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KENYA TAX ALERT

FINANCE ACT, 2021

PREAMBLE

The Finance Act, 2021 ("the Act") was enacted on 29th June 2021. The Act amends various provisions of tax and fiscal laws including Income Tax Act, Value Added Tax Act, Excise Duty Act, Tax Procedures Act and Miscellane¬ous Fees and Levies Act. The Act also stipulates changes to other Acts such as the Capital Market Act, Insurance Act, Kenya Revenue Authority Act, Retirement Benefits Act and Central Depositories Act.

The Act contains taxation provisions that were not in the Finance Bill, 2021. The Act has introduced new legislative provisions on Registered Trusts, Minimum Tax and additional investment allowances on capital investments.

Notably, the proposal in the Finance Bill, 2021 to extend time for record keeping from five years to seven years and abolishment of Group VAT registration did not make it through to the Act.

We set out below our analysis of the Act's proposed changes to tax laws.

A. INCOME TAX

Interest expense capped at 30% of EBITDA

The Act has overhauled Section 16(2)(j) of the Income Tax Act on deductibility of interest expense.

Currently, only a thinly capitalized company is required to restrict its interest expense to the extent it is thinly capitalized. A thinly capitalized company is a company resident in Kenya that is considered as foreign controlled entity (control of a non-resident person alone or together with four or fewer other persons) and its debt-to-equity ratio exceeds 3:1. However, petroleum and mining companies had a lower debt to equity ratio of 2:1 and a company implementing a project under an affordable housing scheme upon recommendation by the Cabinet Secretary responsible for housing was exempt from thin capitalization rules.

Effective 1st January 2022, deductible interest will be capped at 30% of Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA). The interest restriction applies to interest on all loans, payments that are economically equivalent to interest and expenses incurred in relation to raising finance but will exclude income exempt from income tax. The interest restriction provisions will also be applicable to the extractive industry and a company implementing a project under an affordable housing scheme upon recommendation by the Cabinet Secretary responsible for housing was exempt from thin capitalization rules.

Banks, financial institutions and micro and small enterprises registered under the Micro and Small Enterprises Act, 2012 are exempt from interest restriction provisions.

Effective Date: 1st January 2022

Redefining control for foreign exchange loss restriction purposes

The definition of control was contained under the Second Schedule to the Income Tax Act. The Tax Laws Amendment Act, 2020 repealed and replaced the Second Schedule to the Income Tax Act effective April 2020 which did not contain a definition for control.

Control was defined as holding of at least 25% of the shareholding or voting power in a company.

The Act has now addressed this anomaly through introduction of a new definition for control. In addition to holding of at least 25% of the shareholding or voting power in a company, the new definition is expanded to include the following additional circumstances:

i. A loan advanced to another which contributes 25% or more of the total value of the assets of that other person other than a loan from an independent financial institution.
ii. A guarantee by a person to another where the guarantee covers at least 75% of the indebtedness of that other person excluding a guarantee from an independent financial institution.
iii. A person appoints more than 50% of the board of another or at least one director or executive member of the board of that person.
iv. A person owns exclusive rights over the know-how, patent, copyright, trademark, license, franchise or other business or commercial right which the other person depends on for manufacturing or processing of goods or articles of business carried on by the other person.
v. A person is designated by another to sup-

ply at least 90% of its purchases or in the opinion of the Commis¬sioner, the first mentioned person influences the prices or other conditions of supply of the person in question.

vi. A person is designated by another to purchase at least 90% of the sale of the other person or in the opinion of the Commissioner the first mentioned person controls prices and other conditions of sale of the person in question.

vii. Any other relationship that constitutes control in the opinion of the Commissioner.

Redefining control will result in foreign exchange losses arising from transactions with entities that are now considered as being in control of a business as not being deductible for corporation tax purposes.

Effective Date: 1st July 2021

Redefining permanent establishments (PE)

A "Permanent Establishment" was simply defined as "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 6 months or more where that person wholly or partly carries on business".

The Act has amended the Act radically lowering the threshold for creating a PE in Kenya and aligning Kenya with international best practice under the Organisation for Economic Co-operation and Development (OECD) and UN Models and the Base Erosion and Profit Shifting (BEPS) initiative. Key inclusions to situations triggering a PE in Kenya include:

- a fixed place of business through which business is wholly or partly carried on
- a building site, construction, assembly or installation project or any supervisory activity connected to the site or project, but only if it continues for a period of more than one hundred and eighty-three days
- the provision of services, including consultancy services, by a person through employees or other personnel
- an installation or structure used in the exploration for natural resources
- a dependent agent of a person who acts on their behalf in respect of any activities which that person undertakes in Kenya
- excludes activities which are preparatory or auxiliary character such as:
  i. Use of facilities solely for the purpose of storage, or display of goods or merchandise belonging to the enterprise
  ii. Maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or processing by another enterprise
  iii. Maintenance of a fixed place of business solely for the purpose of purchasing goods, and collecting information for the enterprise

The increase high threshold provisions are set to capture more transactions under branch taxation in Kenya.

Effective Date: 1st July 2021

Taxation of Registered Family Trusts

The Act has introduced provisions clearly outlining taxation of Registered Family Trusts and Registered Trusts as follows:

- Withholding tax to apply at the rate of 25% on amounts paid out to a beneficiary by a trustee, administrator or executor excluding:

  i. Payments for exclusive use of education, medical treatment or early adulthood housing.
  ii. Payments cumulatively below KES 10 million in a year
  iii. Any amounts that may be prescribed by the Commissioner

- Capital Gains Tax exemption on the following:

  i. Transfer of immovable property to a family trust
  ii. Transfer of property, including investment shares, which is transferred or sold for the purpose of transferring the title or the proceeds into a registered family trust.

The provisions on taxation of registered family trusts were not proposed in the Finance Bill, 2021. However, the amendments are welcomed since due the tax incentives presented for registered family trusts. Families are likely to elect utilizing of registered family trusts in succession planning.

Effective Date: 1st July 2021

Return for multinational entities

Multinational enterprises whose ultimate parent entity is resident in Kenya for tax purposes will be required to submit a return describing their Group's financial activities in Kenya where gross turnover exceeds a pre¬scribed threshold. The Act has not prescribed the threshold for application of the provision. The return is to be submitted within 12 months after the Group's last day of financial reporting and is to contain the prescribed information with respect to the Group for each country:

- Revenue
- Profit and loss before income tax
- Taxes paid
- Taxes accrued
- Stated capital
- Accumulated earn¬ings
- Employees
- Tangible assets,
- Cash and cash equiva¬lents about each country.

Effective Date: 1st January 2022

Minimum Tax

Minimum tax was introduced through the Finance Act, 2020 effective 1st January 2021 through introduction of Section 12D to the Income Tax Act. The Commissioner further issued Minimum Tax Guidelines which provided for administration of Minimum Tax which include exemptions on various incomes and businesses.

The newly introduced provisions were challenged at the High Court of Kenya effectively culminating in issuing of Conservatory Orders by the High Court of Kenyan suspending enforcement measures with respect to the collection of minimum tax prior to determination of the case before the High Court challenging the legitimacy of minimum tax (the Minimum Tax Case). Notably, one of the grounds presented before the High Court under the Minimum Tax Case included provisions for exemptions not anchored in the main law.

The Act has now anchored in law the following incomes or businesses from minimum tax:

- A business whose retail prices is controlled by the Gov¬ernment
- Insurance business
- Manufacturing business whose cumulative investment in the preceding 4 years from 29th July 2021 is KES 10 Billion
- A licensed Special Economic Zones enterprise
- A distribution business whose income is wholly based on commissions

The Minimum Tax Guidelines contained income subject to withholding tax including digital service tax (DST) as being exempt from minimum tax provided that at the end of the accounting period, the tax payable on taxable income exceeded the minimum tax payable. This exemption has not been captured under the minimum tax amendment provision in the Act.

Effective Date: 1st July 2021

Digital Service Tax (DST)

The Act has significantly amended DST provisions in the Income Tax Act after only six months of operations having taken effect 1st January 2021. The applicable DST rate of 1.5% of the gross turnover payable on or before the 20th of the subsequent month following the end of the month in which the digital service was offered has been retained. However, the following new aspects to administration of the tax have been introduced:

- DST will be applicable only to non-resident persons
- Income subject to WHT will not be subject to DST
- A non-resident person that carries on business of transmitting messages in Kenya by cable, radio, optical fibre, television broadcasting, Very Small Aperture Terminal (VSAT), internet, satellite or by any other similar method of communication is exempt from DST.
- The non-resident person will be required to file a monthly return on or before the 20th of the subsequent month following the end of the month in which the digital service was offered.

Effective Date: 1st July 2021

Carry forward limit for tax losses lifted

The deficit carry-forward period is now limitless from the current 10-year limit. The change responds to the complexity of loss carry for¬ward limitations and their impact on large investments. In addition, businesses in a tax loss position will still be captured under the income tax regime should minimum tax upon resolution of the case at the High Court challenging minimum tax.

Effective Date: 1st July 2021

Reinstatement of definition of civil works for purposes of claiming of investment allowances

Civil works (infrastructure) auxiliary to buildings constitutes part of a building for purposes of qualification of capital allowances. The Tax Laws (Amendment) Act, 2020 repealed and replaced the Second Schedule to the Income Tax Act effective April 2020 which did not contain a definition for civil works therefore igniting an element of ambiguity on ancillary infrastructure that constitutes part of a building.

The Act has now amended the Income Tax Act through provision of a definition for civil works which to include roads, parking areas, railway lines and related infrastructure, water, industrial effluent and sewerage works, communication and electrical posts and pylons and other electrical supply works and security wall and fencing.

Effective Date: 1st January 2022

Investment allowances rates

The Tax Laws (Amendment) Act, 2020 provided for claiming of capital allowances on a reducing balance basis. Prior to the amendment, capital allowances were claimed on a straight-line basis.

The Act reverts the capital allowance claiming rate to a straight-line basis.

Effective Date: 1st January 2022

NHIF Relief

Effective 1st January 2022, NHIF deductions will be eligible for insurance relief when PAYE is being computed. Insurance relief is provided for on insurance payments at the rate of 15% of the insurance premiums to a maximum of KES 60,000 p.a.

Effective Date: 1st January 2022

Internship Relief

The tax rebate enjoyed by employers who employ at least 10 university graduates under 6-12 months appren¬tice contracts will now be extended to graduates from technical, vocational education and training institutions ("TVETS").

Effective Date: 1st January 2022

Preferential investment deduction allowance rates

The Act has introduced for preferential investment deduction allowance rates on the following investments:

- Investment deduction allowance rate of 100% on invest¬ments whose cumulative investment value in the preceding three years is at least KES 2 billion outside Nairobi City County and Mombasa County.
- Investment deduction allowance rate of 100% Investment value in that year of income is KES 250 million outside Nairobi City County and Mombasa County.
- Investment deduction allowance rate of 100% where the investment in undertaken in a special economic zone (SEZ).
- Investment deduction allowance of 150% where the investment was made on or before 25th April 2020 and the cumulative value of the investment for the preceding three years of income was KES 2 billion.

Effective Date: 1st January 2022

Capital allowances on investment in the extractive industry

Depreciation for machinery used to undertake operations in the extractive industry have now been aligned with the Second Schedule to the Income Tax Act as tabulated below.

Investment Allowance	Item	Rate
Depreciation	Machinery first used in undertaking operations under a prospecting right	50% in the first year of use and 25% per year, in equal instalments
	Machinery first used to undertake exploration operations	50% in the first year of use and 25% per year, in equal instalments

Effective Date: 1st January 2022

Adjusted withholding tax rates on qualifying payments in the extractive industry

Qualifying payment	Old Rate	New Rate
Service fee payment to a non-resident sub-contractor by a contractor	5.625%	10%
Service fee payment to a non-resident sub-contractor by a licensee	5.625%	10%
Management, training or professional fees paid to a non-resident person by a contractor	12.5%	10%

Effective Date: 1st July 2021

B. VALUE ADDED TAX

Effective Date for All VAT Changes: *1st July 2021*

Reclassification of exported taxable services from a zero-rated supply to exempt

Export of taxable service is now reclassified to an exempt supply.

The VAT classification of export of services has been a contentious issue having triggered numerous disputes between the revenue authority and taxpayers. Several disputes have escalated from the tribunal level to the Court of Appeal.

The bone of contention in the cases involves determination of consumption of the service taking into account that an export of service qualifies as such under the VAT Act provided that consumption is outside Kenya. The trigger in bulk of the cases was based on the revenue authority challenging the consumption of services under tripartite agreements where a local service provider was subcontracted for performance of the service in Kenya by a non-resident party for its customer in Kenya.

Reclassification of exported taxable services from a zero-rated supply to exempt will undoubtedly result in an increase in the service cost for VAT registered persons due to input VAT claiming restrictions and elimination of VAT refunds. VAT registered persons whose exempt supplies constitute between 10% and 90% are required to restrict input VAT on purchases that cannot be wholly attributable to either the exempt or vatable supplies to the extent that the exempt supplies constitute the total sale.

Input VAT restriction on passenger vehicle leasing and hiring

Input VAT on acquisition of passenger vehicles, minibuses and associated expenses are not claimable unless the costs are incurred exclusively for making of taxable supplies in the automotive industry.
The Act has expanded the restriction scope to include leasing and hiring of passenger vehicles, minibuses, and associated costs to this scope.

Expanded scope for application of reverse VAT

Reverse VAT is VAT applicable upon importation of taxable services by persons registered for VAT and making mixed supplies (both vatable and exempt supplies exceeding 10% of the total sales in that month of supply). The scope for Reverse VAT has been expanded to include persons that are not registered for VAT. Moving forward, both registered persons making taxable supplies and VAT non-registered persons will be required to account for VAT.

Reclassification of supplies – Vatable at the standard rate to Exempt (Direct Exemptions)

SUPPLY	Previous Rates	New Rates
2106.10.00 – Protein concentrates and textured protein substances	16%	Exempt
2106.90.10 - Food preparations specially prepared for infants	16%	Exempt
2106.90.99 - Other - Food preparations not elsewhere specified or included	16%	Exempt
2936.27.00 - Vitamin C and its derivatives	16%	Exempt
3002.11.00 - Malaria diagnostic test kits	16%	Exempt
3002.14.00-Immunological products, mixed, not put up in measured doses or in forms or packings for retail sale	16%	Exempt
3002.13.00 -Immunological products unmixed, not put up in measured doses or in forms or packings for retail sale	16%	Exempt
3002.15.00-Immunological products put up in measured doses or in forms or packings for retail sale	16%	Exempt
3003.31.00- Insulin	16%	Exempt
3004.43.00- Other medicaments, containing alkaloids or derivatives containing norephedrine or its salts	16%	Exempt
3004.60.00 – Other, containing antimalarial active principles described in subheading Note 2 to this Chapter	16%	Exempt
2106.90.91 – Food supplements	16%	Exempt
0402.91.00 Other not containing added sugar or other sweetening matter	16%	Exempt
0402.99.00 Other milk	16%	Exempt
9021.10.00 – Orthopaedic or fracture appliances	16%	Exempt
9021.50.00 – Other artificial parts of the body – pacemakers for stimulating heart muscles, excluding parts and accessories	16%	Exempt
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	16%	Exempt
9019.20.00 – Airway guedel and ambu bags	16%	Exempt
9018.90.00 – Blood giving set and infusion sets	16%	Exempt
Prefabricated biogas digesters	16%	Exempt
Biogas	16%	Exempt
Sustainable fuel briquettes for household and commercial use	16%	Exempt

SUPPLY	Previous Rates	New Rates
The supply of denatured ethanol of tariff number 2207.20.00.	16%	Exempt
Medicaments of tariff numbers 3003.41.00, 3003.42.00, 3003.43.00, 3003.49.00, 3003.60.00 (excluding goods of heading 30.02, 30.05 or 30.06) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses	16%	Excempt
	16%	Exempt
Transfer of assets and other transactions related to the transfer of assets into real estate investment trusts and asset backed securities	16%	Exempt

Reclassification of supplies - Vatable to Exempt (Approval Based)

- Taxable supplies including fish feeding and handling, water operations, cold storage, fish cages, pond construction and maintenance, and fish processing and handling, imported or purchased for direct and exclusive use on the recommendation of the relevant state department.
- Taxable goods, excluding motor vehicles, imported or purchased for direct and exclusive use in geothermal, oil or mining prospecting or exploration by a company granted a prospecting or exploration license in accordance with the Energy Act, 2019, production sharing contracts in accordance with the Petroleum Act, 2019, or a mining license in accordance with the Mining Act, 2016, upon recommendation by the Cabinet Secretary responsible for matters relating to energy, the Cabinet Secretary responsible for matters relating to petroleum, or the Cabinet Secretary responsible for matters relating to mining, as the case may be.
- Specialized equipment for the development and generation of solar and wind energy, including photovoltaic modules, direct current charge controllers, direct current inverters and deep cycle batteries that use or store solar power, upon recommendation to the Commissioner by the Cabinet Secretary responsible for matters relating to energy.
- Taxable goods supplied to persons that had an agreement or contract with the Government prior to 25th April 2020 and the agreement or contract provided for exemption from value added tax: Provided that this exemption shall apply to the unexpired period of the contract or agreement and upon recommendation by the Cabinet Secretary responsible for matters relating to energy.
- Medical ventilators and the inputs for the manufacture of medical ventilators upon recommendation by the Cabinet Secretary responsible for matters relating to health.
- Physiotherapy accessories, treadmills for cardiology therapy and treatment of tariff number 9506.91.00 for use by licensed hospitals upon approval by the Cabinet Secretary responsible for matters relating to health.
- Dexpanthenol of tariff number 3304.99.00 used for medical nappy rash treatment by licensed hospitals upon approval by the Cabinet Secretary responsible for matters relating to health.
- Diagnostic or laboratory reagents, of tariff number 3822.00.00 on a backing, prepared diagnostic or laboratory reagents whether or not on a backing, other than those of heading 30.02 or 30.06, certified reference materials upon approval by the Cabinet Secretary responsible for matters relating to health.
- Electro-diagnostic apparatus, of tariff numbers 9018.11.00, 9018.12.00, 9018.13.00, 9018.14.00, 9018.19.00, 9018.20.00, 9018.90.00 upon approval by the Cabinet Secretary responsible for matters relating to Health
- Other instruments and appliances, of tariff number 9018.41.00, used in dental sciences, dental drill engines, whether or not combined on a single base with other dental equipment, upon approval by the Cabinet Secretary responsible for matters relating to health.

- Other instruments and appliances, including surgical blades, of tariff number 9018.49.00, 9018.50.00, 9018.90.00 used in dental sciences upon approval by the Cabinet Secretary responsible for matters relating to health.
- Ozone therapy, oxygen therapy, aerosol therapy, artificial respiration or other therapeutic respiration apparatus upon approval by the Cabinet Secretary responsible for matters relating to health.
- Other breathing appliances and gas masks, excluding protective masks having neither mechanical parts nor replaceable filters upon approval by the Cabinet Secretary responsible for matters relating to health.
- Artificial teeth and dental fittings of tariff numbers 9021.21.00, 9021.29.00 and artificial parts of the body of tariff numbers 9021.31.00, 9021.39.00, 9021.50.00 and 9021.90.00 upon approval by the Cabinet Secretary responsible for matters relating to health.
- Apparatus based on the use of x-rays, whether or not for medical, surgical or dental of tariff numbers 9022.12.00, 9022.13.00, 9022.14.00 and 9022.19.00 upon approval by the Cabinet Secretary responsible for matters relating to health.
- Apparatus based on the use of alpha, beta or gamma radiations, whether or not for medical, surgical or dental of tariff numbers 9022.21.00, 9022.29.00, 9022.30.00 and 9022.90.00, upon approval by the Cabinet Secretary responsible for matters relating to health.
- Discs, tapes, solid-state non-volatile storage devices, "smart cards" and other media for the recording of sound or of other phenomena, whether or not recorded, of tariff number 8523.80.10, including matrices and masters for the production of discs, but excluding products of Chapter 37; software upon approval by the Cabinet Secretary responsible for matters relating to health.
- Weighing machinery (excluding balances of a sensitivity of 5 cg or better), of tariff number 8423.31.00, including weight operated counting or checking machines; weighing machine weights of all kinds upon approval by the Cabinet Secretary responsible for matters relating to health.
- Fetal Doppler-Pocket (Wgd-002) Pc and pulse oximeter-finger held (Gima brand) Pc of tariff number 9018.19.00 upon approval by the Cabinet Secretary responsible for matters relating to health.
- Sterilizer Dry Heat (Wgd-001-Grx-05A) Pc, autoclave steam tabletops of tariff number 8419.20.00 upon approval by the Cabinet Secretary responsible for matters relating to health.
- Needle holders and urine bags, of tariff heading 3926 133. Tourniquets of tariff number 3926.90.99 for use by licensed hospitals upon approval by the Cabinet Secretary responsible for matters relating to health.

Reclassification of supplies - Exempt to Vatable

RECLASSIFICATION OF VAT TREATMENT	Previous Rates	New Rates
0402.99.10 - Milk, specifically prepared for infants	Exempt	16%
0402.91.10 – Milk - Other not containing added sugar or other sweetening matter specially prepared for infants	Exempt	16%
Disposable plastic syringes of tariff no. 9018.31.10	Exempt	16%
Other syringes with or without needles of tariff No. 9018.31.90	Exempt	16%
Transportation of sugarcane from farms to milling factories.	Exempt	0%

C. EXCISE DUTY ACT

Effective Date for All VAT Changes: *1st July 2021*

Excise duty rate changes

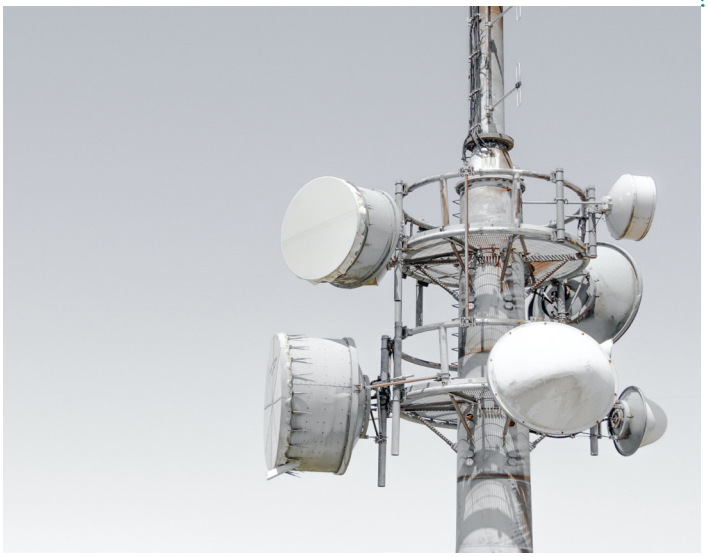
ITEM	Previous Rates	New Rates
Imported sugar confectionary of tariff heading 17.04	KES 20.99 per kg	KES 35 per kg
Imported white chocolate, chocolate in blocks, slabs or bars of H.S. Code 1806.31.00, 1806.32.00 and 1806.90.00	KES 209.88 per kg	N/A
Jewellery of Tariff Heading 7113 and imported jewellery of Tariff Heading 7117	N/A	10%
Fees and commissions earned in respect of loans	N/A	20%
Products containing nicotine or nicotine substitutes intended for inhalation without combustion or oral application	N/A	KES 1,200 per kg
(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 extracts and essences)	N/A	KES 1,200 per kg
Articles of plastic of tariff heading 3923.30.00	N/A	10%
Imported pasta of tariff 1902 whether cooked or not cooked or stuffed (with meat or other substances) or otherwise prepared	N/A	20%
Imported furniture of any kind used in offices, kitchen, bedroom and other furniture of tariff number 9403	N/A	25%
Imported eggs of tariff heading 04.07	N/A	25%
Imported onions of tariff heading 07.03	N/A	25%
Imported potatoes, potato crisps and potato chips of tariff heading 07.01	N/A	25%
3907.91.00 unsaturated polyester	N/A	10%
39.07.50. 00 Alkyd	N/A	10%
3905.91.00 Emulsion VAM	N/A	10%
3903.20.00 Emulsion-styene acrylic	N/A	10%
3905.19.00 Homopolymers	N/A	10%
3906.90.00 Emulsion B.A.M	N/A	10%
Telephone and internet data services	15%	20%
Betting	N/A	7.5% of amount wagered or stalked
Gaming	N/A	7.5% of amount wagered or stalked
Price competition	N/A	7.5% of amount charged for participation

ITEM	Previous Rates	New Rates
Lottery (excluding charitable lotteries)	N/A	7.5% of amount paid or charged to purchase the lottery ticket
Imported glass bottles (excluding glass bottles for packaging of pharmaceutical products) imported from any of the countries within the East African Community	25%	N/A
Illuminating kerosene supplies to licenced or registered manufacturers of paint, resin or shoe polish (upon approval by the Commissioner)	KES 10,305 1,000l @ 20degC	N/A
	N/A	N/A
Excisable services supplied in Kenya by a mobile telecommunication service provider on the sale of a ring back tune to a subscriber	15%	N/A

Excise duty relief on purchase of internet data by a licensed person

A licensed person will now be able to offset excise duty payable for supply of internet data services by excise duty incurred on the purchase of internet data in bulk for purposes of resale of the internet data service to the final consumer. The newly introduced provision will allow for the benefit of offsetting excise duty incurred on purchase of internet data in bulk by a licensed person to be enjoyed by the final consumers through a reduction of the retail price.

The Excise Duty Act only allowed for offsetting of excise duty incurred on excisable goods imported into or manufactured in Kenya by a licensed manufacturer for use as raw materials in the manufacture of other excisable goods.



Defined process in granting remission of excise duty on beer or wine made from locally sourced agricultural products

The Excise Duty Act has empowered the Cabinet Secretary for National Treasury to grant remission of excise duty through a Gazette Notice in respect of beer or wine made from sorghum, millet, cassava or any other agricultural products grown in Kenya other than barley. The Act has amended the Excise Duty Act to further outline the process by which the remission of excise duty remission will be granted as outlined below:

- The Gazette Notice will be presented before the National Assembly without unreasonable delay; and
- A resolution may be passed by the National Assembly within 21 days on which it next sits after the notice is presented before the National Assembly for either approval or annulment.

Provision of new definitions

New definitions for "Compound" and "Possession" have been inserted into the Excise Duty Act to provide clarity and avoid uncertainty on the terms for administration purposes.

The meaning of "Compound" under the Excise Duty Act has been assigned the meaning assigned to it under the Compounding of Potable Spirits Act which has defined the term as "to communicate any flavour to, or to mix any ingredient or material with, spirits, but not so as to denature the spirit".

Possession has been defined as "having, owning or controlling any excisable goods including -

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

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

D. TAX PROCEDURES ACT

Effectiveness of Double Taxation Agreements and Multilateral Agreements/ Lob Clause

The Act amends the Tax Procedures Act ("TPA") to specifically stress that treaties and multilateral agreements signed by Kenya and other countries will have effect in law. Documents and other information obtained or ex¬changed through such arrangements to be kept con¬fidential except under conditions specified in such agreements.

This will affect income tax as well as other taxes (VAT, Excise and import duty) which are relieved under Host Country Agreements.

Effective Date: 1st July 2021

Common Reporting Standards (CRS)

Common Reporting Standards ("CRS") means procedures for and due diligence standards for automatic exchange of financial accounts information. The Act stipulates that the Cabinet Secretary to the National Treasury is empowered to publish CRS Guidelines for due diligence and information to be maintained and automatically exchanged by Kenyan financial institutions.

The information is supplied to the Government which may exchange it with the authorities of other countries which have also signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (Multilateral Convention), which Kenya signed in February 2016. Kenya will also be entitled to some financial information on Kenyan residents maintained in foreign countries' financial institutions. Reporting institutions include:

- Financial Institutions
  i. Depository institutions
  ii. Custodial institutions
  iii. Specified insurance companies
  iv. Investment outfits

- Agency entity which primarily operates in money markets, foreign exchanges, exchanges, interest rate and index instruments, transferable securities, or commodity futures trading Individual and collective portfolio management, or otherwise investing, administering, or managing funds or money on behalf of other persons.
- An entity with the gross income of primarily attributable to reinvesting, or trading in financial assets, if the entity is managed by another entity that is a Depository of Custodial Institution, a Specified Insurance Company, or investment entity.

Penalties for non-compliance with CRS Obligation

- A penalty of KES 100,000 per false statement or omission of information.
- A financial institution that fails to file a CRS return is liable to a fine of KES 1 million.
- A person who fails to provide information relating to CRS may suffer a penalty of KES 20,000 for each day of non-compliance.

Effective Date: 1st July 2021

Expanded application of the Tax Procedures Act

The TPA's scope has been expanded to include administrative functions of Miscellaneous Fees and Levies Act ("MFL Act"). The MFL Act governs the following fees and levies previously administered under the now repealed Customs and Excise Act:

- Railway Development Levy ("RDL")
- Import Declaration Fee ("IDF")
- Export Levy

MFL Act also introduced the Anti-adulteration Levy in 2018

Effective Date: 1st July 2021

Administrative Changes

NO.	Administrative Legislation	Effective Date
1.	VAT registered persons will no longer be in a position to apply for WHVAT exemptions. The TPA provided a taxpayer with an opportunity for WHVAT exemption upon demonstration to the Commissioner that the business will be in a continuous VAT credit position for a period of not less than 24 months due to WHVAT deductions.	1st July 2021
2	Interest and penalties will cease to accrue on outstanding tax liabilities where the Commissioner has approved a refund application and subjected the approved refund into settlement of previously outstanding tax.	1st January 2022
3	Introduce a provision to the effect that where a person submits a notice of objection in electronic form, the due date shall remain the date specified in the relevant tax law. Consequently, weekends and public holidays will not be taken into consideration.	1st July 2021
4	The Commissioner's powers to refrain from assessing taxes for the years 2015 and earlier with respect to certain circumstances have been revoked. The provision was outdated, and the amendment was effectively an effort to clean up the TPA.	1st July 2021
5	The Act has expanded the powers of the Commissioner to abandon the collection of unpaid tax where there is any other reason other than the reasons currently stipulated in the TPA occasioning inability to recover the unpaid tax. Further, the Commissioner will be required to submit bi-annual reports to the Cabinet Secretary to the National Treasury on details of forfeited tax collections on or before 30th June and 31st December of each year.	1st July 2021
6	Additional transaction requiring a PIN - Selling of goods and services over a digital marketplace.	1st July 2021

NO.	Administrative Legislation	Effective Date
7	The Commissioner may seek the cooperation of other authorities in the enforcement of digital services tax which is only applicable to non-resident persons. The amendment provides the Commissioner with powers to engage communication, financial, security or any other authorities in enforcing DST provisions on non-resident persons.	1st July 2021

Although captured under the Kenya Revenue Authority Act, the maximum reward for providing information leading towards identification of unassessed taxes or duties has been increased to KES 500,000 from KES 100,000. Similarly, the maximum reward for providing information leading towards recovery of unassessed taxes or duties has been increased to KES 5,000,000 from KES 2,000,000. The improved reward system will likely encourage individuals to volunteer information on tax cheats and increase the Commissioner's tax collections.

Easement of currency requirements for non-resident persons under the DST regime

Taxpayers are required to maintain records and file returns in the local currency (KES). A non-resident person undertaking business in Kenya through a digital marketplace will be required to account for DST and file monthly returns.

The TPA now allows for a non-resident person carrying on business through a digital marketplace to maintain their records in a convertible foreign currency upon approval by the Commissioner. However, this excludes a non-resident person who makes payments and files returns through a resident tax representative or those with a permanent establishment in Kenya (branch).

Effective Date: 1st July 2021

E. MISCELLANEOUS FEES AND LEVIES ACT

Refund of overpaid or erroneously remitted levies

Refund of levies administered under the MFL Act (RDL, IDF, Export Levy and Anti-adulteration Levy) will now be allowable as administered under the Tax Procedures Act.

Effective Date: 1st January 2022

Reintroduction of RDL and IDF exemption on goods for promotion of investment and in the public interest

Railway Development Levy ("RDL") and Import Declaration Fee ("IDF") exemption will now be allowed on goods imported into the country of which the Cabinet Secretary in charge of National Treasury may determine is in the public interest or to promote investment in the country and whose value does not exceed KES 5 billion.

The Tax Laws Amendment Act, 2020 in April 2020 had lifted the IDF and RDL exemption on goods which the Cabinet Secretary in charge of National Treasury may have determined were in the public interest or to promote investment in the country. However, the threshold of the value of the investment for the now deleted exemption provision was KES 200 million.

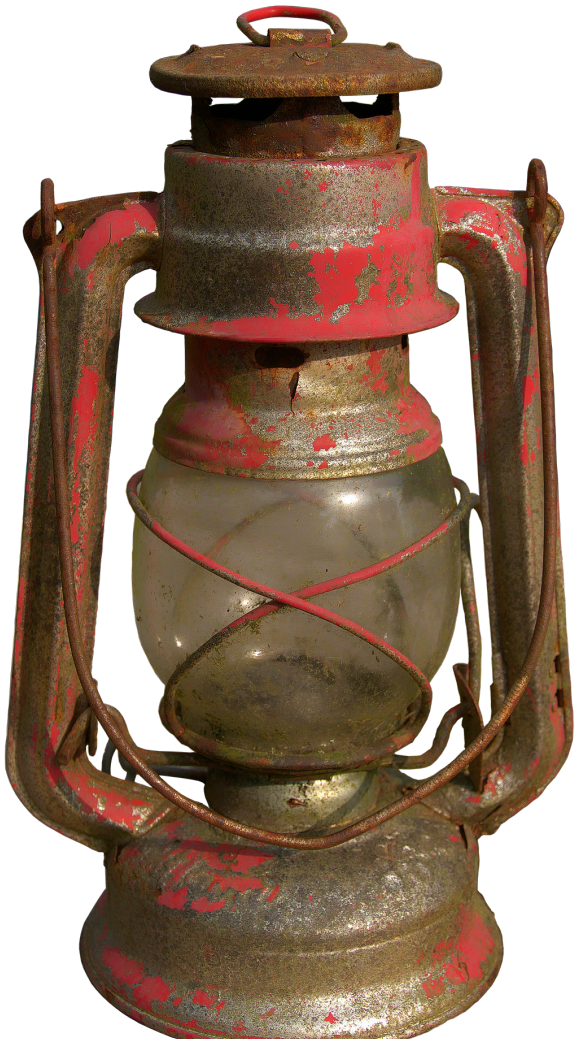
Effective Date: 1st July 2021

Anti-adulteration levy exemption for licensed or registered manufacturers of paint, resin or shoe polish

The Anti-adulteration levy was introduced in 2018 through the Finance Act, 2018 applicable to illuminating kerosene imported into the country for home use at the rate of KES 18 per litre of
the customs value.

Effective 1st July 2021, licensed or registered manufacturers of paint, resin or shoe polish are exempt from ant-adulteration levy upon importation of illuminating kerosene.

Effective Date: 1st July 2021



F. STAMP DUTY

Stamp duty exemptions on transfers to registered family trusts

The Act has amended the Stamp Duty Act to provide for stamp duty exemptions on the transfer of property into a family trust.

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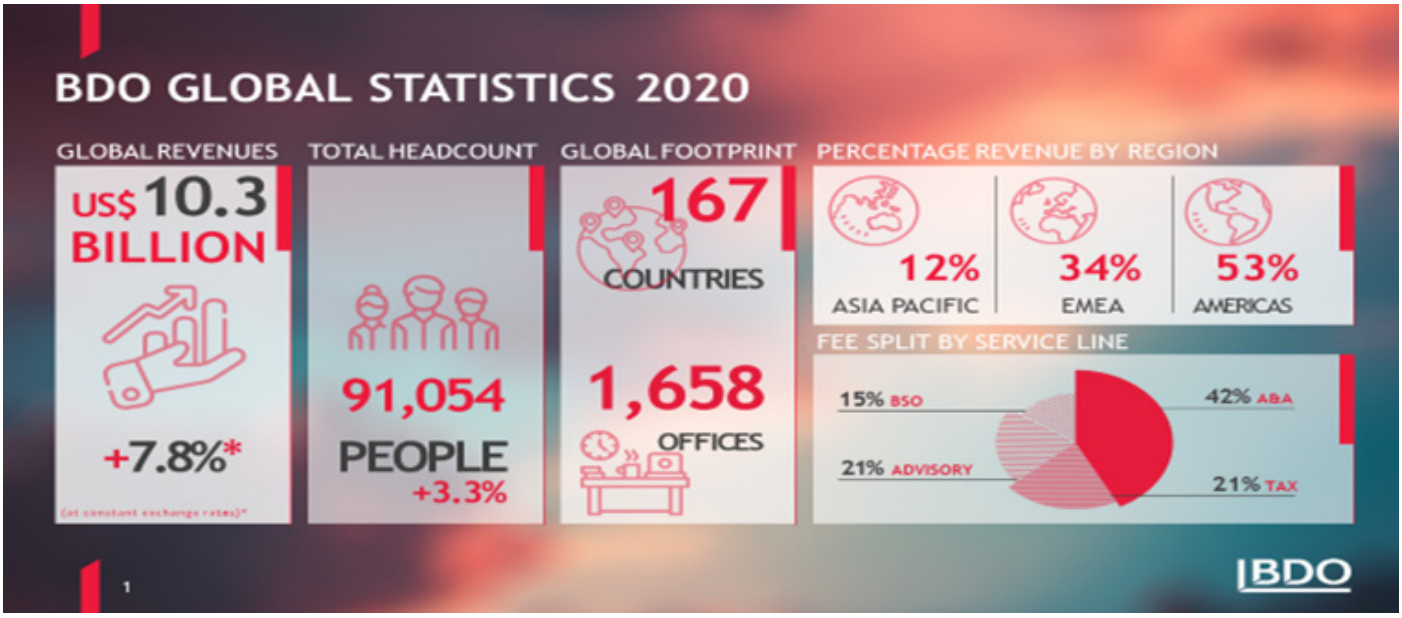

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