should be expunged as it seeks to apply a second layer of taxation on income that has otherwise already been taxed at the level of the trust (trustee).

The income tax exemption for family trusts that was introduced in 2021 was viewed as a progressive move by the Government to encourage the adoption of family trusts as a vehicle to consolidate and safeguard family property and ease the process of generational transfer.

DEDUCTIBILITY OF DONATIONS TO CHARITABLE ORGANIZATIONS

The bill provides for deduction of any donation in that year of income to a charitable organization whose income is exempt from tax under Paragraph 10 of the First Schedule to the ITA or any project approved by the Cabinet Secretary responsible for matters relating to finance.

This proposal aims at incentivizing contribution to charities by business entities by allowing businesses to claim deductions for donations to charitable organizations irrespective of whether these organizations are registered or not.

This is a welcome move in recognition of the pivotal role played by charitable societies in Kenya.

EXEMPTION OF MICROFINANCE INSTITUTIONS FROM INTEREST RESTRICTION

The Bill proposes to exempt microfinance institutions licensed under the Microfinance Act, 2006 from the interest restriction.

The proposed change will go a long way in aligning tax treatment of interest expense across the financial sector. Currently, Banking institutions and Small and Medium Enterprises are the only entities exempt from such interest restrictions.

The ITA currently limits deductibility of interest expense incurred by microfinance institutions to 30% of EBITDA.

ASCERTAINMENT OF GAINS OR PROFITS OF BUSINESS IN A PREFERENTIAL TAX REGIME

The Bill proposes to increase the scope of dealings subject to the preferential tax regime provision to include where a resident person carries on business with

- A non-resident person located in a preferential tax regime; or
- An associated enterprise of a nonresident person in a preferential tax regime;
- Or permanent establishment of a nonresident person operating in Kenya where the non resident person is located in a preferential tax regime

The Bill also proposes amendment to the definition of the term “preferential tax regime to include foreign jurisdictions which:

- Does not tax income;
- Taxes income at a rate less than 20%;
- Does not have a framework for the exchange of information;
- Does not allow access to banking information; or
- Lacks transparency on corporate structure, ownership of legal entities located therein, its beneficial owners of income or capital, financial disclosure or regulatory supervision

The proposed amendment seeks to expand the definition of the term “preferential tax regime” to cover foreign jurisdictions where there is no tax or nominal tax.

However, it is important to note that the proposed definition as to what constitutes a “preferential tax regime” is quite broad and could capture genuine third party transactions thus expanding the scope of transactions which the KRA could review when testing the arm’s length principle.

It is unclear whether this means that taxpayers would be required to maintain transfer pricing documentation in relation to third parties. Such a consequence would impose an impractical and burdensome obligation on taxpayers.

There is no clarity as to the impact of the extension of the arm’s length principle to third parties.

The proposal is effective 1st January 2023

MULTINATIONAL ENTERPRISE ("MNE") GROUP TO FILE COUNTRYBY-COUNTRY REPORTS ("CBCR")

The proposed amendments are aimed at enhancing Country by Country Reporting and the exchange of information between tax jurisdictions with respect to MNEs

The Finance Bill expands the scope of CbCR reporting to cover UPEs that are tax resident in Kenya and also:

- Constituent Entities; and
- Surrogate Parent Entities resident in Kenya that have been appointed by the MNE Group.

The proposed amendment will cover MNE groups that have a Constituent Entity or Surrogate Parent Entity that is resident in Kenya. This means that subsidiaries that are MNE members that meet the revenue threshold may now be required to file a CbCR return in Kenya.

DEFINITION OF ULTIMATE PARENT ENTITY ("UPE")

The UPE definition proposed in the Finance Bill 2022 is identical to the UPE definition contained in the ITA.

It is noted that maintaining the requirement that the UPE is resident in Kenya will create contradictions and inconsistencies to other sections which do not require the MNE Group to have a UPE resident in Kenya in order for the filing requirement to be operational.

REQUIREMENT TO FILE A MASTER FILE AND A LOCAL FILE

There are currently no requirements to file a master file. With regard to the local file, the current requirement is for taxpayers to prepare a transfer pricing documentation report and submit this to the Commissioner upon the Commissioner's request.

The Bill proposes to introduce a requirement by an Ultimate Parent Entity or Constituent Entity to file a master file and a local file with the Commissioner in the manner in which the Commissioner specifies. This will be filed within 6 months of the last reporting financial year of the MNE group meaning it will be due together with the corporate income tax return.

OECD's BEPS Action 13 proposes a three-tiered standardized approach to transfer pricing documentation which includes preparation of a master file, a local file and CbCR. This approach will aid the Commissioner to gain visibility of the MNE's operations both in and outside Kenya.

The adoption of the master / local file filing together with CbCR is therefore a full adoption by Kenya of the OECD's recommendations around transfer pricing documentation and tax transparency.

Based on the proposed contents of the master file as contained in the Finance Bill, the master file is intended to give a high-level overview of the MNEs global operations while the local file provides more specific information on actual intercompany transactions.

In addition, as the purpose of the local file is to test compliance to the arm's length principle, the information to be provided should be expanded to include aspects such as comparability analysis and selection and application of the method. This is in line with the OECD Guidance on the contents of a local file.

Moreover, taxpayers will now be required to review and update where necessary the master file and local file on an annual basis hence increasing the compliance burden.

INCREASE IN CAPITAL GAINS TAX RATE

The ITA currently imposes a capital gains tax at the rate of 5% and the bill proposes to increase the capital gains tax from the current 5% to 15%.

The proposal seeks to increase the capital gains tax rate from 5% to 15% in a bid to shore up the tax collections by the KRA.

This is likely to have an adverse impact on transfer of property especially as the tax legislation does not permit taxpayers to claim indexation allowance relief which allows the taxpayer to remove the effect of inflation on the value of assets .

The proposal is effective 1 January 2023.

INVESTMENT DEDUCTION ALLOWANCE

The Finance Bill seeks to amend the definition of manufacture under Paragraph 1 of the Second Schedule to remove the limitation of the term to the generation of electrical energy for supply to the national grid. As such, the limitation to the national grid has been removed hence widening the scope of interpretation of manufacture subject to the benefit if investment allowance.

The intention of the proposal was to delete the phrase “for supply to the national grid”. However it appears they are proposing to delete a phrase that was deleted by the Finance Act, 2021.

If the proposal is amended and the correct phrase is deleted, the deletion of the requirement to supply the electrical energy to the national grid will be a welcomed move that will see several off grid independent power producers as well as taxpayers who generate their own electrical energy qualify for investment deduction.

The Bill also proposes that the rates shall not apply to investments which due to the nature of their business have to be located in places outside Nairobi County and Mombasa County.

The introduction of the limitation of the application of the 100% investment deduction rate limits the number of investments that are eligible to enjoy the investment allowance.

3 TAX APPEALS TRIBUNAL ACT

PAYMENT OF 50% OF THE DISPUTED TAXES BEFORE APPEAL TO THE HIGH COURT

The Bill proposes that the Appellant deposit, with the Commissioner, 50% of the disputed amount before appealing to the High court.

Subsequently, if the court rules in favour of the taxpayer the full amount shall be refunded to the taxpayer within 30 days after the court's ruling.

This proposal raises serious concerns, notably, the limitation of taxpayers' access to justice and their right of appeal. It creates a significant barrier for the taxpayer to appeal to the High Court as taxpayers are required to pay 50% of the disputed tax before appealing.

A similar provision existed prior to the repeal of the VAT Act Cap No 476 where payment of the full amount disputed was demanded. This was later removed as it affected the ability for taxpayers to appeal against unfavorable VAT Tribunal decisions.

Given that tax disputes can take several years to be resolved even before a single court, the provision is likely to significantly affect the cash flows of taxpayers. The deposit is only refunded upon exhaustion of all appeals which could include appeals to the Supreme Court of Kenya.

It also provides the KRA with an extremely powerful bargaining position in an alternative dispute resolution process as taxpayers may be intimidated to settle cases rather than pursue the litigation process.

Finally, the provision also raises issues of fairness as it does not provide for interest at market rates that will be payable to the taxpayer in the event of a successful appeal.

OFFSET OR REFUND OF OVERPAID TAX

The Bill proposes to amend the current Section 47 of the TPA to allow taxpayers who have overpaid tax to apply to the Commissioner for the overpaid tax to offset the taxpayer's future tax liabilities or to apply for a cash refund of the overpaid tax. The KRA is required to make a determination on the taxpayer's application within 90 days.

Further, where a taxpayer has overpaid instalment tax under section 12A of the ITA ,the overpaid tax shall be offset against a taxpayer's future installment tax liability.

Where the KRA fails to refund the overpaid tax within 2 years of an application for overpaid tax, the amount due will accrue interest at a rate of 1% per month.

The Bill also allows refunds of overpaid tax, in the case of VAT, where applications are made within 6 months from the date of overpayment.

This proposal clarifies that taxpayers who have overpaid tax either have the option of applying for the tax overpayment to be utilised to offset future tax liabilities or apply for a cash refund.

With regard to instalment tax overpayments, this proposal is welcome move, as a taxpayer will no longer be required to apply for offset as this should automatically be done by KRA.

However, there is need for clarity on whether the automatic offset will only be applicable to future instalment tax liability payable in the same year.

Given that we operate a self assessment regime for the majority of the taxes in Kenya, the preference should have been to allow for automatic offset for all overpayments except in the case of refunds.

From a VAT perspective, this proposal is unfair to taxpayers. It would have been preferable to allow for applications to be lodged within a period of 5 years for overpaid VAT.

INPUT VAT CLAIMABLE ON AMENDMENT OF ASSESSMENTS

The Bill proposes to include a provision, in relation to making amendments of VAT returns, stating that the input tax shall be allowable for a deduction within six months after the end of the tax period in which the supply or importation occurred.

TIMELINE FOR APPLICATION FOR REFUND OF VAT PAID IN ERROR NOW CAPPED AT 6 MONTHS

The Bill proposes to restrict the period to apply for VAT refunds to 6 months. This proposal restricts the period of claims from the 12 months currently provided to 6 months which is an even shorter time period.

OTHER TAXES PAID IN ERROR

The Bill proposes to allow taxpayers who have paid tax in error to seek a refund of the amounts subject to the provisions of the proposed Section 47. In the Bill, “tax paid in error” is defined to mean tax paid which the Commissioner is satisfied ought not to have been paid.

Currently there is no provision that expressly provides for refunds of taxes paid in error. Taxpayers currently apply for refunds of tax paid in error as tax overpayments.

CHANGE OF PARTICULARS FOR TRUSTS

The Bill proposes to require trusts to notify the Commissioner of any changes to the trust whether it is carrying out business or not.

The proposal clarifies the need for trusts to notify the Commissioner on any changes to their particulars.

TAX PERSONAL IDENTIFICATION NUMBERS (PINS)

The Bill proposes to include registration of trusts as transactions for which a PIN is required. Tax PINs will now be required for registration of trusts.

SECURITY ON PROPERTY FOR UNPAID TAX

The Bill proposes to empower the Commissioner to direct in writing the Land Registrar, the Registrar of Ships, Director General of the National Transport and Safety Authority ("NTSA") and any other person who the Commissioner is satisfied has authority to hold Property (collectively referred to as "Registrars") to register securities over properties owned by taxpayers as security for the unpaid tax.

Property is to be defined as land or building, aircraft, ship, motor vehicle, or any other property which the Commissioner may deem sufficient to serve as security for unpaid taxes.

Under this proposal any restraints or securities registered before Commissioner's direction supersede the Commissioner's registration of a security.

The Bill further proposes to empower the Commissioner or an authorized officer to recover unpaid tax by disposing the property subject to the security if the taxpayer does not pay the unpaid tax within two months of notification. The disposal to recover the unpaid tax would be either by public auction or private treaty. The taxpayer shall be required to bear costs associated with the Commissioner's recovery efforts.

The proposal broadens the assets available to KRA that can be used as security for unpaid taxes to include ships, aircrafts, motor vehicles and any other properties that may be used as security for unpaid taxes. Currently, the only assets available to KRA as security for unpaid tax is land and buildings.

The proposed provision also empowers the Commissioner to dispose of the properties if the tax is not paid within two months of the notification to the taxpayer.

The proposed provision seeks to protect security holders such as banks as any security registered prior will supersede the Commissioner's security.

The amendment with regards to disposal of property is not aligned to the Insolvency Act regarding the priority of tax claims during the distribution of an insolvent company's assets to the company's creditors.

OBJECTION TO TAX DECISION

The Bill proposes to require the Commissioner to inform the taxpayer that their notice of objection has not been validly lodged within 14 days.

The Bill also proposes to require the Commissioner to inform the taxpayer of their decision on an application for extension of time within 14 days.

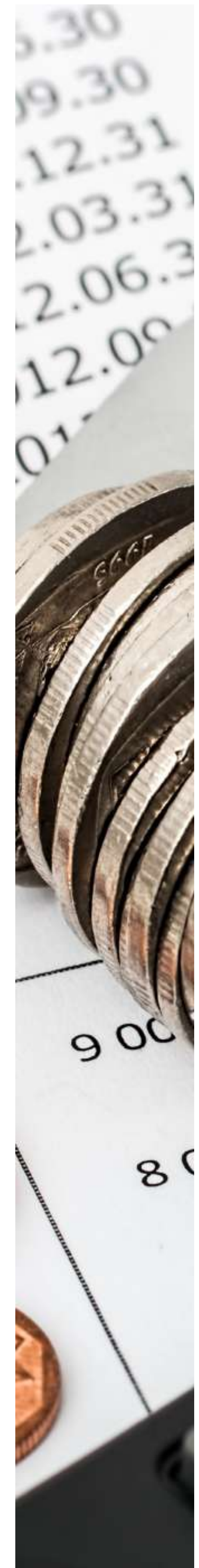
The Bill further proposes to require the Commissioner to make an objection decision within 60 days from the date of receipt of a valid notice of objection.

The proposals with regard to objection to tax decisions is welcome as it will ensure efficiency in the dispute process. Taxpayers are to be notified of the validity of their notice of objection within 14 days. Further, the Commissioner will be required to consider and make decisions on applications for extension of time within 14 days.

The Bill also seeks to reduce the amount of time it takes the Commissioner to issue a decision on a taxpayer's objection against a tax assessment. Currently, the Commissioner can request for documents from the taxpayer which extends the 60-day limit within which they are required to issue an objection decision.

The proposal will go a long way in ensuring efficiency in dispute resolution. Any requests by the Commissioner for further documentation will now have to be within the 60 day limit.

4 VALUE ADDED TAX (VAT) IMPACTS



AMENDMENT OF THE DEFINITION OF "DIGITAL MARKETPLACE" WITHIN THE VAT ACT.

"Digital marketplace" means "an online platform which enables users to sell goods or provide services to other users." The proposed amendment will provide clarity.

CLARIFICATION ON WHEN INPUT TAX MAY BE DEDUCTED.

The Bill proposes to amend the section to read "input tax on a taxable supply to, or importation made by, a registered person may, at the end of the tax period in which the supply or importation occurred, be deducted by the registered person, in a return for the period, subject to the exceptions provided under this section, from the tax payable by the person on supplies by him in that tax period".

The Tribunal ruled that in the absence of any clear, certain and unambiguous legal provisions requiring the Appellant to file a VAT return in order to claim input deduction, the Appellant was entitled to deduct input tax incurred.

UNDEFINED DOCUMENTATION REQUIREMENTS BY THE COMMISSIONER TO VALIDATE DEDUCTION OF INPUT VAT

The Bill proposes to add to the already specified documents, "any other documentation that the Commissioner may require for the purposes of validating the input tax".

The documents currently listed in the VAT Act suffice to allow for input tax deduction. This should especially be so seeing as KRA is implementing the Tax Invoice Management System ("TIMS") that will ensure sales information on electronic tax invoices will be relayed to KRA on a real/near real time basis.

The Bill should have proposed specific documents rather than giving the Commissioner powers to request for limitless documents.

PROVISION FOR APPLICATION OF REFUND OF TAX PAID IN ERROR DELETED.

The TPA has been amended to include this provision in a bid to have administrative requirements under one law.

CHANGE IN VAT STATUS FROM EXEMPT TO STANDARD RATED

The Bill proposes to change the VAT status of the goods and services from exempt to standard rated (taxable at 16%). However, it also proposes to maintain any existing exemptions on goods and services for specialized hospitals, which are already approved by the Cabinet Secretary responsible for health, up until the relevant supply is made in full.

The proposed change will increase the cost of constructing and equipping specialized hospitals. In our view, the taking away of this exemption contradicts the Government's intention to improve the health sector.

EXEMPTION OF PELLETS IN ADDITION TO BRIQUETTES

The Bill proposes to include pellets in the exemption by amending the paragraph thus "Sustainable fuel briquettes and pellets for household and commercial use."

The proposal will widen the scope of exemption for sustainable fuel options which will further encourage the use of clean energy.

INTRODUCTION OF VAT EXEMPTIONS

The Bill proposes to exempt the following from VAT:

- Plant and Machinery of Chapter 84 and 85 imported by manufacturers of pharmaceutical products or investors in the manufacture of pharmaceutical products upon the recommendation of the Cabinet Secretary responsible for matters relating health;
- Medical oxygen supplied to registered hospitals;
- Urine bags, adult diapers, artificial breasts, colostomy or ileostomy bags for medical use;
- Input and raw materials used in the manufacture of passengers motor vehicles;
- Locally manufactured passenger motor vehicles which are defined as "a motor vehicle for the transportation of passengers which is manufactured in Kenya and whose total value comprises at least thirty per cent of parts designed and manufactured in Kenya by an original equipment manufacturer operating in Kenya."

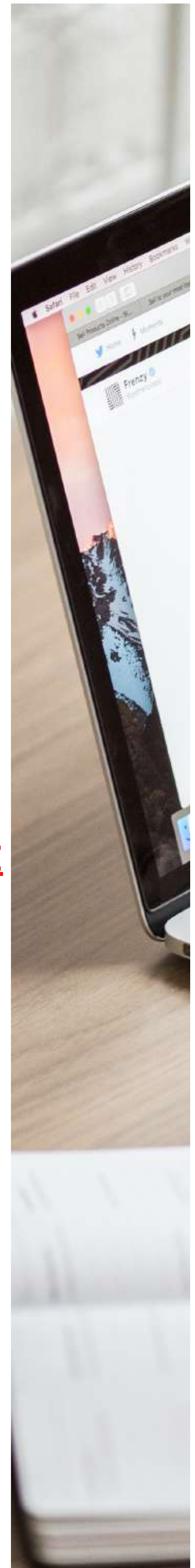
These proposals are intended to cushion Kenyans against the effects of the ongoing pandemic and its ensuing social economic implications as the exemptions will ease the financial burden of various treatments.

CHANGE OF STATUS FROM ZERO RATED TO STANDARD RATED

The supply of articles of apparel, clothing accessories and equipment specially designed for safety or protective purposes for use in registered hospitals and clinics or by county government or local authorities in fire fighting is zero rated. The Bill proposes to delete this paragraph under the Second Schedule of the VAT Act.

This change is contrary to the Government's plan to improve health care.

5 EXCISE DUTY ACT AMENDMENTS



COMMISSIONER TO HAVE DISCRETIONARY POWERS IN EXEMPTING PRODUCTS FROM ANNUAL INFLATIONARY ADJUSTMENT

The Bill proposes to amend the section by adding a provision to the effect that "the Commissioner may, by notice in the Gazette and with the approval of the Cabinet Secretary, exempt specified products from inflation adjustment after considering the circumstances prevailing in the economy in that year in respect of such products."

The proposed change aims to empower the Commissioner to review the economic and social circumstances affecting certain products before effecting inflationary changes.

IMPOSITION OF INTEREST AND PENALTIES ON EXCISE DUTY FOR IMPORTS TO BE SIMILAR TO THAT APPLIED ON OUTSTANDING EXCISE DUTY ON LOCAL SUPPLIES, AND SUBJECT TO THE IN DUPLUM RULE

The Bill proposes that the provisions of the TPA, i.e., simple interest of 1% per month and late payment penalty of 5%, shall apply on late payment of Excise Duty on imports. Further, the Bill proposes that in cases where interest becomes payable, it shall not, in aggregate, exceed the principal tax.

REMOVAL OF ELECTRONIC CIGARETTES AND CARTRIDGES FOR USE IN ELECTRONIC CIGARETTES FROM THE AMBIT OF SPECIFIC EXCISE DUTY RATES

The rate of Excise Duty on electronic cigarettes is Sh. 4,171.59 per unit while that on cartridges for use in electronic cigarettes is Sh. 2,781.43 per unit.

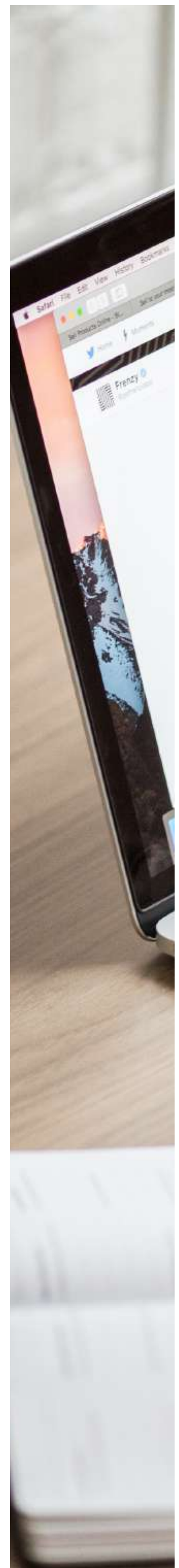
The Bill proposes to remove these items from the ambit of Excise Duty based on a specific rate per unit. This proposal allows for the application of Excise Duty at an ad valorem rate of 40%.

INCREASES IN THE EXCISE DUTY RATES FOR VARIOUS GOODS

ITEM	EXCISE DUTY RATE	PROPOSED RATE
Fruit juices (including grape must), and vegetable juices, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter	Sh. 12.17 per litre	Sh. 13.30 per litre
Cosmetics and beauty products of tariff heading No. 3303, 3304, 3305 and 3307	10%	15%
Bottled or similarly packaged waters and other non-alcoholic beverages, not including fruit or vegetable juices	Sh.6.03 per litre	Sh. 6.60 per litre
Beer, cider, perry, mead, opaque beer and mixtures of fermented beverages with nonalcoholic beverages and spirituous beverages of alcoholic strength not exceeding 6%	Sh. 121.85 per litre	Sh. 134 per litre
Powdered Beer	Sh. 121.85 per kg	Sh. 134 per kg

ITEM	EXCISE DUTY RATE	PROPOSED RATE
Wines including fortified wines, and other alcoholic beverages obtained by fermentation of fruits	Sh. 208.20 per litre	Sh. 229 per litre
Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 6%	Sh. 278.70 per litre	Sh. 335.30 per litre
Cigars, cheroots, cigarillos, containing tobacco or tobacco substitutes*	Sh. 13,906.04 per kg	Sh. 13,296.6 per kg
Cigarette with filters (hinge lid and soft cap)	Sh. 3,477.61 per mille	Sh. 3,825.99 per mille
Cigarettes without filters (plain cigarettes)	Sh. 2,502.74 per mille	Sh. 2,752.97 per mille
Other manufactured tobacco and manufactured tobacco substitutes; "homogenous" and "reconstituted tobacco"; tobacco extracts and essences"	Sh. 9,734.45 per kg	Sh. 10,707.88 per kg

ITEM	EXCISE DUTY RATE	PROPOSED RATE
Motorcycles of tariff no. 8711 other than motorcycle ambulances and locally assembled motorcycles"	Sh. 12,185.16 per unit	Sh. 13,403.64 per unit
Imported sugar confectionary of tariff heading 17.04	Sh. 36.74 per kg	Sh. 40.37 per kg
White chocolate, chocolate in blocs, slabs or bars of tariff Nos. 1806.31.00, 1806.32.00, 1806.90.00	Sh. 220.31 per kg	Sh. 242.29 per kg
Jewellery of tariff heading 7113 and imported jewellery of tariff heading 7117	10%	15%
Products containing nicotine or nicotine substitutes intended for inhalation without combustion or oral application but excluding medicinal products approved by the Cabinet Secretary responsible for matters relating to health and other manufactured tobacco and manufactured tobacco substitutes that have been homogenized and reconstituted tobacco, tobacco extracts and essences	Sh. 1,259.64 kg	Sh.2,500 per kg



EXCISE DUTY NOW APPLICABLE ON LOCALLY MANUFACTURED AND IMPORTED GLASS BOTTLES ALIKE

The Bill proposes to subject all glass bottles (whether imported or not) to Excise Duty at the rate of 25%. Glass bottles for packaging of pharmaceutical products will still be excluded.

The proposal is aimed at enhancing revenue collection for the Government by including locally manufactured glass bottles and doing away with the exclusion of glass bottles imported from the EAC

MORE PLASTIC ITEMS SUBJECT TO EXCISE DUTY

The Bill proposes to add articles of plastic of tariff heading 3923.90.90, a residual tariff line for "other" articles, under the ambit of Excise Duty at the rate of 10%.

The proposal is not only aimed at discouraging the use of plastics, but at increasing Government revenue.

MORE POTATO PRODUCTS SUBJECT TO EXCISE DUTY

The Bill proposes to expand the description of items subject to Excise Duty by revising it thus "Imported potatoes, potato crisps and potato chips of tariff heading 07.01 and imported potatoes of tariff numbers 0710.10.00, 2004.10.00 and 2005.20.00"

The proposal, which continues to propagate protectionism, will increase Government revenue.

NEW ITEMS ADDED TO THE LIST OF EXCISABLE GOODS AND SERVICES

The Bill proposes to introduce Excise Duty on the following items at the specified rates:

- Electronic cigarettes and other nicotine delivery devices - 40%;
- Liquid nicotine for electronic cigarettes - Sh. 70 per millilitre;
- Ice cream and other edible ice whether or not containing cocoa of tariff number 2105.00.00 - 15%; and
- Fees charged on advertisement by television stations, print media, billboards and FM radio stations on alcoholic beverages, betting, and gaming, lottery and prize competitions - 15%.

The changes proposed are largely meant to deter harmful practices by encouraging healthier diets and harmless recreation.

INCREASE OF EXCISE DUTY RATES ON SPECIFIED SERVICES.

The Bill proposes to increase the Excise Duty rates on the services from 7.5% to 20% The change aims to discourage vulnerable groups, e.g., unwary youth from participation in betting, gaming, price competitions and the lottery, which are all very popular

EXEMPTION OF EXCISE DUTY ON VARIOUS GOODS

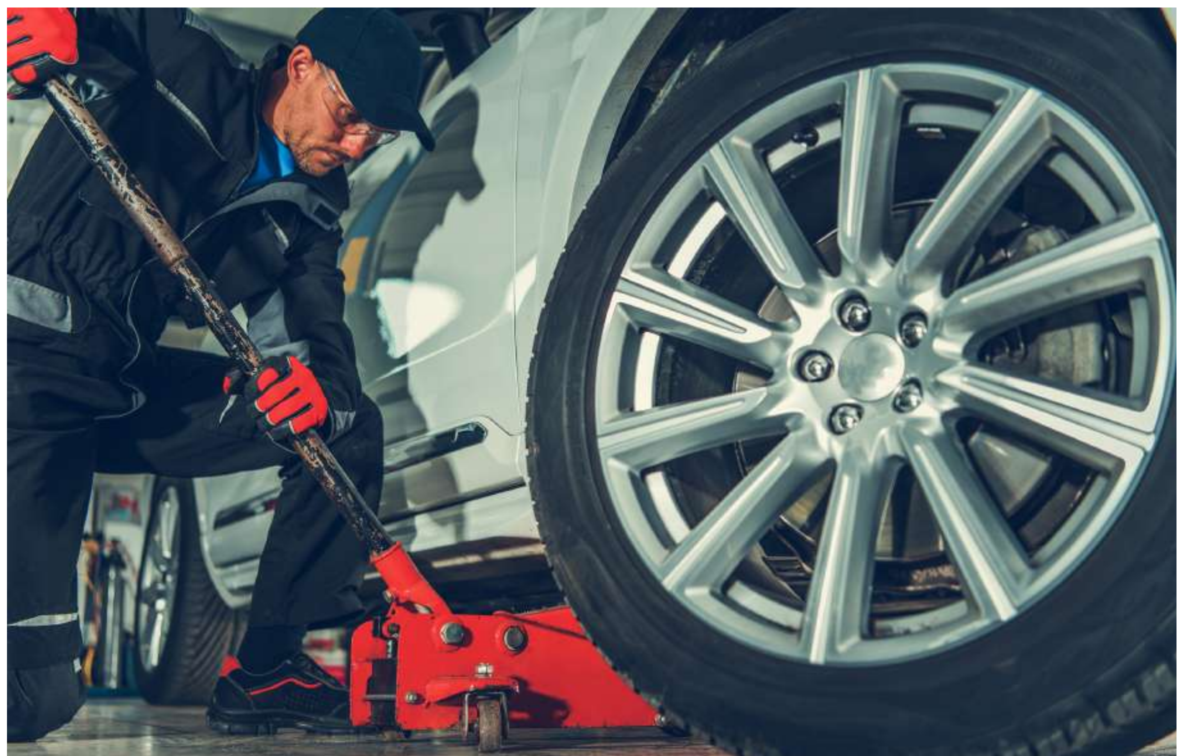
The Bill proposes to exempt the following goods from Excise Duty:

- Fertilized eggs of tariff numbers 0407.11 and 0407.19 imported by hatcheries, upon recommendation by the Cabinet Secretary responsible for matters relating to livestock.
- Neutral spirit imported or purchased locally by registered pharmaceutical manufacturers upon approval by the Commissioner.
- Locally manufactured passenger motor vehicles which will be defined similarly as in the VAT Act.

The application of Excise Duty on imported eggs only took effect from 1st July 2021 after which the Government realised that the new law had led to an insufficiency of eggs in the country.

The exemption of neutral spirit is meant to cushion pharmaceutical manufacturers from having to seek refunds as the process tends to take too long.

The exemption of locally manufactured passenger motor vehicles from Excise Duty will spur growth in the automotive industry



6 IMPACT ON MISCELLANEOUS FEES AND LEVIES ACT

CLARIFICATION THAT REFUND OF LEVIES THAT REMAIN UNPAID BY THE COMMISSIONER ARE ALSO SUBJECT TO PENALTIES AND INTEREST AS PROVIDED UNDER THE TPA

The Bill proposes to add the term “levies” in addition to “fees” within the provision. In our view, this proposal will bring clarity that where the Commissioner has offset any unpaid tax against a refund and there are still outstanding levies, penalties and interest will continue to accrue on the outstanding levies.

ADDITION TO GOODS SUBJECT TO EXPORT LEVY

The bill proposes to charge export levy at the rate of USD 175 per tonne on “Iron ores and concentrates, including roasted iron pyrites” of tariff number 2601. In our view, this proposal is meant to safeguard the country’s reserves of iron ore.

REDUCTION OF EXPORT LEVY ON RAW HIDES AND SKINS

The Bill proposes to change the rate of export levy on these goods from 80% or USD 0.52 per kg to 50% or USD 0.32 per kg The proposed amendment is aimed at giving incentives to herders and pastoralists by encouraging exportation of raw hides and skins.

CHANGE OF PERIOD FOR ADJUSTMENT FOR INFLATION FOR EXPORT LEVY

The Bill proposes that the inflationary adjustment be done at a date not later than 1st October of every financial year. In our view, this proposal will give room for adequate public participation regarding proposed inflationary adjustments.

EXEMPTION FROM IMPORT DECLARATION FEE (“IDF”) AND RAILWAY DEVELOPMENT LEVY (“RDL”) OF INPUTS AND RAW MATERIALS USED IN THE MANUFACTURE OF PHARMACEUTICAL PRODUCTS

The Bill proposes to exempt from IDF and RDL inputs and raw materials imported by manufacturers of pharmaceutical products on the recommendation of the Cabinet Secretary responsible for matters relating to health.

This move is aimed at encouraging local manufacture of pharmaceutical products which advances one of the Big Four Agenda.

7 MISCELLANEOUS LEGISLATIVE CHANGES

DEFINITION OF AN INVESTMENT ADVISOR

"Pursuant to a contract or arrangement with a client, undertakes on behalf of the client (whether on a discretionary authority granted by the client or otherwise), the management of a portfolio of securities for the purpose of investment, where the total portfolio does not exceed the amount prescribed by the Authority from time to time". This has been deleted from the definition in the proposal.

LICENSING REQUIREMENTS OF SECURITIES INDUSTRY LICENSEES

Currently, all securities industry licensees have to be constituted as either companies limited by shares or as collective investment schemes. The proposal intends to open up the industry to alternative business forms such as partnerships in order to increase the number of providers of investment advisory services across the country.

UPDATING OF THE INSURANCE ACT

The Bill refers to "closed fund business" which means the continuance of insurance business for the purpose of maintaining, without renewal, any policy or contract of insurance issued before the appointment date.

PENALTIES ON NON DELIVERY OF UNCLAIMED FINANCIAL ASSETS

The Authority may, with the approval of the Cabinet Secretary waive payment of any of the penalties and fines under section 33, whether in part or in full, where:

- the waiver is intended to facilitate the holder of the asset to disclose and deliver the undeclared asset to the Authority;
- in the opinion of the Authority, there is justifiable reasons to do so; or
- it is in the public interest to do so

The proposal has been introduced to empower the Cabinet Secretary to waive the penalties and fines payable for non-delivery of unclaimed financial assets in justifiable circumstances.

VOLUNTARY DISCLOSURE PROGRAMME

A Voluntary Disclosure Programme (VDP) has been proposed under which a relief from penalties and interest relating to nondelivery of unclaimed financial assets shall be provided for 12 months from the date of commencement of the section. The proposal has been made to encourage compliance with the Act by extinguishing any accumulated penalties and interest payable by holders of unclaimed financial assets that haven't delivered them to the Unclaimed Financial Assets Authority.

Trainee Development - Gold

Practising Certificate Development

Professional Development

ICAEW
AUTHORISED
TRAINING EMPLOYER

Established in 1949

www.anantbhattllp.com

CPA Kamal Anantroy Bhatt
Managing Partner
E : kamal@anantbhatt.com

CPA Daniel Kinyae Mumo
Associate Partner
E : daniel@anantbhatt.com

Anant Bhatt LLP
City House, First Floor
Nyerere Avenue
Mombasa, Kenya

P.O. Box 80766-80100
E : info@anantbhatt.com
P : 0726241555, 041-2223682, 041-2226542

Under no circumstance should this guide be taken as an alternative to professional advice. If you would like professional advice, please get in touch with the contact information in this report. The information within this report is general, and no persons should take it as fully accurate guide, and use it to make any monetary, or other decisions on the basis of it. Anant Bhatt LLP takes no responsibility of any persons external actions from the use this guide. All Rights Reserved.