



Dedicated to finding the best possible tax solutions for your business

KENYA FINANCE ACT, 2021

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INTRODUCTION

The Finance Act ("the Act"), 2021 received Presidential assent on 29th June 2021. Most of the changes will be effective from 1st July 2021, which is the Government's fiscal year, while a few will be effective from 1st January 2022.

Most of the proposed changes in the Finance Bill, 2021 have been maintained in the Act with a few additions. This newsletter covers changes that were maintained in the Finance Act (maintained in colour grey), new additions that were not previously included in the Finance Bill (highlighted in colour blue) and proposals in the Finance Bill that were not passed as law by the Finance Act (highlighted in colour green).

Some of the legislative highlights are as follows:

- Ordinary bread remains zero-rated;
- The supply of maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour by more than ten percent in weight was previously zero-rated remain zero-rated;
- **Income tax exemption for registered family trusts;**
- The transportation of goods originating from Kenya to a place outside Kenya remains zero-rated;
- **Investment deduction for capital expenditure incurred prior to 25th April 2020 has been retained at 150% if the cumulative investment is at least KShs. 2 billion in the preceding 3 years;**
- **Fees or commissions earned in respect of a loan are now chargeable to excise duty; and**
- **Mobile cellular phone services shall be charged excise duty at the rate of 20% of their excisable value. This is a revised rate from the initial 15%.**

DIRECT TAXES

DEFINITION OF CONTROL

The Act has re-introduced the definition of control that is more comprehensive and in line with the proposal in the Income Tax Bill.

Control in relation to a person shall now include:

- a) A person holding at least 20% voting rights in a company, directly or indirectly;
- b) A loan advanced by one person to another, constituting at least 70% of the book value of the total assets of the entity, excluding a loan from a financial institution not associated with the person advancing the loan;
- c) A guarantee by a person for any form of indebtedness constituting at least 70% of the total indebtedness of the entity, excluding a guarantee from a financial institution not associated with that guarantor;
- d) The power to appoint more than half of the board of directors of the entity, or at least one director or executive member of the governing board of that entity;
- e) A person who has exclusive rights over the know-how (includes patent, copyright, trademark, license, franchise, and any other business or commercial right) on which the entity is wholly dependent for the manufacture or processing of goods or articles or business carried on by the other person;
- f) The person or another person designated by him supplies at least 90% of the purchases of the entity; or in the opinion of the Commissioner, influences the price or other conditions relating to the supply of the purchases of the entity;
- g) The person or another person designated by him purchases 90% of the sales of the entity; or in the opinion of the Commissioner, influences the price or any other conditions of sales of the entity; or
- h) Any other relationship, dealing or practice that the Commissioner may deem to constitute control.



The Tax Laws (Amendment) Act, 2020 deleted the definition of control in the Second Schedule of the ITA, thus leaving a lacuna in the legislation. The re-introduction of the definition has therefore sealed the gap.

The new definition of control will be a consideration in determining the residency status of a corporate body and evaluation of whether a Kenyan entity is an ultimate parent company. In addition, it will be a consideration for compliance with transfer pricing provisions.

INFRASTRUCTURE BOND NOW DEFINED

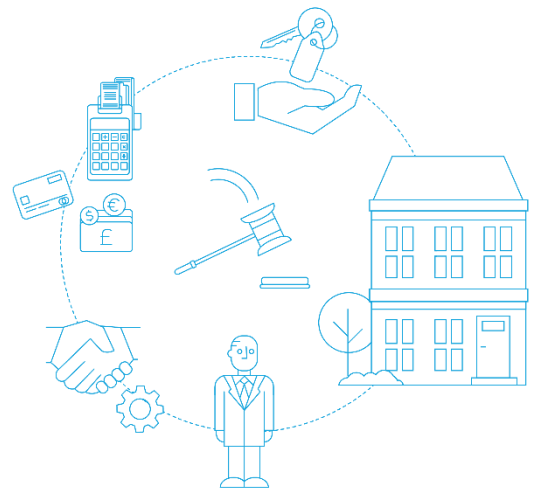
Interest income received from infrastructure bonds for a maturity of at least 3 years is exempt from income tax, and the exemption extends to a communication network or energy project.

Infrastructure bonds was previously not defined in the ITA; this introduction provides clarity on the bonds that qualify for income tax exemption.

PERMANENT ESTABLISHMENT DEFINITION EXTENDED

The definition of a permanent establishment has been deleted and substituted to include the following:

- i. A fixed place of business through which business is wholly or partly carried on and includes:
 - A place of management, a branch, an office, a factory, a workshop and a sales outlet;
 - A mine, an oil or gas well, a quarry, or any other place of extraction or exploitation of natural resources;
 - A warehouse in relation to a person whose business is providing storage facilities to others; or
 - A farm, plantation or other place where agricultural, forestry plantation or related activities are carried out;
- ii. A building site, construction, assembly or installation project, or any supervisory activity connected to a site or project if it continues for a period of more than 183 days, provided that:
 - Where a person carries on activities at a place that constitutes a building site or construction or installation project and these activities are carried on during one or more periods of time that, in the aggregate, exceed 30 days but do not exceed 183 days; and
 - Connected activities are carried on at the same building site or construction or installation project during different periods of time, each exceeding thirty days, by one or more enterprises closely related to the first-mentioned enterprise; the different periods of time shall be added to the aggregate period of time during which the first-mentioned enterprise has carried on activities at that building site or construction or installation project;
- iii. The provision of services including consultancy services provided by a person through employees or other personnel engaged for that purposes if the period exceeds the aggregate 91 days in any 12-month period commencing or ending the year of income concerned;
- iv. An installation or structure used in the exploration of natural resources provided the exploration continues for a period equal to 91 days or more; or
- v. A dependent agent of a person who habitually concludes, contracts or plays the principal role leading to the conclusion of contracts without material modification by the person, excluding the activities that are of a preparatory or auxiliary character such as:
 - The use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise;
 - The maintenance of stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display, for the purpose of processing by another enterprise; or
 - The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or collecting information for the enterprise, for the purpose of carrying on any other activity or combination of activities.



The new definition provides various scenarios that crystallize a permanent establishment in Kenya. Similarly, the new definition has also provided some clarity on the scenarios that do not result in a permanent establishment, which aligns with the OECD guidelines.

DIGITAL MARKETPLACE PROVISIONS

DEFINITION

Income from accruing from business carried out over the internet or an electronic network, including through a digital marketplace will be chargeable to income tax.

Further, a digital marketplace has been defined as “an online platform which enables users to sell or provide services, goods or other property to other users”.

This has widened the scope of income from services & goods on which Digital Service Tax (“DST”) will be charged.

Income earned by non-residents from online rental of property will be subject to DST based on the above legislation.

PERSONS LIABLE TO DIGITAL SERVICE TAX

DST will only be chargeable to income earned by non-resident persons except where the non-residents' income is subject to withholding tax or where the non-resident person is in the business of transmitting messages via radio, cable, optical fiber, television broadcasting, internet, satellite or VSAT.

DST will be payable by the 20th of the month following the end of the month when the digital service was offered.

Tax Procedures Act, 2015 (“TPA”) now allows the Commissioner to seek the intervention of relevant authorities in the collection of tax.

TRUST INCOME

EXEMPT TRUST INCOME

Income from registered trusts are taxable except:

- a) any amount that is paid out of the trust income on behalf of any beneficiary and is used exclusively for the purpose of education, medical treatment or early adulthood housing;
- b) income paid to any beneficiary which is collectively below KShs. 10 million in the year of income; or
- c) such other amount as the Commissioner may prescribe from time to time and at such rate as prescribed in Paragraph 5 of the Third Schedule to the ITA.

The new legislation brings under the ambit of taxation specific sources of income registered trusts.

WITHHOLDING TAX ON PAYMENT TO TRUSTEE BENEFICIARIES

Income in respect to the disbursement of deemed income to beneficiaries of a registered trust, that do not qualify for income tax exemption under any of the following categories, shall be subject to withholding tax at a rate of 25%.

- i) any amount that is paid out of the trust income on behalf of any beneficiary and is used exclusively for the purpose of education, medical treatment or early adulthood housing;
- ii) income paid to any beneficiary which is collectively below KShs. 10 million in the year of income;
- iii) such other amount as the Commissioner may prescribe from time to time and at such rate as prescribed in Paragraph 5 of the Third Schedule to the ITA.

INCOME ON SETTLEMENT ARRANGEMENT

The Act has expanded the definition of a settlement in relation to transfer of assets to mean assets transferred through a registered family trust.

Based on the revised definition of settlement, any income on transfer of shares will be exempt based on the new Paragraph 36 of the First Schedule to the ITA, which now exempts from income tax the following income from a registered family trust:

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

The exemption is likely to cause an increase in the number of registered family trusts.

EXPANSION OF BUSINESSES EXEMPT FROM MINIMUM TAX

Income from the following businesses will be exempt from minimum tax:

- 1) business whose retail price is controlled by the Government;
- 2) insurance business;
- 3) manufacturing business with a cumulative investment in the preceding 4 years from the date of assent is at least KShs. 10 billion;
- 4) persons licensed under the Special Economic Zones Act, 2015;
- 5) is engaged in distribution business whose income is wholly based on a commission.

The exemption comes amidst the High Court's suspension of implementation of minimum tax. However, it is a welcome move to the exempted businesses.

The 10-year limit for utilisation of tax losses has been removed. The change counteracts the imposition of minimum tax in the loss-making years.

THIN CAPITALIZATION PROVISIONS MORE RESTRICTIVE

The thin capitalisation provisions have been amended to restrict the total interest claimable in a year of income to 30% of earnings before interest, taxes, depreciation and amortization ("EBITDA"); provided in the calculation of EBITDA, any income that is exempt from tax is to be excluded. This is applicable both to locally and foreign controlled companies.

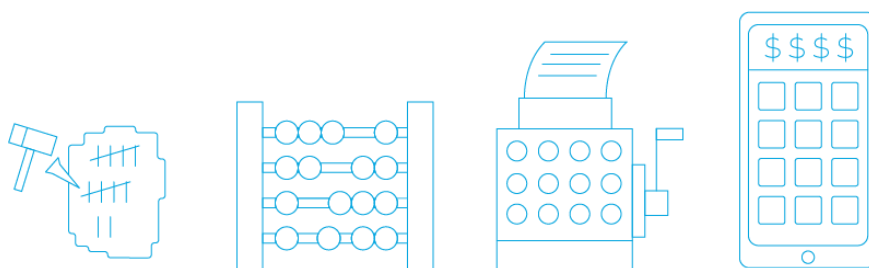
The interest restriction will apply to:

- interest on all loans;
- payments that are economically equivalent to interest; and
- expenses incurred in connection with raising of finance.

The restriction of the payment of deemed interest on interest free loans by entities controlled by a non-resident alone or together with not more than four other persons (excluding a licensed bank or a financial institution) still applies. However, the clarification that loans advanced to the company by a non-resident associate of the non-resident company controlling the resident company has been deleted.

The exemption granted from this provision for a company implementing a project under the affordable housing scheme upon the recommendation of the CS responsible for housing has also been deleted.

The above interest restriction provisions will not apply to banks or financial institutions and micro and small enterprises registered under the Micro and Small Enterprises Act, 2012.



REQUIREMENT FOR SUBMISSION OF GROUP RETURN FOR MULTINATIONAL ENTERPRISE GROUPS

The Act has introduced a new requirement for multinational enterprise groups to submit returns giving information on their activities in other jurisdictions.

The Act has defined a multinational enterprise group ("MEG") to mean: "A group that includes two or more enterprises which are resident in different jurisdictions including an enterprise that carries on business through a permanent establishment or through any other entity in another jurisdiction."

Further, an Ultimate Parent Entity ("UPE") has been defined to mean: "An entity that is a resident in Kenya for tax purposes; is not controlled by another entity; and owns or controls a multinational enterprise group."

An UPE of a MEG will be required to submit to the Commissioner a return describing the group's financial activities in Kenya, where its gross turnover exceeds the prescribed threshold, and in all other jurisdictions where the group has taxable presence, not later than 12 months after the last day of the reporting financial year of the group.

The Act however does not provide clarity on the prescribed gross turnover threshold.

The information required in the group return in relation to each jurisdiction in which the group operates shall consist the group's aggregate information relating to:

- revenue;
- profit or loss before income tax;
- income tax paid;
- income tax accrued;
- stated capital;
- accumulated earnings;
- number of employees; and
- tangible assets other than cash or cash equivalents.

The group reporting has been necessitated by limitations of law to enable the Commissioner to get information from offshore entities for multinational entities whose ultimate parent entities are resident in Kenya.

INTRODUCTION OF NHIF RELIEF

The Act has introduced relief on payments made by resident individuals to the National Hospital Insurance Fund ("NHIF") as an insurance relief.

This relief will be equivalent to 15% of the amounts paid toward NHIF and other insurance premiums, not exceeding KShs. 60,000 per annum.

The insurance relief will increase employees' net pay.



TAX REBATES FOR EMPLOYERS PROVIDING APPRENTICESHIP

The Act has expanded the category of graduates for which an employer may be entitled to rebates for apprenticeship to also include graduates from technical and vocational education and training centers.

Previously, the rebate was only applicable to employers providing apprenticeship to university graduates. The rebate available is equivalent to 50% of the amount of salaries and wages paid to at least 10 apprentices for a period of 6 – 12 months, in addition to the salaries and wages expense.

This is a welcome move as it will encourage employers to consider offering apprenticeship to students from vocational & training centers, thus opening the students to employment opportunities.

DOUBLE TAXATION RELIEF

All Double Taxation Agreements (DTA) entered into between Kenya & other states shall be subject to the provisions of the Treaty Making and Ratification Act, 2012, which ensures that any ratified treaties with other jurisdictions are bound by the values and principles of the Constitution.

Further, any exemption from tax or a reduced tax rate in Kenya as a result of the application of the arrangement in a DTA shall not be applicable to person who, for the purposes of the arrangement, is a resident of the other contracting state if 50% or more of the underlying ownership of that person is held by a person or persons who are not residents of that other contracting state for the purposes of the agreement.

The definition of a person being referred to above was previously not defined. The Act now states that the definition of a person is in line with the definition provided in the Ninth Schedule of the ITA which includes an individual, company, partnership, trust, government or similar body or association.

The definition of person now clarifies that even individuals are prevented from treaty shopping.

INVESTMENT ALLOWANCE

The Act has introduced the following changes to the Second Schedule:

Deleting the words “on reducing balance” wherever they may occur and substituting with the words “in equal instalments”. This will be applicable to:

Building/Machinery	Rate of investment allowance
Hotel building	50% in the first year of use, 25% per year on the residual value, on reducing balance in equal instalments
Building used for manufacture	50% in the first year of use, 25% per year on the residual value, on reducing balance in equal instalments
Hospital buildings	50% in the first year of use, 25% per year on the residual value, on reducing balance in equal instalments
Petroleum or gas storage facilities	50% in the first year of use, 25% per year on the residual value, on reducing balance in equal instalments
Educational buildings including student hostels	10% per year, on reducing balance in equal instalments
Commercial buildings	10% per year, on reducing balance in equal instalments
Machinery used for manufacture	50% in the first year of use, 25% per year on the residual value, on reducing balance in equal instalments
Hospital equipment	50% in the first year of use, 25% per year on the residual value, on reducing balance in equal instalments
Ships or aircraft	50% in the first year of use, 25% per year on the residual value, on reducing balance in equal instalments
Motor vehicles and heavy earth moving equipment	25% per year, on reducing balance in equal instalments
Computer and peripheral computer hardware and software, calculators, copiers and duplicating machines	25% per year, on reducing balance in equal instalments
Furniture and fittings	10% per year, on reducing balance in equal instalments
Telecommunications equipment	10% per year, on reducing balance in equal instalments
Filming equipment by a local film producer licensed by the Cabinet Secretary responsible for filming	25% per year, on reducing balance in equal instalments
Machinery used to undertake operations under a prospecting right	50% in the first year of use and 25%, on reducing balance in equal instalments
Machinery used to undertake exploration operations under a mining right	50% in the first year of use and 25% per year, on reducing balance in equal instalments
Other machinery	10% per year, on reducing balance in equal instalments
Purchase or an acquisition of an indefeasible right to use fibre optic cable by a telecommunication operator	10% per year, on reducing balance in equal instalments
Farm works	50% in the first year of use and 25% per year, on reducing balance in equal instalments

The Act has also extended the time limit for capital allowances claimable relating to capital expenditure incurred on the construction of bulk storage and handling facilities for supporting the Standard Gauge Railway operations of a minimum storage of 100,000m³, and where the capital expenditure incurred is KShs. 5 billion, from 31st December 2021 to 31st December 2022.

Going forward, any persons distributing electricity will be allowed to claim investment deduction on their capital expenditure, whether the distribution is done through the national grid or not. Previously, capital allowance was only claimable, if the distribution was made to the National Grid.

Re-introduction of the definition of "civil works" captured under the terms **building used for manufacture and commercial building** to include:

- roads and parking areas;
- railway lines and related structure;
- water, industrial effluent and sewerage works;
- communications and electrical posts and pylons and other electrical supply works; and
- security walls and fencing.

In addition, the definition of **farm works** which was repealed alongside the Second Schedule of the ITA has been re-introduced by the Act in the new Second Schedule to mean "farmhouses, labor quarter, any other immovable building necessary for the proper operation of the farm, fences, dips, drains, water and electricity supply works and other works necessary for the proper operation of the farm".

The re-introduction of the definition of civil works and farm works provides clarity to what structures qualify for the respective investment allowance.

Further, where the cumulative capital expenditure incurred on buildings, including machinery farm works and other machinery is at least KShs. 2 billion in the preceding three years of income before 25th April 2020, the applicable rate of investment allowance for capital expenditure incurred outside Nairobi and Mombasa will be 150%; and 100% if the capital expenditure is incurred from 25th April 2020.

Where the capital expenditure incurred on building and machinery is at least KShs. 250 million outside Nairobi and Mombasa County, the rate of investment allowance applicable is 100%.

Where a person incurs capital expenditure on building and machinery in an SEZ, the rate of investment allowance claimable shall be 100%.

TAXATION OF EXTRACTIVE INDUSTRIES

The Act has brought about the following changes to the Ninth Schedule:

The rate of depreciation for machinery first used to undertake operations under the prospecting right from 100% to 50% in the first year of use, and 25% per year on the residual value in equal instalments, effective 1st January 2022.

The rate of depreciation for machinery first used to undertake exploration operations from 100% to 50% in the first year of use, and 25% per year on the residual value in equal instalments, effective 1st January 2022.

The Act has also introduced interest restriction where interest expense is greater than 30% of EBITDA for contractors and licensees, effective 1st January 2022. This move may be quite unfavorable as it will hugely impact capital intensive projects that rely on debt as its major source of funding which is the case for the mining and petroleum sectors.



WITHHOLDING TAX

The rate of withholding tax for provision of services to a licensee or contractor in respect of mining or petroleum operations shall increase to 10% up from 5.625%, effective 1st July 2021.

To amend the rate of withholding tax to be withheld by the contractor on management, training and professional fees will decrease from 12.5% to 10%. This amendment will become effective 1st July 2021.

INDIRECT TAXES

VALUE ADDED TAX

IMPORTED SERVICES

The VAT Act 2013 in relation to the treatment of imported services has been amended to state that any person in Kenya, whether registered for VAT or not, shall be deemed to make a taxable supply to himself on importing a taxable service.

This means where a supply is made to any person who would not be entitled to claim the full amount of reverse VAT paid as input tax, the VAT on the imported supply has to be accounted for by the person importing the service, irrespective of whether the person is registered or not.

RESTRICTION ON DEDUCTION OF INPUT TAX ON LEASING AND HIRING OF PASSENGER CARS AND MINIBUSES

Input VAT incurred on leasing or hiring costs on passenger cars or mini buses is now not claimable as input VAT unless these costs are incurred exclusively for making taxable supplies of that automobile in the ordinary course of a continuous and regular business of selling or dealing in or hiring of passenger cars or mini buses.

TAX IS DUE BY BOTH REGISTERED AND UNREGISTERED PERSONS

Section 19 of the VAT has been amended to ensure that both registered and unregistered persons can have a tax obligation, and the section allows the person to defer the payment of tax to a date not later than the 20th day of the month succeeding the date when the tax became due.

INCREASE OF SCOPE OF TAXATION OF DIGITAL SERVICES

The supplies chargeable to VAT will now be expanded to include supplies made over the internet or an electronic network, in addition to the supplies made through a digital marketplace.

The amended the definition of a digital marketplace to mean an online platform which enables users to sell or provide services, goods or other property to other users, rather than the existing definition which defines a digital marketplace merely as a platform that allows direct interaction between buyers and sellers.

GROUP REGISTRATION

The proposal by the Bill to delete the provision for group registration based on regulations made by the Cabinet Secretary did not go through to the Act.

This means that group entities can continue accounting for VAT jointly.

REMOVAL OF THE REQUIREMENT TO TABLE VAT REGULATIONS

The Bill proposal to delete the provision requiring the CS Treasury to table before the National Assembly any VAT regulations before they take effect did not go through to the Finance Act, 2021.

AMENDMENTS TO THE FIRST SCHEDULE TO THE VAT ACT, 2013

EXEMPT SUPPLIES NOW VATABLE

Supplies	New Rate	Old Rate
Disposable plastic syringes of tariff no. 9018.31.10	16%	Exempt
Other syringes with or without needles of tariff no. 9018.31.90	16%	Exempt
3001.90.10 – Heparin and its salts	16%	Exempt
3001.90.90 – Other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included	16%	Exempt
3002.10.00 – Antisera and other blood fractions and modified immunological products whether or not obtained by means of biotechnological processes.	16%	Exempt
0402.99.10 – Milk, specifically prepared for infants	16%	Exempt
0402.91.10 – Other not containing added sugar or other sweetening matter specially prepared for infants	16%	Exempt
0402.21.10 – Other milk in powder granules, or other solid forms, of a fat content, by weight, exceeding 1.5%	16%	Exempt
Airlid paper without super absorbent polymer 180gsm/67 of tariff number 48.03.00.0	16%	Exempt
Airlid paper without super absorbent polymer 80gsm/67 of tariff number 48.03.00.0	16%	Exempt
Plain polythene film/PE of tariff number 39.20.10.10	16%	Exempt
PE white 25–40gsm/release paper of tariff number 48.10.99.00	16%	Exempt
12–16 gsm spun bound piyopo nonwoven cover stock/15gsm spun bound PP non-woven SSMMS hydrophobic leg cuffs of tariff number 56.03.1190	16%	Exempt



VARIABLE SUPPLIES NOW EXEMPT UNDER PART 1

Supplies	New Rate	Old Rate
2106.10.00 – Protein concentrates and textured protein substances	Exempt	16%
2106.90.10 – Food preparations specially prepared for infants	Exempt	16%
2106.90.99 – Other – Food preparations not elsewhere specified or included	Exempt	16%
2936.27.00 – Vitamin C and its derivatives	Exempt	16%
3001.90.00 – Other – Heparin and its salts	Exempt	16%
3001.90.00 – Other – Other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included	Exempt	16%
3002.11.00 – Malaria diagnostic test kits	Exempt	16%
3002.12.00 – Antisera and other blood fractions	Exempt	16%
3002.13.00 – Immunological products unmixed, not put up in measured doses or in forms or packings for retail sale	Exempt	16%
3002.14.00 – Immunological products, mixed, not put up in measured doses or in forms or packings for retail sale	Exempt	16%
3002.15.00 – Immunological products put up in measured doses or in forms or packings for retail sale	Exempt	16%
3002.19.00 – Other – Antisera, other blood fractions and immunological products, whether or not modified or obtained by means of biotechnological processes	Exempt	16%
3003.31.00 – Insulin	Exempt	16%
3004.43.00 – Other medicaments, containing alkaloids or derivatives containing norephedrine or its salts (This was previously zero-rated and subsequently made vatable by the Tax Laws (Amendment) Act, 2020)	Exempt	16%
3004.60.00 – Other, containing antimalarial active principles described in Subheading Note 2 to this Chapter	Exempt	16%
2106.90.91 – Food supplements	Exempt	16%
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	Exempt	16%
0402.29.00 – Other milk in powder granules or other solid forms of a fat content, by weight, exceeding 1.5%	Exempt	16%
0402.91.00 – Other not containing added sugar or other sweetening matter.	Exempt	16%
0402.99.00 – Other milk	Exempt	16%
9021.10.00 – Orthopaedic or fracture appliances	Exempt	16%
9021.50.00 – Other artificial parts of the body: Pacemakers for stimulating heart muscles, excluding parts and accessories	Exempt	16%
9025.19.00 – Hydrometers and similar floating instruments, thermometers. Pyrometers, barometers, hygrometers and psychrometers, recording or not, and any combination of these instruments. thermometers and Pyrometers, not combined with other instruments: Other	Exempt	16%
9019.20.00 – Airway Guedel and Ambu bags	Exempt	16%
9018.90.00 – Blood giving set and infusion sets	Exempt	16%
The transfer of assets and other transactions related to the transfer of assets into real estate investment trusts and asset-backed securities (this was previously exempt and subsequently made vatable by the Tax Laws (Amendment) Act, 2020)	Exempt	16%

112. Taxable goods, excluding motor vehicles, imported or purchased for direct and exclusive use in geothermal, oil 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.

113. 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.

114. 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.

115. Medical ventilators and the inputs for the manufacture of medical ventilators upon recommendation by the Cabinet Secretary responsible for matters relating to health.

116. 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.

117. 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.

118. 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.

119. 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.

120. 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.

121. 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.

122. 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.

123. 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.

124. 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.

125. 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.

126. 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.
127. 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.
128. 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.
129. 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.
130. 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.
131. Sterilizer Dry Heat (Wgd-001-Grx-05A) Pc, autoclave steam table tops of tariff number 8419.20.00 upon approval by the Cabinet Secretary responsible for matters relating to health.
132. 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.
134. 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.
135. Pre-fabricated biogas digesters.
136. Biogas.
137. Sustainable fuel briquettes for household and commercial use.
138. The supply of denatured ethanol of tariff number 2207.20.00.
139. Tractors other than road tractors for semi-trailers.

ZERO-RATED SUPPLIES NOW EXEMPT

Supplies	New Rate	Old Rate
The exportation of taxable services	Exempt	0%

The movement of the above supplies to an exempt status will affect the deductibility of input VAT for persons who mainly export taxable services.

It is our view that this amendment is off the back of continuous disputes between taxpayers and the Kenya Revenue Authority on the issue of where final consumption lies with respect to the provision of taxable services as this amendment will ensure there are no refunds due from the KRA if determined that consumption is deemed to be in a foreign jurisdiction.

ZERO-RATED SUPPLIES REMAINING ZERO-RATED SUPPLIES

Supplies	New Rate	Old Rate
The transportation of goods originating from Kenya to a place outside Kenya	0%	0%
The supply of ordinary bread	0%	0%
The supply of maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour by more than ten percent in weight	0%	0%

EXEMPT SUPPLIES NOW ZERO-RATED

Supplies	New Rate	Old Rate
Transportation of sugarcane from farms to milling factories	0%	Exempt



PARAGRAPHS UNDER THE FIRST SCHEDULE DELETED AND SUBSTITUTED WITH THE CORRECT CODES

- i) ~~68. Super absorbent polymer (sap) of tariff number 39.06.90.0.~~
68. Super absorbent polymer (sap) of tariff number 3906.90.00
- ii) ~~70. IP super soft fluff pulp – for – fluff 310 treated pulp 488*125mm (cellose) of tariff number 4703.21.0.~~
70. IP super soft fluff pulp – for – fluff 310 treated pulp 488*125mm (cellulose) of tariff number 4703.21.00
- iii) ~~71. Perforated PE film 15–22 gsm of tariff number 3921.190.0.~~
71. Perforated PE film 15–22 gsm of tariff number 3921.90.00
- iv) ~~72. Spunbound non-woven 15–25 gsm of tariff number 56.03.1190.8.~~
72. Spun bound non-woven 15–25 gsm of tariff number 5603.11.00
- v) ~~73. Airlid paper with super absorbent polymer 180gsm/67 of tariff number 48.03.00.0.~~
73. Airlid paper with super absorbent polymer 180gsm/67 of tariff number 4803.00.00
- vi) ~~74. Airlid paper with super absorbent polymer 80gsm/67 of tariff number 48.03.00.0.~~
74. Airlid paper with super absorbent polymer 80gsm/67 of tariff number 4803.00.00
- vii) ~~77. Pressure sensitive adhesive of tariff number 3506.91.90.~~
77. Pressure sensitive adhesive of tariff number 3506.91.00
- viii) ~~78. Plain polythene film/LPDE of tariff number 39.21.190.0.~~
78. Plain polythene film/LPDE of tariff number 3921.19.10
- ix) ~~79. Plain polythene film/PE of tariff number 39.21.190.0.~~
79. Plain polythene film/PE of tariff number 3921.19.10
- x) ~~80. PE white 25–40gsm/release paper of tariff number 48.44.51.10.0.~~
80. PE white 25–40gsm/release paper of tariff number 4811.49.00
- xi) ~~81. ADL 25–40gsm of tariff number 56.03.1190.8.~~
81. ADL 25–40gsm of tariff number 5603.11.00
- xii) ~~82. Elasticized side tape of tariff number 5402.4410.~~
82. Elasticized side tape of tariff number 5402.44.00
- xiii) ~~83. 12–16 gsm spunbound piyropo nonwoven coverstock/12gsm spunbound pp non-woven SMS Hydrophobic leg cuffs of tariff number 56.03.1190.8.~~
83. 12–16 gsm spun bound piyropo nonwoven cover stock/12gsm spun bound pp non-woven SMS hydrophobic leg cuffs of tariff number 5603.11.00
- xiv) ~~84. Polymetric elastic 2/3 strands of tariff number 3919.90.90.10.~~
84. Polymetric elastic 2/3 strands of tariff number 3919.90.10

Some of the above amendments seek to align the tariff codes referenced in the VAT Act, 2013 to match the codes in the East African Community Common External Tariff handbook.

EXCISE DUTY ACT

INTRODUCTION OF NEW DEFINITIONS

The following new definitions have been introduced by the Act under Section 2 of the Excise Duty Act, 2015:

- *“Compound” will have the same meaning as assigned per the Compounding of Potable Spirits Act (Act No.16 of 1961) as follows to communicate any flavour to, or to mix any ingredient or material with, spirits, but not so as to denature the spirits; where denatured spirits subsequently refers to spirits mixed with any substance so as to render the mixture unfit, and incapable of being readily converted so as to fit, for human consumption as a beverage.”*
- *“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 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 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.”

The amendments remove ambiguity regarding the interpretation of these words.

AMENDMENTS RELATING TO ISSUANCE OF NOTICE FOR REMISSION OF EXCISE DUTY

A new section 3A requires that Gazette notices issued in regards to remission of beer or wine made from sorghum, millet or cassava or any other agricultural products (excluding barley) grown in Kenya, be laid before the National Assembly without unreasonable delay, and a resolution may be passed by the National Assembly within twenty-one days on which it next sits after the notice is so laid, and that the notice—

- (a) be approved; or
- (b) be annulled and it shall henceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the issuing of a new notice.

This amendment seeks to have the National Assembly to pass duty remissions for beer or wine made from sorghum, millet or cassava or any other agricultural products (excluding barley), without unreasonable delay.

OFFSET OF EXCISE DUTY INCURRED AGAINST EXCISE DUTY PAYABLE

Excise duty paid in respect of internet data services by licensed persons who purchase the data in bulk for resale can now be offset against the excise duty payable by that person on internet data services supplied to the final consumer.

AMENDMENTS TO PART 1 OF THE FIRST SCHEDULE

- i) Imported sugar confectionary of tariff heading 17.04 attracts an excise duty of KShs. 35 per kg. Previously, excise duty was payable on imported sugar confectionary at KShs. 20 per kg.
- ii) White chocolate, chocolate in blocs, slabs or bars of tariff Nos. 1806.31.00, 1806.32.00 and 1806.90.00 to attract excise duty of KShs. 200 per kg. Previously, excise duty was only payable on importation.
- iii) Excise duty of 25% on imported glass bottles (excluding imported glass bottles for packaging of pharmaceutical products) from countries within the EAC has been removed, meaning glass bottles can now be imported without attracting any excise duty. Any glass bottles imported outside the EAC countries will attract an excise duty at 25%
- iv) ~~Motor cycles of tariff 87.11, other than motorcycle, ambulances and locally assembled motorcycles will now attract duty excise duty at the rate of 15% of the excisable value instead of a flat rate of Shs. 11,608.23 per unit.~~
- v) Jewellery of tariff heading 7113 and imported jewellery of tariff heading 7117 to attract an excise duty of 10%.
- vi) 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 to attract an excise duty of KShs. ~~5,000~~ 1,200 per kg.
- vii) Articles of plastic of tariff heading 3923.30.00 to attract an excise duty of 10%.
- viii) Imported pasta of tariff 1902 whether cooked or not cooked or stuffed (with meat or other substances) or otherwise prepared, such as spaghetti, macaroni, noodles, lasagne, gnocchi, ravioli, cannelloni, couscous, whether or not prepared, to attract an excise duty of 20%.
- ix) Imported furniture of any kind used in offices, kitchen, bedroom and other furniture of tariff number 9403 will now be chargeable to excise duty at 25%.
- x) Imported eggs of tariff heading 04.07, imported onions of tariff heading 07.03, and imported potatoes, potato crisps and potato chips of tariff heading 07.01 will now attract an excise duty of 25%.
- xi) Unsaturated polyester (tariff 3907.91.00), Alkyd (tariff 3907.50.00), Emulsion VAM (tariff 3905.91.00), Emulsion-styrene Acrylic (tariff 3903.20.00), Homopolymers (3905.19.00) and Emulsion B.A.M (tariff 3906.90.00) to attract an excise duty of 10%.
- xii) Mobile cellular phone services shall be charged excise duty at the rate of 20% of their excisable value. This is a revised rate from the initial 15%.
- xiii) Price competition will now attract excise duty at the rate of 7.5% of the amount paid or charged to participate in a prize competition.
- xiv) Lotteries (excluding charitable lotteries) will now attract excise duty at the rate of 7.5% of the amount paid or charged to buy the lottery ticket.
- xv) Excise duty re-introduced on betting at the rate of 7.5% on the amount wagered or staked. This is a revised rate from the 20% rate initially introduced by the Finance Act, 2019, but deleted by the Finance Act, 2020.
- xvi) The Act has amended the definition of other fees by deleting fees or commissions earned in respect of a loan.

We understand that the intended objective of the deletion is to bring **fees or commissions earned in respect of a loan** under the ambit of excise duty.

Our view is that the industry needs to take a combined position on the change and get a joint clarification on this matter. Please [click here](#) for our detailed memo on the subject.

AMENDMENTS TO PART 1 OF THE SECOND SCHEDULE

- i) Illuminating kerosene supplied to licenced or registered manufacturers of paint, resin or shoe polish is now exempt from excise duty in such quantities as may be approved by the Commissioner.
- ii) The Act has also exempted from excise duty all excisable services supplied in Kenya by mobile telecommunication service providers on the sale of a ring back tune to a subscriber.

THE TAX PROCEDURES ACT, 2015

INCLUSION OF THE MISCELLANEOUS AND LEVIES ACT

The Miscellaneous Fees and Levies Act, 2016 as part of the taxes administered under the TPA.

Similar amendments have been in the Miscellaneous Fees and Levies Act, 2016 to state that any application for refunds, ascertainment and repayment of fees overpaid or levies paid in error; or the determination by the Commissioner of penalties and interest on fees that remain unpaid shall be governed by the TPA.

VALIDITY AND ENFORCEMENT OF INTERNATIONAL TAX AGREEMENTS

Multilateral agreements and treaties that have been entered into by or on behalf of the Government of Kenya relating to international tax compliance and prevention of evasion of tax or exchange of information on tax matters to take effect in the manner stipulated in such agreements or treaties.

Any information obtained pursuant to agreements shall not be disclosed except in accordance with the conditions specified in the agreements.

This amendment is a stepping stone into Kenya entering into common reporting standards regime pursuant to the signing and depositing the required instruments under the Multilateral Convention on Mutual Administrative Assistance.

COMMON REPORTING STANDARDS PROVISIONS

The Act has introduced due diligence procedures and record keeping requirements as set out in the common reporting standards ("CRS") regulation to be developed by the CS Treasury to:

- Any financial institution that is resident in Kenya (excluding any branch located outside Kenya); or
- A branch of a foreign financial institution located in Kenya.

The CRS is a global initiative developed by the Organization for Economic Co-operation and Development ("OECD"). Its objective is to enable tax authorities to obtain more information about their residents' tax affairs.

The reporting requirements under CRS include furnishing the Commissioner with all reportable accounts held, managed or administered by the reporting institution; or nil accounts if no account is held by a date to be set out under the regulations.

It also prescribes anti-avoidance provisions to circumvent reporting.

The penalty for non-compliance with the CRS obligations are as follows;

- Making a false statement or omission of any information required – KShs. 100,000 for each false statement or omission, an imprisonment for a term not exceeding 3 years or both (unless reasonable effort was made to obtain information);
- Failure to file an information return or nil return by a financial institution – KShs. 1 million for each failure;
- Failure to comply with a duty or obligation, where no other penalty is prescribed – penalty of KShs. 20,000; and KShs. 20,000 per day for each day of non-compliance, however, not exceeding 60 days.

RECORD KEEPING OF DOCUMENTS FOR ALL PERSONS EXTENDED

The Bill proposed to amend the requirement for record keeping from 5 years to 7 years. Also, where a proceeding has commenced before the end of the 7 years, the person is required to retain the documents until all proceedings have been completed.

A change is also proposed to allow the Commissioner to issue assessments within a period of 7 years as opposed to the current period of 5 years, including making any amendments to the tax returns filed. This time limit does not apply in the case of gross or willful neglect, evasion, or fraud by, or on behalf of, the taxpayer.

The above Bill proposal did not go through.

RECORD KEEPING CURRENCY FOR NON-RESIDENTS

In respect to a digital marketplace, a non-resident is now allowed maintain the books of accounts, records, paper registers, tax returns or tax invoices in a convertible foreign currency as approved by the Commissioner.

However, this provision does not apply to a non-resident person who files returns and makes payments through a resident tax representative or a non-resident person with a permanent establishment in Kenya.

ABANDONMENT OF TAX

The Act has expanded the conditions under which the Commissioner may abandon the recovery of tax.

With regards to accountability of unrecovered taxes, the Commissioner will be required to provide semi-annual reports (by 30th June and by 31st December) to the CS Treasury on details and amounts of taxes to be abandoned.

RECOVERY OF TAX ON RENTAL INCOME

Section 37A of the TPA has been deleted. The Section prevented the Commissioner from recovering taxes, interests and penalties related to rental income for the period prior to 2013.

REMOVAL OF WITHHOLDING VAT EXEMPTIONS

The provision exempting taxpayers from withholding VAT if they could prove that due to the nature of their business, they would be in a continuous credit position for a period of not less than twenty-four months has been deleted.

This move follows the reduction of withholding VAT applicable from 6% to 2%.

PENALTIES AND INTEREST ON APPROVED REFUNDS

A new provision has been introduced with regards to approved refunds pending payment by the Commissioner. The provision states that when the Commissioner has approved a refund claim and the same is to be utilized against any outstanding tax liability, the penalties and interest for the outstanding liability will cease to accrue on the date the Commissioner gives notification that the refund claim has been ascertained.

Any tax liability that remains unpaid or outstanding after the Commissioner has applied the refund amount towards payment of an outstanding tax shall continue accruing interest and penalties in accordance to the provision of the TPA.

[Any other tax overpayment approved by the Commissioner may be utilized against the taxpayer's future tax liabilities.](#)

ADMISSIBILITY OF EVIDENCE

Section 57 deals with admissibility of evidence where the seizure or obtaining of documents has to be done by an authorized officer granted these powers.

The Act has increased the width of information that can be relied on as admissible evidence to include information gathered under Section 58 of the TPA.

INCLUSION OF NOTICE OF OBJECTION TO ELECTRONIC DUE DATES

Where a notice of objection is in electronic form, the due date shall remain the date specified under the relevant tax law and not the previous working day if the due date falls on a Saturday, Sunday, or public holiday in Kenya.

CONCURRENT CIVIL AND CRIMINAL PROCEEDINGS

The Bill proposed to introduce a new section to state that where any matter under a tax law is in issue in any ongoing criminal case or civil case, this shall not be a ground for any stay, prohibition or delay of either the criminal or civil case.

The above proposal did not go through to the Finance Act.

PROTECTION OF KRA OFFICERS

The officers of the Kenya Revenue Authority are now protected from being personally liable for any act or omission done or committed in good faith while performing their duties.

COLLECTION OF DST THROUGH RELEVANT AUTHORITIES

The Commissioner may seek the intervention of a relevant authorities in the collection of tax where a person who provides services over the internet or an electronic network including through a digital marketplace has not fulfilled the person's tax obligations.

This will facilitate DST collection efforts by the KRA.

PIN REQUIREMENTS FOR VENDORS MAKINGS SALES THROUGH THE INTERNET AND DIGITAL MARKETPLACE

Business carried out over the internet or an electronic network including through a digital marketplace is now required to have a PIN under the First Schedule of the TPA.

OTHER INDIRECT TAXES

STAMP DUTY

The Act has now exempted from stamp duty the conveyance or transfer operating as a voluntary disposition of property by a registered family trust.

MISCELLANEOUS AMENDMENTS

MISCELLANEOUS FEES & LEVIES ACT, 2016

GOODS EXEMPT FROM IMPORT DECLARATION FEE

The Cabinet Secretary can now exempt goods from IDF, where such goods are for public interest or meant to promote investment, the value of which shall not be less than KShs. 5 billion.

GOODS EXEMPT FROM RAILWAY DEVELOPMENT LEVY

The Act has amended to the Second Schedule by including under Part B item (x) which seeks to empower the Cabinet Secretary to exempt goods from RDL where such goods are in the public interest or are meant to promote investments, the value of which shall not be less than KShs. 5 billion.

GOODS EXEMPT FROM ANTI-ADULTERATION LEVY

Registered manufacturers of paint, resin or shoe polish are now exempt from anti-adulteration levy. This levy will be paid by the importers of illuminating kerosene at the rate of KShs. 18 per litre of the customs value of the illuminating kerosene at the point of entry into the country.

CAPITAL MARKETS AUTHORITY ACT

APPEALS BEFORE THE TRIBUNAL

The Tribunal will now be required to hear and determine an appeal within 90 days from the date of filing any Appeal. This is intended to improve efficiency in the capital markets and ensure fair administrative action by the Authority.

INSURANCE ACT

DEFINITION OF BROKER

The Act has amended the Insurance Act by modifying the definition of **broker** to provide for the regulation of foreign reinsurance brokers in accordance with the current practice and enable the regulation of the brokers by the Authority.

CLOSED FUND BUSINESS

A new section 21A has been introduced by the Act to provide provisions for closed fund businesses. A closed fund business means the continuance of insurance business for the purpose of maintaining, without renewal, any policy or contract of insurance issued before the appointed date.

REMOVAL OF REQUIREMENT FOR CERTIFICATION OF REINSURANCE CONTRACTS

The Act has removed the requirement to have the Kenya Reinsurance Corporation certify reinsurance contracts.

ANNUAL FEES PAYABLE BY LICENSED INSURERS

The Act has introduced the requirement to pay an annual fee by insurers issued with a license under the Act.

KENYA REVENUE AUTHORITY ACT

REWARD FOR INFORMATION LEADING TO IDENTIFICATION AND COLLECTION OF DUTIES OR TAXES

The Act has increased rewards for information leading to identification of unassessed taxes or duties from KShs. 100,000 to KShs. 500,000 or 1% of duties or taxes identified, whichever is lower.

Additionally, in a case of information leading to recovery of unassessed duties and taxes, the reward has been increased from KShs. 2 million to KShs. 5 million or 5% of taxes or duties so recovered, whichever is lower.

RETIREMENT BENEFITS AUTHORITY ACT

The Retirement Benefits Act has introduced the following definitions:

- “Corporate trustee” means a limited liability company incorporated under the Companies Act, 2015, which is, for the time being, empowered under any written law, its charter, memorandum of association, deed of settlement or other instrument constituting it or defining its powers to mainly undertake trusts, and includes a trust corporation;
- “Post-retirement medical fund” means a fund established within a scheme into which contributions are made and from which the costs of medical benefits can be met as may be determined in accordance with the medical fund rules.

POST RETIREMENT MEDICAL SCHEME (EFFECTIVE 1ST JANUARY 2022)

The Act has included post-retirement medical cover to be included as one of the post retirement settlements. This has been done through expanding the definition of a retirement benefits scheme under Section 2 of the Act.

Additionally, the Act has provided the definition of post-retirement medical fund, which was only previously included in The Retirement Benefits (Post-Retirement Medical Funds) Guidelines, 2018. It is defined as a fund established within a scheme into which contributions are made and from which the costs of the medical benefits can be met as may be determined in accordance with the medical fund rules.

AMENDMENT OF SECTION 25 – CORPORATE TRUSTEES

The Act seeks to empower limited liability companies incorporated under The Companies Act, 2015 to act as corporate trustees.

The requirements for registration as corporate trustees under Section 25C of the Act are as follows:

- Minimum paid up share capital as may be prescribed by the Retirements Benefits Authority
- Capable of meeting the obligations of members and sponsors as specified in the scheme rules
- Has the professional and technical capacity and adequate operational systems to perform its functions
- Has never been a corporate trustee of any scheme fund which has been deregistered, wound up or placed under an interim administrator due to any fault, either fully or partially, of the corporate trustee.
- Has never been involved in the management or administration of a scheme which was deregistered for any failure on the part of management or the administration thereof.
- Has in its board of directors and senior management such number of persons as may be prescribed who are academically and professionally qualified in matters relating to administration of schemes, insurance, law, accounting, actuarial science, economics, banking, finance or investment of scheme funds.
- Meets such additional requirements as may be prescribed by the Authority.

SUBMISSION OF ANNUAL REPORT

The Act allows the trustees to apply for a further three months' extension to submit a copy of audited accounts of the scheme, if justified.

Where an extension of time has been granted, the penalty for late submission for the extended period shall not apply.

APPOINTMENT OF KRA AS A COLLECTING AGENT FOR TRUSTEES OF THE RETIREMENT BENEFITS AUTHORITY

The Act has introduced a new subsection under Section 53B which states as follows:

- i) Where an employer has failed to remit contributions, the Trustees may with the approval of the Authority, appoint the Kenya Revenue Authority, as an agent, to collect unremitted contributions, interests, and penalties.
- ii) The Trustees may seek KRA's intervention on collection of unremitted retirement contributions, interest and penalties, and KRA may accept or reject the request within 21 days.
- iii) Where KRA has accepted an appointment for collection of unremitted retirement benefit contributions, KRA has been given the power to attach the employer's bank accounts of such defaulting employer.

SECURITY ACCOUNTS AND RECORDS (EFFECTIVE 1ST JANUARY 2022)

Section 2 of the Act is amended to insert new definitions as follows:

- "authorized nominee" means a person appointed in writing by a beneficial owner or legal owner to open a securities account and transact on behalf of such beneficial owner or legal owner;
- "beneficial owner" has the meaning assigned to it under the Companies Act, 2015;
- "legal owner" means a person who holds the titles to securities or assets on behalf of a beneficial owner; and
- "omnibus account" means an account held by an authorized nominee on behalf of two or more beneficial owners or legal owners.

Section 30(3) introduces the requirement that a securities account opened with the Central Depository shall be in the name of beneficial owner, legal owner or authorized nominee.

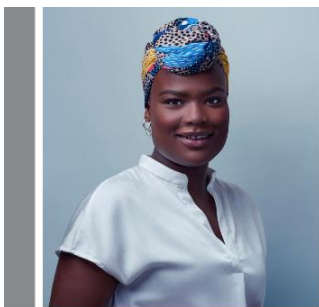
Additionally, Section 30(4) now requires a declaration to be made on whether the person is the beneficial owner of the deposited securities or the legal owner.

Section 30A has been introduced by the Act empowering a beneficial owner to appoint in writing a person to be the authorized nominee for the purpose of opening a securities account and making security deposits. Notably, the nominee will be required to declare the securities above as per the CDS rules. or in the case of more than one beneficial owner, an omnibus account in the name of the beneficial or legal owner(s).

A person who contravenes the above requirements will be liable to a fine not exceeding KShs. 10 million or imprisonment for a term not exceeding 10 years or both.

AMENDMENT OF SECTION 32 – RECORD KEEPING (EFFECTIVE 1ST JANUARY 2022)

Section 32 of the Act has been amended to include paragraph (e) that requires the Central Depository to keep records of all purchases and sales of deposited securities and other dealings, including the charges and credits arising, the identity of the buyer and seller of each of those deposited securities or, in the case of other dealings, the identity of the persons executing such dealings and the persons in whose favour the dealings are executed.



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