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# 2021 FINANCE BILL
## The Proposed Changes

# ABOUT JM ASSOCIATES

## THE FIRM

JM Associates LLP "JM Associates" is a firm established to provide professional and quality services to various organisations in the areas of audit, advisory and tax.

Our services are tailor-made to the specific needs of the organisations to enable our clients to make informed financial decisions; making their businesses more profitable and subsequently achieve their growth goals.

Combining insights and innovation from multiple disciplines and industries, we help organizations excel no matter what they do and where they are in the region. We examine opportunities and challenges from every angle hence making our clients better at what they do. Through this approach, we help businesses uncover opportunities and manage risks in ways that help them to create more value every step of the way.

JM Associates in Kenya is one of the fastest growing professional services' firms in East Africa. The firm has more than 30 professional accountants and over 20 independent consultants.

JM Associates is a member of ANTEA, an international association of independent firms offering auditing, consulting, tax and legal advice. ANTEA has representatives in 70 countries and more than 250 offices worldwide.

Through our membership in ANTEA, we are able to provide our clients who have cross-border interests with up-to date advise, and our local clients; innovative solutions anchoring on knowledge sharing within the ANTEA Network.

## OUR VALUE PROPOSITION

We measure our success in terms of the long-term value we deliver, rather than our short-term revenue. Our preferred way of working is to form long-term relationships with clients and bring high quality advice with actionable results, an insight into and understanding of our clients' objectives, and working practices that involve a strong relationship balance, independence and challenge. Overall focus is on delivering sustainable results.

## INTRODUCTION

**We wish to bring to your attaention the proposed changes by The Finance bill 2021, which was published on 5th May 2021.The bill has proposed various Ammendments in the Income Tax Act, CAP 470, VAT Act, 2013,Excise Duty Act, 2015, Tax Procedures Act, 2015 etc as explained below.**

## PROPOSED AMENDMENTS TO THE INCOME TAX ACT,CAP 470

### Expansion of the definition of 'Control'

The Finance Bill has proposed to expand the definition of 'control' and instances that give rise to control. Currently, control entails ownership by one person of at least 25% of the shares or voting rights in a separate entity or another person but the Bill seeks to reduce this to 20%.

Additionally, the Bill proposes to include the following as instances that result in control:

- Where loans advanced by a person to another person constitute at least 70% of the book value of the total assets excluding loans from financial institutions not associated with the person advancing the loan;
- Where guarantees by the person for any form of indebtedness of another person constitute at least 70% of the total indebtedness of the other person excluding guarantees from financial institutions not associated with the guarantor;
- Where 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;
- Where the manufacture or processing of goods or articles or business carried on 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;

### VOTING RIGHTS IN AN ENTITY

The Finance Bill has proposed to expand the definition of 'control' and instances that give rise to control. Currently, control entails ownership by one person of at least 25% of the shares or voting rights in a separate entity or another person but the Bill seeks to reduce this to 20%.

- Where a person or a person designated by that person supplies at least 90% of the purchases of another person;
- Where a person purchases or designates a person to purchase at least 90% of the sales of another person; and
- Where the Commissioner is of the opinion that the relationship, dealing or practice with another person influences pricing or constitutes control.

Expansion of the definition of a 'Permanent Establishment'

The Income Tax Act CAP 470,defines "permanent establishment" as;

,in relation to a person means a fixed place of business and includes a place of management, a branch, an office, a factory, a workshop, and a mine, an oil or gas well, a quarry or any other place of extraction of natural resources, a building site, or a construction or installation project which has existed for six months or more where that person wholly or partly carries on business:

**Provided that —**

(a) the permanent establishment of the person shall be deemed to include the permanent establishment of the person's dependent agent;

(b) in paragraph (a), the expression "dependent agent" means an agent of the person who acts on the person's behalf and who has, and habitually exercises, authority to conclude contracts in the name of that person;

The Bill proposes to expand the definition of a Permanent Establishment (PE) to cover the following additional scenarios:

- A warehouse in relation to a person whose business is providing storage facilities to others;
- A farm or plantation for agricultural activities;
- A building or construction site or project installation that has existed for: (a) a period of 183 days; or

(b) an aggregate of between 30 to 183 days when carried on in one or more periods of time; or (c) for more than 30 days if carried on by a related enterprise;

- Provision of consultancy services within Kenya for a period exceeding an aggregate of 91 days in a year;
- An installation or structure used in the exploration of natural resources where the exploration continues for a period of more than 91 days;
- A dependent agent of a person who acts on their behalf in Kenya including the negotiation and conclusion of contracts except where the activities are preparatory or auxiliary in nature.

## Clarification on Digital Service Tax

Digital Service Tax (DST) was introduced by the Finance Act, 2020. It is applicable on income derived from or accrued in Kenya from provision of services through a digital marketplace.

The Bill has proposed to clarify that the scope of DST covers all income accrued from business activities made over the internet or an electronic network including through a digital marketplace.

The Bill further emphasizes that a **digital marketplace** is an online platform, which enables users to sell or provide services, goods or other property to other users.

Additionally, the Bill has proposes to restrict the imposition of DST only to non-resident persons whose income is derived from or accrued in Kenya from the provision of services through a digital marketplace.

The Bill has also proposed that a non-resident person subject to DST should submit a return and pay DST on or before the 20th day of the month following the end of the month in which the digital service was offered, which is still the case currently.

An amendment has also been made in the Bill to clarify that DST is not applicable to income subject to Withholding Tax (WHT) and telecommunications income taxed under Section 9(2) of the Income Tax Act, CAP 470 (ITA).

These exemptions had already been gazetted through the DST regulations, 2020 - Legal Notice No. 207.

## Removal of capping of carry forward of tax losses

The Bill has proposed to re-introduce the indefinite carrying forward of tax losses. This was the position until 2010 when carrying forward of tax losses was capped to five years and later in 2015 when it was capped to 10 years.

Currently, taxpayers seeking to carry forward any tax losses beyond 10 years have to make an application to the Cabinet Secretary (CS) National Treasury upon recommendation by the Commissioner providing evidence of the inability to extinguish the losses within the 10-year period.

This proposal will be advantageous especially to taxpayers with large capital investments that attract investment deductions that result in huge tax losses that cannot be utilized within the 10-year period.

## Overhaul of thin capitalization provisions

The Bill has  proposed to completely overhaul thin capitalization provisions by repealing the current provisions where interest payments in a year of income by a foreign controlled entity are not either partly or fully tax deductible depending on the ratio of debt to equity which is 3:1 respectively.

The Bill has  proposes to introduce restriction on tax deductibility of interest expense on any gross interest amounts exceeding 30% of Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA).

This proposed provision shall apply to all entities including those in the extractive sector and shall be applicable to interest on all loans, payments that are economically equivalent to interest and expenses incurred in connection with raising the finance. The deferment of realized foreign exchange losses for thinly capitalized companies until they cease to be thinly capitalized, however, remains which we believe could be a drafting error given the proposed overhaul of thin capitalization provisions.

From the current drafting of the Bill, the interest restriction appears to be applicable not only to foreign controlled companies but to local companies as well.

This proposal is retrogressive in the sense that it will discourage investments that are highly geared by restricting the amounts of interest claimable even on local loans particularly during earlier periods of such investments when returns are naturally expected to be low.

The proposal is also detrimental to loss making entities because they will not claim any interest expense. Further, the proposal is punitive for companies in the extractive industry whose operations are highly geared with no immediate revenues.

## DIGITAL SERVICE TAX

The Bill has proposed to clarify that the scope of DST covers all income accrued from business activities made over the internet or an electronic network including through a digital marketplace.

## Introduction of Country-by-Country reports for ultimate parent entities of Multi-National Enterprises resident in Kenya

The Bill has proposed to introduce Country-by-Country ("CbC") reporting requirements for ultimate parent entities of multinational enterprises (MNEs) which are:

**(a) Tax Resident in Kenya;**

i. not controlled by another entity; and

ii. own or control a MNE group. The ultimate parent entity of the MNE shall submit to the Commissioner a return describing the group's financial activities in Kenya and in all other jurisdictions where the group has taxable presence. The return shall be submitted not later than 12 months after the last day of the reporting financial year of the group.

Further, the return shall contain information on the group's aggregate information on revenue, profit and loss before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees and tangible assets with regard to each jurisdiction in which the group operates.

The proposal is in line with KRA's continued scrutiny on MNEs to ensure they pay their fair share of taxes in Kenya. It is imperative to note that the Bill has not prescribed the threshold of gross turnover of the MNEs to qualify for the CbC reporting and we anticipate further guidance on this.

Further, this proposal highlights Kenya's efforts to implement the OECD BEPS Action 13 on CbC reports.

Action 13 seeks to provide revenue authorities with a high-level overview of the operations and tax risk profiles of MNE groups. By submitting to the revenue authorities' information on the MNE and all the constituent group entities on an annual basis, revenue authorities are able to assess on a high level any inherent TP risks.

Additionally, this proposal is a further indication that Kenya is stepping up its efforts to join other nations on exchange of information for tax purposes. This is as per the guidance contained in the Common Reporting Standards (CRS) developed by the OECD. CRS calls on nations to obtain tax and financial related information from taxpayers and automatically exchange that information with other nations that have signed to the CRS on an annual basis. Kenya ratified to the Convention on Mutual Administrative


**COMMON REPORTING STANDARDS**

Proposal is a further indication that Kenya is stepping up its efforts to join other nations on exchange of information for tax purposes. CRS calls on nations to obtain tax and financial related information from taxpayers and automatically exchange that information with other nations that have signed to the CRS on an annual basis.

Assistance in Tax matters in December 2019. Subsequently, in July 2020, Kenya deposited its instruments of ratification for the Multilateral Convention on Mutual Administrative Assistance in Tax Matters ("The Convention") with the OECD.

The ratification means that Kenya can now automatically share tax related information with over 137 jurisdictions that have ratified the Convention. Consequently, Kenya can also undertake simultaneous tax audits with other jurisdictions and the proposed amendment by the Bill, if assented into law, will be a boost to these efforts. There is a proposal in the Bill to introduce CRS requirements through the Tax Procedures Act, 2015.

## Insurance Relief on NHIF Contributions

The Bill has proposed to allow individual taxpayers claim insurance relief on contributions made to the National Hospital Insurance Fund ("NHIF") in a year of income.

The proposed amendment is a welcome move as it provides relief to employees on NHIF contributions from taxation.

## Expansion of scope of tax rebate scheme for apprenticeship program

The Bill has proposed to expand the tax rebate scheme to employers who engage graduates from Technical and Vocational Education and Training ("TVET") for a period of 6 to 12 months.

The tax rebate scheme has only been available to employers who engage 10 university graduates as apprentices for a period of 6 to 12 months.

The proposal is a welcome move as it will benefit both employers and TVET graduates as it gives incentives to the employers while enabling TVET graduates acquire more experience.

## Amendment of the limitation of benefits clause

The Bill has proposed to widen the scope of persons who can access the benefits of the DTAAs that Kenya has signed with other countries.

Access to DTA benefits in Kenya is currently restricted to companies which have at least 50% of the underlying ownership held by individuals who are residents of the other contracting state.


**RELIEF ON NHIF CONTRIBUTIONS**

The Bill has proposed to allow individual taxpayers claim insurance relief on contributions made to the National Hospital Insurance Fund ("NHIF") in a year of income.

The Bill has proposed to expand this scope to include companies that have at least 50% of the underlying ownership held by persons who are residents of the other contracting state.

## Clarification on what constitutes an infrastructure bond

The Bill has proposed to define an 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 system, or a communication network. This makes it clear for persons who want to invest in infrastructure bonds due to the associated income tax exemptions as a result.

## Amendment to investment allowances deduction method

The Bill proposes to amend the investment allowances available on capital expenditure deduction criteria under the Second Schedule of Income Tax Act that is currently on a reducing balance basis to a basis of equal instalments. If this proposal is enacted into law, the new capital deduction rates will be as follows:

| Item | Current | Proposed |
|---|---|---|
| Hotel buildings, buildings used for manufacture, hospital buildings and Petroleum or gas storage facilities | 50% in the first year and 25% on the residual value per year on reducing balance basis | 50% in the first year and 25% on the residual value per year on equal instalments |
| Commercial and educational buildings including student hostels | 10% per year on reducing balance basis | 10% per year on equal instalments |
| Machinery used for manufacture, hospital equipment and ships and air crafts | 50% in the first year and 25% on the residual value per year on reducing balance basis | 50% in the first year and 25% on the residual value per year on equal instalments |
| Motor vehicles and heavy earth moving equipment | 25% per year on reducing balance basis | 25% per year on equal instalments |
| Computer and peripheral, computer hardware, computer software, calculators, copiers and duplicating machines | 25% per year on reducing balance basis | 25% per year on equal instalments |
| Furniture and fittings and telecommunication equipment | 10% per year on reducing balance basis | 10% per year on equal instalments |
| Filming equipment | 25% per year on reducing balance basis | 25% per year on equal instalments |
| Machinery used to undertake operations under prospecting right and machinery used to undertake exploration operations under a mining right | 50% in the first year and 25% on the residual value per year on reducing balance basis | 50% in the first year and 25% on the residual value per year on equal instalments |
| Other machinery | 10% per year on reducing balance basis | 10% per year on equal instalments |
| Fibre optic cable | 10% per year on reducing balance basis | 10% per year on equal instalments |
| Farm works | 50% in the first year and 25% on the residual value per year on reducing balance basis | 50% in the first year and 25% on the residual value per year on equal instalments |

The proposed change of capital deduction criteria from reducing balance to equal instalments will see taxpayers equally spread the capital deductions over the life of the asset depending on the applicable investment allowance rate. The result of this change is that taxpayers will claim investment allowances in shorter periods.

Additionally, the Bill has clarified that machinery used in the generation of electricity for own consumption or for distribution to other persons without necessarily being through the National Grid is subject to capital deductions.

The Bill further proposes to clarify on what constitutes civil works to include roads and parking areas, railway lines and related structures, water, industrial effluent and sewerage works, communications and electrical posts and pylons and other electrical supply works, and security walls and fencing.

## TAXATION OF EXTRACTIVE INDUSTRIES

The Bill also proposes to increase the withholding tax rate for service fees paid by a contractor or a licensee to 10% from 5.625%.

## Amendments to the Ninth Schedule (Taxation of Extractive Industries) to the ITA

The Bill has proposed to align the capital deductions criteria for machinery used to undertake operations in extractive industry under a prospecting right to equal instalments from a reducing balance basis as per the Second Schedule.

The Bill also proposes to increase the withholding tax rate for service fees paid by a contractor or a licensee to 10% from 5.625%.

Further, the Bill proposes to reduce the withholding tax to be deducted by a contractor in the case of management, training or professional fees to 10% from 12.5%.

Whereas the reduced withholding tax rate for management services is a welcome move, the increased withholding tax rates by contractors and licensees and the restriction of claiming of interest expenses will discourage investments in the mining and petroleum operations.

## Proposed Amendments to the Tax Procedures Act

The Bill has proposed several changes to the Tax Procedures Act, 2015, (TPA) as highlighted below:

**Broadening the scope of tax laws governed under the Tax Procedures Act.**

The Bill has proposed an amendment on the definition of the term “Tax law” under the TPA to include the Miscellaneous Fees and Levies Act, 2016.

**Recognition of International Tax Agreements**

The Bill has proposed to recognise multilateral agreements and treaties entered into or on behalf of the Government of Kenya relating to international tax, compliance and prevention of evasion of tax or exchange of information on tax matters.

Such agreements will have an effect as stipulated therein. Whilst these agreements have always had effect in Kenya through provision of Section 41 of Income Tax Act, the proposed amendment seeks to anchor them in the TPA for purposes of encompassing the same application in all tax laws.

**Confidentiality in administration of Tax Law**

The confidentiality scope on information disclosure as stipulated under the TPA is proposed to be expanded to include conditions specified in Multilateral Agreements and Treaties relating to the exchange of information on tax matters.

The issues handled under such arrangements shall be guided by the Agreements and Treaties between the two Contracting states.

**Common Reporting Standards**

The Bill has proposed to introduce and define principles that will govern the application of CRS in Kenya as follows:

- Common Reporting Standard: this is defined to mean reporting and due diligence standard for the automatic exchange of financial account information.
- Financial Institution: means a custodial institution, a depository institution, an investment entity or a specified insurance company.

## RECORD KEEPING REQUIREMENTS FOR TAX PURPOSES

The Bill has proposed to have the new record keeping period revised from five years to seven years. This is to align it with the Kenyan Companies Act, 2015 which requires a Company to keep records for period of seven years.

- Kenyan Financial Institution: means any financial institution that is resident in Kenya and does not include any branch of that financial institution that is located outside Kenya or any branch of a financial institution that is not resident in Kenya if that branch is located in Kenya.

The above financial institutions are expected to abide by the CRS Regulations which are yet to be issued. These institutions will be required to share, with the Commissioner an information return on reportable accounts held, managed or administered by the financial institution, in the manner prescribed under Section 6 of the TPA.

If no account is held, a nil return would be considered a reportable account. If a transaction is entered into an arrangement whose purpose is with intention to avoid the CRS and sharing of information, then the proposed amendment empowers the Cabinet Secretary to recommend the Reporting Procedures.

### Record keeping requirements for tax purposes

The Bill has proposed to have the new record keeping period revised from five years to seven years. This is to align it with the Kenyan Companies Act, 2015 which requires a Company to keep records for period of seven years.

This implies that taxpayers would be required to produce records for a longer period in the event of a KRA audit if this proposal is enacted.

### Abandonment of tax

The Bill has proposed that the Commissioner will be required to file a detailed report with the National Treasury for all the abandoned taxes on 30 June and 31 December of every year.

The Bill has further enhanced the basis upon which the Commissioner may propose abandonment of tax to the CS.

### Digital transactions

The Bill has proposed that non-resident persons whose businesses operate through a digital marketplace can report their transactions in the respective foreign currency as may be approved by the Commissioner.

However, this provision excludes non-resident persons who file their returns via a tax representative.

The Bill has proposed to empower the Commissioner to seek intervention from relevant Tax Authorities in the collection of tax from businesses operating via the internet, electronic network or digital service marketplace.

**Amendment of assessments**

The Bill has proposed to increase the period within which the Commissioner can amend assessments from five to seven years.

Additionally, the Bill proposes to align the Commissioner's powers of amending returns to the period proposed for carrying out audits and maintaining records.

**Exemption from VAT Withholding in certain circumstances scrapped**

The Bill has proposed to scrap the powers of the Commissioner currently exercises in exempting suppliers from the withholding VAT provisions. There is no clarity on what will happen to already approved exemptions, which in the past were granted for a period of up to 24 months. Businesses that are perpetually in refund position will be pushed into further refunds.

**Tax Refunds**

The Bill has proposed that in cases where the Commissioner ascertains and notifies a taxpayer of a tax refund and the refund due is utilized to offset other outstanding taxes, the interest and penalties of the taxes due will no longer accrue from the date the Commissioner informs the taxpayer.

**Due date for submissions and payments**

The Bill has proposed that should the due date for submission and payment of taxes due fall on a weekend or a public holiday, the due date is deemed to be the previous working day excluding those submitting a notice of objection, tax return or a tax payment electronically. The due dates will remain as stipulated in law for any electronic tax filings and payments.

**Penalties for non-compliance with Common Reporting Standards**

The Bill has proposed to introduce various penalties for non- compliance with Common Reporting Standards as follows:

i) KShs 100,000 for each false statement or omission, to imprisonment for a term not exceeding 3 years or to both.

ii) KShs 1,000,000 for each failure to file an information return or nil return by a Reporting Financial Institution.

iii) KShs 20,000 for failure to comply with a duty of obligation where no other penalty is prescribed and Kshs 20,000 for each day during which non- compliance continues for a period not exceeding 60 days.

## Amendments to the Miscellaneous Fees and Levies Act

**Refunds for overpaid fees and levies**

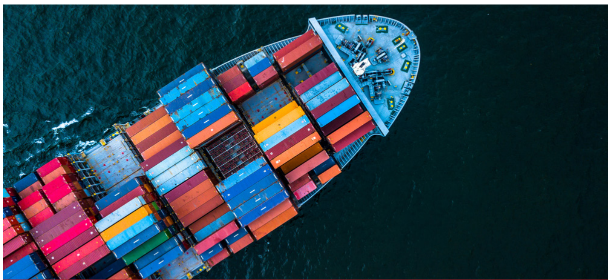
The Bill has proposed to introduce a provision to allow for refund of any overpaid fees and levies under this Act in line with the refund of overpaid tax provisions under Section 47 of the Tax Procedures Act, 2015. The Commissioner will also have powers to determine the resultant penalties and interest if the levies and fees remain unpaid.

This is a welcome proposal since there was not law allowing for refund of any overpaid fees and levies under this Act.

**Import Declaration Fee and Railway Development Levy exemption**

The Bill has proposed to exempt Import Declaration Fee (IDF) and Railway Development Levy (RDL) goods that the CS in charge of the National Treasury may determine to be in public interest or promote investment and whose value exceed KShs 5 billion.

This is a welcome incentive that will encourage investments into the country due to huge cost savings on IDF and RDL charges.



**IMPORT DECLARATION FEE AND RAILWAY DEVELOPMENT**

Proposal to exempt Import Declaration Fee (IDF) and Railway Development Levy (RDL) on goods that the CS in charge of the National Treasury may determine to be of public interest or promote investment and whose value exceed KShs 5 billion.

## Value Added Tax Changes

### Clean up of reverse charge VAT applicability

The Bill has proposed to clarify the applicability of reverse VAT for:

i) persons who are not registered for VAT;

ii) persons registered for VAT but not entitled to claim input VAT.

This proposal is not a major change in the Bill, just a clean-up of the reverse charge VAT provisions which are applicable to all persons i.e. both VAT registered and non-VAT registered persons. For VAT registered persons, reverse charge VAT on imported services is only applicable if the registered person is not entitled to claim in full input tax payable in that tax period when they import a service.

### Clarity on applicability of VAT on online transactions

The Bill clarifies that VAT is applicable on all online vatable transactions that are conducted over the internet or on an electronic network. The Bill further emphasizes that a digital marketplace is an online platform, which enables users to sell or provide services, goods or other property to other users. Any persons doing online business be it sale of goods or provision of services are required to register and charge their customers VAT if their taxable sales exceed the set threshold of KShs 5 million annually.

### Restriction of input VAT on hiring and leasing costs for automobiles

The Bill has proposed to restrict registered persons from deducting input VAT incurred on leasing and hiring of passenger cars or mini-buses and their repair and maintenance thereof including spare parts.

### Deletion of Group VAT registration

The Bill has proposed to revoke group registration as one registered person for VAT purposes. Since enactment of the VAT Act in 2013, the law required the CS for The National Treasury to provide Regulations to guide on group registrations. The draft group VAT Registration Guidelines were later published for public participation sometimes back but these have never been gazetted to date.

**HIRING AND LEASING COSTS FOR AUTOMOBILES**

The Bill has proposed  to restrict registered persons from deducting input VAT incurred on leasing and hiring of passenger cars or mini-buses and their repair and maintenance thereof including spare parts.

## VAT Regulations.

The Bill has proposed to give the CS National Treasury wide latitude of powers in gazetting VAT Regulations without seeking the approval of the National Assembly. Currently, the CS is required to seek the approval of the National Assembly before gazetting any VAT Regulations.

The proposed change is retrogressive in the sense that it leaves a wide un-checked latitude of powers to the Executive, which can be exercised whimsically and insensitively. The principle of separation of powers will be negated if this provision is passed, leaving taxpayers at the mercy of the Executive. There is no rationale or justification why the Government would want to avoid approval by the National Assembly for such important Regulations which could have far- reaching implications to the business community and consumers generally. This is bad law and should not be allowed to pass.

## Proposed reclassification of goods from VAT exempt status to standard-rated

Should this proposal be enacted, the following goods and services will be subject to VAT at a standard rate of 16%:

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

## Proposed reclassification of goods from standard rate of VAT to VAT exempt status

If this proposal is enacted, the following goods would be VAT exempt:

| 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 |

| No. | Item |
|---|---|
| 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, 3003.43.00,3003.49.00,330 3.60.00 (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, 9018.12.00,9018.13.00,9018.14.0 0,9018.19 |
| 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. |
| 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 respiration apparatus. |
| 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 body of 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 numbers 9022.12.00, 9022.13.00, 9022.14.00 and 9022.19.00. |
| 32 | Apparatus based on the use of alpha, beta or gramma 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 8423.31.00 including 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. |

The proposed exemption on medical items (serialized 20 to 39 above) shall be granted upon recommendation of the CS responsible for health.

## Proposed reclassification 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.

## Proposed reclassification of export services from zero-rated status to exempt status

The proposal through the Bill to exempt exported taxable services from VAT is ill motivated and aimed at limiting VAT refund claims by taxpayers providing services to non-resident persons.

## Extension of special VAT exemptions

The Bill proposes that any person who had supplied taxable goods to persons that had an agreement or contract with the Government prior to 25th April 2020, which provided for VAT exemption will continue enjoying the exemptions for the unexpired period of the agreement or contract. However, extension of the VAT exemptions will be subject to recommendation by the CS responsible for Energy.

This is a welcome proposal since it will ensure that the initially negotiated project costs are maintained avoiding any contract price escalations that affect funding for the Government Projects.

**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%

## Proposed VAT exemption for transactions under Real Estate Investment Trusts

The Bill has proposed to exempt VAT transfer of assets and other transactions related to the transfer of assets into real estate investment trusts and asset-backed securities.

Currently, this is standard rated. This is aimed at making it cheaper for persons to establish Real Estate Investment Trusts (REITs) hence spurring growth in the real estate sector.

**Correction of erroneous tariff codes for VAT exempt goods**

| Item | HS Code in VAT Act | Correct HS code |
|---|---|---|
| Other – Heparin and its salts | 3001.90.10 | 3001.90.00 |
| Other human or animal substance prepared for therapeutic or prophylactic uses, not elsewhere specified or included | 3001.90.90 | 3001.90.00 |
| 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 |
| Other milk in powder, granules, or other solid forms, of a fat content, by weight, exceeding 1.5% | 0402.29.10 | 0402.29.00 |
| Super absorbent polymner (SAP) | 3906.90.0 | 3906.90.00 |
| IP super soft fluff pulp – for –fluff 310 treated pulp 488*125mm (cellulose) | 4703.21.0 | 4703.21.00 |
| Perforated PE film 15-22 gsm | 3921.190.0 | 3921.90.00 |
| Spun bound non-woven 15-25 gsm | 56.03.1190.8 | 5603.11.00 |
| Airlid paper with super absorbent polymer 180gsm/67 | 48.03.00.0 | 4803.00.00 |
| Airlid paper with super absorbent polymer 80gsm/67 | 48.03.00.0 | 4803.00.00 |

The Bill has proposed to correct the erroneous tariff codes for the goods stated below. Notably, the goods are currently VAT exempt but bear the wrong tariff codes. Therefore, this amendment is seeking to align the VAT exempt products with their correct tariff codes:

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

## Excise Duty

### Excise duty offset for internet service providers

The Bill proposes to amend the Excise Duty Act, 2015 to enable licensed internet service providers (ISPs), who purchase data in bulk for resale, to offset the Excise Duty payable on internet supplied to the final customer against excise duty already paid.

Excise Duty on telephone and internet data services was introduced in the Finance Act, 2018. However, there was no corresponding provision, other than in the case of a licensed manufacturer, for ISPs to offset excise duty paid against amounts payable on supply to the final customer.

This is a welcome move as it provides clarity to licensed ISPs that Excise Duty incurred on the purchase of data for resale can now be offset against the Excise Duty payable on internet supplied to final customers.

Local sugar confectionery and chocolate products

The Bill proposes to expand the application of excise duty to include local sugar confectionery and chocolate products as follows:

- Sugar confectionery of tariff 17.04 at the rate of KShs.20 per Kg; and
- White chocolate in blocs, slabs or bars of tariff 1806.31.00, 1806.32.00, 1806.90.00 at KShs. 200 per Kg.

Previously, excise duty was only applicable to imported sugar confectionery and chocolate products. If adopted, this will affect the competitiveness of local sugar confectionery and chocolate products in the market while at the same time, increase tax revenues.

**EXERCISE DUTY ON JEWELLERY**

There is a proposal to introduce excise duty of 10% on articles of jewellery and imitation jewellery

## Relief for glass bottle importers

The Bill has proposed to scrap the current excise duty of 25% on imported glass bottles that had previously been introduced through the Business Laws (Amendment) Act, 2020 to encourage local industries to venture into production of glass bottles. However, this decision was suspended by the East African Court of Justice (EACJ) following an application by a Tanzanian bottle manufacturer who claimed this amendment was discriminatory as it did not provide an exemption for goods imported from the East African Community (EAC) member states.

The above amendment will be a welcome move for local bottlers who currently rely largely on imported glass bottles.

## Change of Excise Duty basis on motor cycles

There is a proposal to change the basis upon which Excise Duty on motor cycles of tariff 87.11 other than motor cycle ambulances and locally assembled motor cycles is calculated from a fixed rate to an ad valorem rate of 15%. Previously, motorcycles were excisable at a specific rate of KShs 11,608.23 per unit.

This amendment is aimed at enhancing revenue collection for the KRA as higher value motor cycles will attract more tax on ad valorem basis.

## Casting the net wider for luxurious products: Jewellery

There is a proposal to introduce excise duty of 10% on articles of jewellery and imitation jewellery of tariff headings 7113 (articles of jewellery and parts thereof, of precious metal or of metal class with precious metal) and 7117 (imitation jewellery) respectively.

This proposal is intended to increase revenue collection.

## Cashing in on sin taxes: Nicotine

The Bill has proposed to introduce Excise Duty of KShs 5,000/Kg on nicotine or nicotine substitutes intended for inhalation without combustion or oral application. However, medical products approved by the CS for Health will be excluded from this.

The introduction of excise duty on nicotine or nicotine substitutes will thus create an additional revenue stream for the Kenya Revenue Authority.


**EXCISE DUTY ON BETTING**

The Bill has proposed to re-introduce excise duty on betting at a rate of 20% on the amount wagered or staked.

## Re-introduction of excise duty on betting

The Bill has proposed to re-introduce excise duty on betting at a rate of 20% on the amount wagered or staked.

This was first introduced through the Finance Act, 2019 and abolished by the Finance Act, 2020 after an outcry by the industry players.

The tax is intended to discourage the negative impact of betting on youth as the government also seeks to cash in on the rapid growth witnessed in this industry in recent years.

## Amendment of definitions

The Bill proposes to include and amend the following definitions:

i. The term "Compound" to be included in the Excise Duty Act as assigned to it according to Section 2 the Compounding of Potable Spirits Act as follows:

"to communicate any flavour to, or to mix any ingredient or material with, spirits, but not so as to denature the spirits"

The above amendment seeks to align the definition of compounding in line with the Compounding of Potable Spirits Act.

ii. The term "Possession" to be included in the Excise Duty Act and defined as follows:

"possession means 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 of benefit of oneself; or

d) having an excisable goods for the use or benefit of another person"

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

The above amendment seeks to clarify who would be considered an importer for purposes of applying Excise Duty.

iii. The term "Other fees" to be amended by deleting the term "or fees or commissions earned in respect of a loan".

This proposed amendment seeks to introduce Excise Duty at the rate of 10% on fees or commissions earned in respect of a loan by a financial institution. This will in turn increase tax revenue for the KRA.

**DEFINITIONS AMENDMENT**

The term "Possession" to be included in the Excise Duty Act and defined as follows:

**"possession means having, owning or controlling any excisable goods including:**

## Abbreviations

**KRA** - Kenya Revenue Authority

**MNE** - Multi-National Enterprise

**BEPS** - Base Erosion and Profit Shifting

**CbC** - Country by Country

**RDL** - Railway Development Levy

**IDF** - Import Declaration Fee

**Cs** - Cabinet Secretary

**VAT** - Value Added Tax

**TP** - Transfer Pricing

**DTA** - Double Taxation Agreement

**NHIF** - National Hospital Insurance Fund

**ITA** - Income Tax Act

**CRS** - Common Reporting Standards

**TPA** - Tax Procedures Act

**OECD** - Organisation for Economic Corporation and Development

**ISP** - Internet Service Provider

**RDL** - Railway Development Levy

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