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RSM Newsletter

Overview of The Finance Bill, 2021

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INTRODUCTION

The Finance Bill, 2021 was published on 5th May 2021. The reason for publishing the Bill early, as was the case in 2020, is to ensure that the Bill is assented to by the President by 30th June 2021, so that the proposed changes to certain tax provisions in the Income Tax Act, Value Added Tax Act, 2013, Excise Duty Act, and Tax Procedures Act, 2015 can become effective by 1st July 2021, to coincide with the beginning of the Government's fiscal year.

THE INCOME TAX ACT CAP 470 (ITA)

INCOME TAX ACT

CONTROL DEFINITION MORE PUNITIVE (EFFECTIVE 1ST JULY 2021)

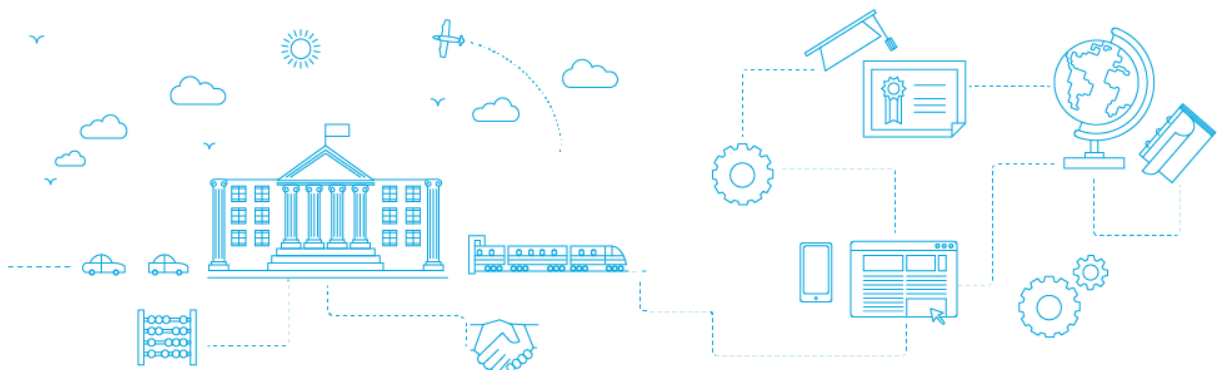
- Previously, the definition of **control** was in the Second Schedule of the ITA. This was deleted (inadvertently, we believe) when the Second Schedule was repealed and replaced by the Tax Laws (Amendment) Act, 2020, which left a lacuna in our legislature.
- The Bill now seeks to re-introduce the definition of **control** which is much more comprehensive, and in line with the proposal in the Income Tax Bill. Control in relation to a person to now include:
 - i) A person holding at least 20% voting rights in a company, directly or indirectly;
 - ii) A loan advanced 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;
 - iii) 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;
 - iv) 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;
 - v) 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;
 - vi) 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;
 - vii) 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
 - viii) Any other relationship, dealing or practice that the Commissioner may deem to constitute control.
- This will have an impact on the determination of the residency status of a corporate body, evaluation of whether a Kenyan entity is an ultimate parent company, and also have an impact on transfer pricing provisions.
- The prior definition of control focused on direct control of 25% of the capital, unless control was differently defined in the entity's constitution.

INFRASTRUCTURE BOND NOW DEFINED (EFFECTIVE 1ST JULY 2021)

- The Bill seeks to bring clarity to the definition of the term **infrastructure bond** as:
"A bond issued by the government for financing of a strategic public infrastructure facility including a road, hospital, port, sporting facility, water & sewerage system or a communication network".
- The aim is to clarify that only interest income received from infrastructure bonds for a maturity of at least 3 years is exempt from income tax. However, the full clarity has not been mirrored in Paragraph 51 of the First Schedule of the ITA which still reads "infrastructure and other social services, provided that such bonds, notes or securities".

DEFINITION OF PERMANENT ESTABLISHMENT EXTENDED (EFFECTIVE 1ST JULY 2021)

- The definition of a **permanent establishment** has been deleted and substituted to include:
 - 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.
- This proposed new definition is much wider than the current definition in the ITA as it now provides various scenarios as to when a permanent establishment is deemed to be created in Kenya. Similarly, the new definition has also provided some clarity in the scenarios that do not result in a permanent establishment.
- The above definition to some extent aligns to the definition provided for in the OECD guidelines.



DIGITAL MARKETPLACE – ADDITIONAL PROVISIONS (EFFECTIVE 1ST JULY 2021)

- The Bill seeks to amend the taxing section of the ITA by substituting the current definition with the following new definition:
“income accruing from a business carried out over the internet or an electronic network, including through a digital marketplace.”
- Further, the definition of a **digital marketplace** has been substituted to mean:
“An online platform which enables users to sell or provide services, goods or other property to other users”.
- We believe this seeks to widen the scope as to who is liable for DST, as property owners who rent their properties via online platforms will be caught by this.

PERSONS LIABLE TO DIGITAL SERVICE TAX (EFFECTIVE 1ST JULY 2021)

- The Finance Bill, 2021 proposes to amend this section to provide clarity that only non-resident persons will be subject to digital service tax (“DST”).
- Additionally, if 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, the provisions of DST shall not apply. This amendment is in line with the requirements in the Income Tax (Digital Service Tax) Regulations, 2020.
- The Finance Bill, 2021 also proposes to amend the due date of DST from the time of supply to the 20th of the month following the end of the month when the digital service was offered. This aligns the Regulations to the ITA provisions.
- The Tax Procedures Act (TPA) now allows the Commissioner to seek the intervention of relevant authorities in the collection of tax where a person provides services over the internet or through the digital marketplace and has not fulfilled their tax obligations.
- The TPA has been amended to require a PIN for persons selling goods and services over a digital marketplace.

REMOVAL OF TIME LIMIT TO CARRY FORWARD LOSSES (EFFECTIVE 1ST JULY 2021)

- The provision restricting the carry forward of losses beyond the nine-year period has been removed. This means that tax losses can be carried forward indefinitely. This change could be to counteract the imposition of minimum tax in the loss making years.
- The original provision, which previously allowed a husband to utilize the losses brought forward by the wife prior to the marriage, when submitting a joint return, has now been deleted and hence it is worth noting that a couple can no longer claim any brought forward losses prior to marriage.
- It is worth noting that the provision relating to the application to the Commissioner of extension of tax losses has not been deleted, despite the proposal for non-expiry of losses.

THIN CAPITALISATION PROVISIONS MORE RESTRICTIVE (EFFECTIVE 1ST JAN 2022)

- 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.

REQUIREMENT FOR SUBMISSION OF GROUP RETURN FOR MULTINATIONAL ENTERPRISE GROUPS (EFFECTIVE 1ST JAN 2022)

- The Bill proposes to introduce the requirement for multinational enterprise groups to submit returns giving information on their activities in other jurisdictions.
- The Bill defines 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”) is 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 Bill 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 (EFFECTIVE 1ST JAN 2022)

- The Bill proposes to introduce 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 Shs. 60,000 per annum.

TAX REBATES FOR EMPLOYERS PROVIDING APPRENTICESHIP (EFFECTIVE 1ST JAN 2022)

- The Bill proposes to expand the category of graduates to 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 150% of the amount of salaries and wages paid to at least 10 apprentices for a period of 6 – 12 months.

DOUBLE TAXATION RELIEF (EFFECTIVE 1ST JULY 2021)

- Section 41(5) of the ITA states that a person deriving income from Kenya that qualifies for a special arrangement for relief of double taxation will not be eligible for that relief if the ultimate ownership of the entity deriving income from Kenya is owned (in excess of 50%) by non-resident individuals.
- The Bill proposes to amend the provision to expand the ineligibility of the double taxation relief to include persons (not individuals as previously was the case) deriving income from Kenya whose ultimate ownership lies with a non-resident person(s). A definition of a person includes an individual, company, partnership, trust, government, or similar body or association.

INVESTMENT ALLOWANCE (EFFECTIVE 1ST JANUARY 2022)

- The Bill proposes to introduce 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:

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
Farmworks	50% in the first year of use and 25% per year, on reducing balance in equal instalments

- There is an amendment to the definition of manufacturing that allows person involved in the generation of electrical energy and transformation and distribution to claim investment deduction irrespective of the fact that the distribution is done through the national grid or not. Previously, this was only claimable, if the distribution would be through 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.
- We believe that this re-introduction of the constituents of civil works provides clarity on additional works that qualify for investment allowance.

TAXATION OF EXTRACTIVE INDUSTRIES

- The Bill proposes the following changes to the Ninth Schedule:
 - To amend 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.
 - To amend 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.
 - To amend 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 5.65%, 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.
- The Bill also proposes to introduce 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.

DEFINITION OF IMPORTED SERVICES (EFFECTIVE 1ST JULY 2021)

- The Bill proposes to amend of the definition of the term **supply of imported services** as follows:
~~“(c) the registered person would not have been entitled to a credit for the full amount of input tax payable if the services had been acquired by the person in a taxable supply;”~~
“(c) in the case of a registered person, the person would not have been entitled to a full amount of input tax payable if the services had been acquired by that person in a taxable supply.”
- 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.

INCREASE OF SCOPE OF TAXATION OF DIGITAL SERVICES (EFFECTIVE 1ST JULY 2021)

- The Bill proposes to insert the words “over the internet or an electronic network or” immediately after the word “made”. The subsection now reads as:
“The provisions of subsection (1) shall be applicable to supplies made over the internet or an electronic network or through a digital marketplace.”
- 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.

EXPANSION OF THE DEFINITION OF A DIGITAL MARKETPLACE (EFFECTIVE 1ST JULY 2021)

- Section 5(9) of the VAT Act, 2013 provides the definition of a digital marketplace as follows:
“..... A digital marketplace means a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means.”
- The Bill now proposes to amend 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.

TREATMENT OF IMPORTED SERVICES (EFFECTIVE 1ST JULY 2021)

- The VAT Act 2013 in relation to the treatment of imported services has been amended to state that any person in Kenya, registered or not, on importing a taxable service shall be deemed to make a taxable supply to himself.
- A person who is not able to claim the full credit for any reverse VAT paid on imported supply as input tax shall have to pay the required reverse VAT at the time of supply in proportion to the amount that would not be eligible for claim as input tax.
- The amended section will now read as follows:
“(1) If a supply of imported taxable services is made to any person, the ~~registered~~ person shall be deemed to have made a taxable supply to himself. “
“(2) If ~~a registered person referred to in subsection (1)~~ the person referred to in subsection (1) is a registered person and is entitled to –
 - (a) a credit for part of the amount of input tax payable, the value of the taxable supply under subsection (1) shall be reduced by an amount equal to the supply that is entitled for the input tax credit; or*
 - (b) a full input tax credit payable on the imported taxable services under subsection (1), the value of the taxable services shall be reduced to zero.”**“(3) The output tax in respect of a deemed taxable supply under subsection (1) shall be payable ~~by any person~~ at the time of the supply.”*

DEDUCTION OF INPUT TAX (EFFECTIVE 1ST JULY 2021)

- The Bill proposes the following amendments to the deletion of the word "section" appearing immediately after the words "provisions of this" and substituting therefore the word "Act" in subsection (1) seeking to rectify a drafting error.
- The amended subsection will now read as follows:
"Subject to the provisions of this ~~section~~ Act and the regulations, input tax on a taxable supply to, or importation made by, a registered person may, at the end of the tax period in which the supply or importation occurred, be deducted by the registered person, subject to the exceptions provided under this section, from the tax payable by the person on supplies by him in that tax period, but only to the extent that the supply or importation was acquired to make taxable supplies."

RESTRICTION ON DEDUCTION OF INPUT TAX – LEASING AND HIRING OF PASSENGER CARS AND MINIBUSES (EFFECTIVE 1ST JULY 2021)

- Input VAT 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.
- The amended section will now read as:
"A registered person shall not deduct input tax under this Act if the tax relates to the acquisition, leasing or hiring of..."
- This change confirms that prior to this amendment, the lease and hire costs were actually claimable as input VAT.

TAX IS DUE BY BOTH REGISTERED AND UNREGISTERED PERSONS (EFFECTIVE 1ST JULY 2021)

- The proposal seeks to ensure that both registered and unregistered persons can have a tax obligation and 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.
- The amended section now reads as:
"Notwithstanding the provision of subsection (1), a ~~registered~~ person may defer payment of tax due to a date not later than the twentieth day of the month succeeding that in which the tax became due."

GROUP REGISTRATION (EFFECTIVE 1ST JULY 2021)

- The provision allowing for group registration based on regulations made by the Cabinet Secretary has been deleted.
- This confirms the intention of the Treasury that each entity should account for its own VAT.

REMOVAL OF THE REQUIREMENT TO TABLE VAT ACT REGULATIONS (EFFECTIVE 1ST JULY 2021)

- The requirement to table before the National Assembly any regulations made by the CS Treasury before they take effect has been removed.
- This effectively means that the Cabinet Secretary can make any regulations under the VAT Act without having to get approval from the National Assembly.

AMENDMENTS TO THE FIRST SCHEDULE TO THE VAT ACT, 2013

EXEMPT SUPPLIES NOW VATABLE (EFFECTIVE 1ST JULY 2021)

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 piyropo nonwoven cover stock/15gsm spun bound PP non–woven SSMMS hydrophobic leg cuffs of tariff number 56.03.1190	16%	Exempt
The supply of ordinary bread	16%	0%

VATABLE SUPPLIES NOW EXEMPT UNDER PART I (EFFECTIVE 1ST JULY 2021)

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%

VARIABLE GOODS NOW EXEMPT UNDER PART I (NEW ADDITIONS AFTER PARAGRAPH 111) (EFFECTIVE 1ST JULY 2021)

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.

VATABLE SERVICES NOW EXEMPT UNDER PART II (EFFECTIVE 1ST JULY 2021)

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

- 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 considered 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.

PARAGRAPHS UNDER THE FIRST SCHEDULE DELETED AND SUBSTITUTED WITH THE CORRECT CODES (EFFECTIVE 1ST JULY 2021)

- ~~68. Super absorbent polymer (sap) of tariff number 39.06.90.0.~~
68. Super absorbent polymer (sap) of tariff number 3906.90.00
- ~~70. IP super soft fluff pulp – fr 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
- ~~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
- ~~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
- ~~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
- ~~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
- ~~77. Pressure sensitive adhesive of tariff number 3506.91.90.~~
77. Pressure sensitive adhesive of tariff number 3506.91.00
- ~~78. Plain polythene film/lpde of tariff number 39.21.190.0.~~
78. Plain polythene film/LPDE of tariff number 3921.19.10
- ~~79. Plain polythene film/pe of tariff number 39.21.190.0.~~
79. Plain polythene film/PE of tariff number 3921.19.10
- ~~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
- ~~81. Adl –25–40gsm of tariff number 56.03.1190.8.~~
81. ADL 25–40gsm of tariff number 5603.11.00
- ~~82. Elasticized side tape of tariff number 5402.4410.~~
82. Elasticized side tape of tariff number 5402.44.00
- ~~83. 12–16 gsm spunbound piyropo nonwoven cover stock/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
- ~~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.

INTRODUCTION OF NEW DEFINITIONS (EFFECTIVE DATE 1ST JULY 2021)

- The new definitions to be inserted are "compound" and "possession":

"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 proposed amendments seek to remove ambiguity regarding the interpretation of these words.

OFFSET OF EXCISE DUTY INCURRED AGAINST EXCISE DUTY PAYABLE (EFFECTIVE DATE 1ST JULY 2021)

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

AMENDMENTS TO PART I OF THE FIRST SCHEDULE (EFFECTIVE DATE 1ST JULY 2021)

- Sugar confectionary of tariff heading 17.04 attracts an excise duty of Shs. 20 per kg. Previously, excise duty was only payable on imported sugar confectionary.
- 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 Shs. 200 per kg. Previously, excise duty was only payable on importation.
- Excise duty of 25% on imported glass bottles (excluding imported glass bottles for packaging of pharmaceutical products) has been removed, meaning glass bottles can now be imported without attracting any excise duty.
- 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.
- Jewellery of tariff heading 7113 and imported jewellery of tariff heading 7117 to attract an excise duty of 10%.
- 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 Shs. 5,000 per kg.
- Excise duty of 20% re-introduced on betting on the amount wagered or staked. This was introduced by the Finance Act, 2019, but deleted by the Finance Act, 2020.
- In addition to interest on loans, fees or commissions earned in respect to the loans shall now not attract excise duty.

THE TAX PROCEDURES ACT, 2015

INCLUSION OF THE MISCELLANEOUS AND LEVIES ACT (EFFECTIVE 1ST JULY 2021)

- The Bill proposes to add the Miscellaneous Fees and Levies Act, 2016 as part of the taxes administered under the Tax Procedures Act, 2015 ("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 (EFFECTIVE 1ST JULY 2021)

- The proposed change gives validity to 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.
- It further goes to protect the information obtained by stating that 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 (EFFECTIVE 1ST JULY 2021)

- The Bill also introduces 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 – Shs. 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 – Shs. 1 million for each failure;
 - Failure to comply with a duty or obligation, where no other penalty is prescribed – penalty of Shs. 20,000; and Shs. 20,000 per day for each day of non-compliance, however, not exceeding 60 days.

RECORD KEEPING AND ASSESSMENTS (EFFECTIVE 1ST JULY 2021)

- The Bill proposes 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 document 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.
- In respect to a digital marketplace, a non-resident can 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 (EFFECTIVE 1ST JULY 2021)

- The Bill proposes to expand conditions under which the Commissioner can abandon the recovery of tax in other cases occasioning the inability to recover the unpaid tax.
- Moreover, the Commissioner is now required to provide a semi-annual report (30th June and 31st December) to the CS Treasury on details and amounts of taxes to be abandoned.

REMOVAL OF WITHHOLDING VAT EXEMPTIONS (EFFECTIVE 1ST JULY 2021)

- The Bill proposes to repeal 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.

PENALTIES AND INTEREST ON APPROVED REFUNDS (EFFECTIVE 1ST JANUARY 2022)

- The Bill proposes to introduce new sections cushioning taxpayers from being charged interest and/or penalties on any outstanding tax liabilities that can be offset with an approved tax refund amount. The penalties/interest will cease to accrue from the date of notification after the refund 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.

ADMISSIBILITY OF EVIDENCE (EFFECTIVE 1ST JULY 2021)

- 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 Bill proposes to increase the width of information that can be relied on as admissible evidence as it now includes information gathered under Section 58 of the TPA.

INCLUSION OF NOTICE OF OBJECTION TO ELECTRONIC DUE DATES (EFFECTIVE 1ST JULY 2021)

- The Bill clarifies that where a notice of objection is in electronic form, the due date shall remain the date specified under the relevant tax law.

CONCURRENT CIVIL AND CRIMINAL PROCEEDINGS (EFFECTIVE 1ST JULY 2021)

- The Bill proposes 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.

PROTECTION OF KRA OFFICERS (EFFECTIVE 1ST JULY 2021)

- The Bill proposes to protect officers from being personally liable for any act or omission done or committed in good faith while performing his/her duties.

OTHER INDIRECT TAXES

MISCELLANEOUS FEES & LEVIES ACT, 2016

GOODS EXEMPT FROM IMPORT DECLARATION FEE (EFFECTIVE 1ST JULY 2021)

- The Bill proposes to empower the Cabinet Secretary to 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 Shs. 5 billion.

GOODS EXEMPT FROM RAILWAY DEVELOPMENT LEVY (EFFECTIVE 1ST JULY 2021)

- The Bill seeks to make a further amendment 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 Shs. 5 billion.

MISCELLANEOUS AMENDMENTS

CAPITAL MARKETS AUTHORITY ACT

AMENDMENT OF SECTION 35A – APPEALS BEFORE THE TRIBUNAL (EFFECTIVE 1ST JULY 2021)

- The Bill seeks to delete and substitute Section 35A (17) by requiring the Tribunal 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

AMENDMENT OF SECTION 2 – DEFINITION OF BROKER (EFFECTIVE 1ST JULY 2021)

- The Bill seeks to amend 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.

INTRODUCTON OF SECTION 21A – CLOSED FUND BUSINESS (EFFECTIVE 1ST JULY 2021)

- The Bill seeks to introduce a new section 21A on closed fund business. 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.

AMENDMENT OF SECTION 31 – ANNUAL FEES PAYABLE BY LICENCED INSURERS (EFFECTIVE 1ST JANUARY 2022)

- The Bill seeks to introduce an annual fee payable by an insurer issued with a license under the Act. This is through an amendment of Section 31 by introduction of subsection 3.

KENYA REVENUE AUTHORITY ACT

AMENDMENT OF SECTION 5A – REWARD FOR INFORMATION LEADING TO IDENTIFICATION AND COLLECTION OF DUTIES OR TAXES (EFFECTIVE 1ST JULY 2021)

- The Bill seeks to increase rewards for information leading to identification of unassessed taxes or duties from Shs. 100,000 to Shs. 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 Shs. 2 million to Shs. 5 million or 5% of taxes or duties so recovered, whichever is lower.

RETIREMENT BENEFITS ACT

AMENDMENT TO SECTION 2 – POST RETIREMENT MEDICAL SCHEME (EFFECTIVE 1ST JANUARY 2022)

- The Bill seeks to include 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 Bill inserts the definition of post-retirement medical fund, which was only previously included in The Retirement Benefits (Post-Retirement Medical Funds) Guidelines, 2018. This 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 (EFFECTIVE 1ST JULY 2021)

- The Bill 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.

AMENDMENT OF SECTION 34 – SUBMISSION OF ANNUAL REPORT (EFFECTIVE 1ST JULY 2021)

- The Bill proposes to allow 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.

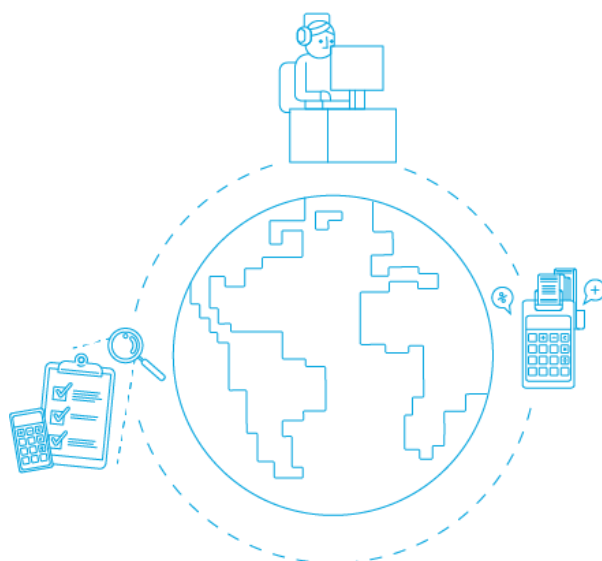
CENTRAL DEPOSITORIES ACT, 2000 ACT

AMENDMENT OF SECTION 30 – 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) 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 that empowers a beneficial owner to appoint in writing a person to be the authorized nominee for the purpose of opening a securities account 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 Shs. 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.



NAIROBI

1st Floor, Pacis Centre,
Slip Road, off Waiyaki Way, Westlands
P.O. Box 349, 00606
Nairobi, Kenya

Tel: +254 20 3614000/4451747/8/9
Mobile: +254 706 347950/772 786111
Email: info@ke.rsm-ea.com
Website: www.rsm.global/kenya
Contact: Ashif Kassam (Executive Chairman)

MOMBASA

3rd Floor, Bayview Place,
Moi Avenue
P.O. Box 87227, 80100
Mombasa, Kenya

Tel: +254 41 2311778/2312640/2224116
Mobile: +254 707 613329
Email: infomsa@ke.rsm-ea.com
Website: www.rsm.global/kenya
Contact: Nihla Mazrui (Partner)

DAR ES SALAAM

1st Floor, Plot No. 1040,
Haile Selassie Road, Masaki
P.O. Box 79586
Dar es Salaam, Tanzania

Tel: +255 22 2602714 / 2602774
Email: info@tz.rsm-ea.co.tz
Website: www.rsm.global/tanzania
Contact: Lina Ratansi (Group Chief Executive)

KAMPALA

6th Floor, DTB Centre,
Plot 17/19, Kampala Road
P.O. Box 31704,
Kampala, Uganda

Tel: +256 414 342780
Email: info@ug.rsm-ea.com
Website: www.rsm.global/uganda
Contact: John Walabyeki (Managing Partner)

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