# ANALYSIS OF THE FINANCE ACT, 2022

The President of the Republic of Kenya assented to the Finance Bill, 2022 on Tuesday 21st June 2022. These alert analyses various measures outlined in the Finance Act, their effective date and the impact of these provisions as follows: -

## A. INCOME TAX ACT, CAP 470 LAWS OF KENYA

The Finance Act introduces a few interpretations of various terms to clarify the meaning of various existing and new provisions of the Income Tax Act. These definitions are set out below:

**Definition of Fair Market Value**

The Finance Act sets out the following definition of the term “fair market value”:

"***fair market value” means the comparable market price available in an open and unrestricted market between independent parties acting at arm's length and under no compulsion to transact, which is expressed in of money or money's worth;***

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

For instance, the Income Tax Act provides that benefits accruing to an employee by virtue of their employment excluding housing benefits and motor vehicle given to an employee by their employer shall either be the higher of the cost to the employer or the fair market value of that benefit.

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

**Definition of Financial Derivative**

The Finance Act introduces the following definition of the term “financial derivative” as follows:

***“financial derivative” means a financial instrument the value of which is linked to the value of another instrument underlying the transaction which is to be settled at a future date;***

The definition of financial derivative is aimed at clarifying the sources of income which the Income Tax Act will bring to tax under Section 3 of the ITA with respect to income from financial derivatives.

**Definition of Permanent Home**

The Finance Act includes the definition of the term "permanent home" to the ITA as below:

***"permanent home" means a place where an individual resides or which is available to that individual for residential purposes in Kenya, or where in the opinion of the Commissioner the individual's personal or economic interests are closest.***

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

**Effective Date 1st July 2022**

**Charge to tax of gains from financial derivatives**

The Finance Act has expanded the scope of Section 3(2) of the ITA to include charge on income earned by non-resident persons from financial derivatives. The tax will however only apply to financial derivatives not traded at the Nairobi Securities Exchange derivatives market (NEXT).

This measure aims at expanding the tax base in Kenya thereby generating revenue by charging to tax the gains from financial derivatives including hedging, futures and options which accrue in Kenya. The provision will also incentivize investment in derivatives listed on the NSE as the investors will benefit from exemption from this tax.

There has been a significant growth in the financial derivatives market and Kenya has in response continued to pass laws regulating this market specifically the Capital Markets (Derivatives Markets) Regulations. The Finance Act has set out this provision in order to bring the profits from the derivatives market in Kenya into the tax net.

Furthermore, the Act has provided for the formulation of Regulations by the Cabinet Secretary to guide the taxation of the gains from the financial derivatives.

**Effective Date 1st January 2023**
**Realization of Foreign Exchange Loss**
The Finance Act amends the provision of the ITA on realization of foreign exchange loss. The amendment sets out that foreign exchange loss shall be deferred and not considered where the foreign exchange loss is realized by a company whose gross interest paid or payable to related persons and third parties exceeds thirty per cent of the company's earnings before interest, taxes, depreciation and amortization (EBITDA) in any financial year.

The provision specifies that the EBITDA criteria will not apply to microfinance businesses in respect of interest on loans paid or payable to related persons and third parties.

**Effective Date 1st July 2022**
**Employee Share Ownership (ESOP)**
he amendment to the Income Tax Act seeks to clarify the applicable value of the benefit of Employee Share Ownershi-p Plan (ESOP). The Finance Act provides that the value of the taxable benefit to an employee in an ESOP shall be the difference between the offer price per share at the date when the option is granted by the employer and the market value per share on the date when the employee exercises the ESOP option.

This provision clarifies that the application of the market value of the shares is with respect to the exercise price. The value of the shares is therefore the difference between the market value of the employee shares at the time that the employee exercises the employee share option and the offer price granted by the employer

**Effective Date 1st July 2022**
**Application of Digital Service Tax**
The amendment to the provision for Digital Service Tax in the Income Tax Act excludes non-resident persons with a permanent establishment from the scope and application of Digital Service Tax. This is with a view to encourage foreign investment by offering tax benefits to entities with a permanent establishment in Kenya.

**Effective Date 1st July 2022**

**Allowable Deductions**

**·Donations to authorized organizations**

This amendment provides for the deduction of expenses incurred by way of donations by entities to charitable organizations or projects authorized by the Cabinet Secretary, Treasury which are deductible as an expense. The Income Tax Act presently provides only for allowable deductions on cash donations to registered organizations.

This provision aims at incentivizing contribution to charities by business entities irrespective of which law the charitable organization is registered under by allowing businesses to claim deductions for donations to charitable organizations irrespective of whether these organizations are registered or not.

**·Removal of deduction on capital expenditure on fibre optic cables**

This amendment removes the current provision in the Income Tax Act for a 5% allowable deduction for telecommunication operators annually for capital expenditure on the acquisition of an absolute right to use a fibre optic cable.

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**Effective Date 1st July 2022**

**Disallowable Deductions**

The amendment to the ITA has expressly excluded Microfinance institutions, entities licensed under the Hire Purchase Act, non-deposit taking lending and leasing service providers from the application of interest restrictions based on the application of a ratio of earnings before interest, taxes, depreciation and amortization (EBITDA) in determination of taxable income.

**Effective Date 1st July 2022**

**Ascertainment of Gains of a Business in a Preferential Tax Regime**

The Finance Act amends the ITA with respect to the ascertainment of profits of a business in a preferential tax regime. The ITA previously provided only for the ascertainment of gains and profits of a resident entity in a preferential tax regime with a related resident person not operating in a preferential tax regime.

The ITA now requires that the provision for ascertainment of gains applies to a resident person carrying on business with –

i. a related resident person operating in a preferential tax regime;

ii. a non-resident person in a preferential tax regime;

iii. an associated business of a non-resident person in a preferential tax regime; and

iv. a permanent establishment of a non-resident person operating in Kenya where the non-resident person is located in a preferential tax regime

**The amendment includes a new definition of "preferential tax regime" which is as follows –**

·Any Kenyan legislation, regulation or administrative practice that provides a preferential tax rate to income or profit;

A foreign jurisdiction which –

- does not tax income
- taxes income at a rate lower than 20%;
- does not have a framework for exchange of information;
- does not allow access to banking information; or
- lacks transparency on corporate structure, ownership of legal entities, beneficial ownership, financial disclosure or regulatory supervision.

The Finance Act introduces the provision that where business transactions between these persons produces no gains or less gains than those that would ordinarily accrue if the business was not with a party in a preferential regime then the gains will be deemed to be the amount that would have been expected to accrue if the transaction had been conducted at arm's length

This amendment is in accordance with Action 5 of the OECD BEPS Action Plan and it aims at implementing the arm's length principle between related persons and curbing tax evasion in the operationalization of preferential tax regimes.

**Effective Date 1st January 2023**

Reporting requirement for Multinational Enterprises (MNEs)

The Finance Act has revised the existing provisions on the requirements for MNEs to comply with international best practice as recommended by the OECD.

The revised provisions particularly provide for filing of annual returns on activities in Kenya and all other jurisdictions where the entities have a taxable presence.

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

The ITA has now imposed several requirements on MNEs operating in Kenya to report their activities within the jurisdiction to KRA as below;

I. MNEs resident in Kenya shall report to the Commissioner with respect to the identity of the entity whether it is the ultimate parent entity, surrogate parent entity or constituent entity;

II. Ultimate parent entities or constituent entities with a gross turnover of ninety-five billion shillings that are resident in Kenya are required to file country-by-country reports annually with the Commissioner on their financial activities in Kenya and other jurisdictions where the group has a taxable presence;

III. The ultimate parent entity shall submit a master file and a local file to the Commissioner not later than six months after the reporting financial year of the MNE. The master file and local file shall include the specified information and any other information as may be required by the Commissioner

This amendment requires entities that meet the criteria set out to comply by filing country-by-country reports, master file and local file. The reporting requirement provisions outline the specific information that must be furnished when filing these reports with the Commissioner. This amendment also imposes a duty of confidentiality on the Commissioner with respect to the information furnished in compliance with this provision.

The exchange of information between jurisdictions under the Multilateral Competent Authority Agreement on the exchange of Country by Country Reports (CbC MCAA) becomes effective where the respective jurisdictions have filed the required notifications and have listed each other as participating countries. Therefore, as an effect of this provision, Kenya will give notice on the implementation of the CbC MCAA and sign it to give effect to it.

These provisions on reporting requirements for MNEs expound in significant detail on similar measures in the amendments by the Finance Act 2021 which require multinationals headquartered in Kenya to file returns on the group's activities in Kenya and in other jurisdictions where the group has a

taxable presence.

This amendment is in a bid to enhance reporting requirements and exchange of information for MNEs which is in conformity with OECD BEPS Action 13 on Transfer Pricing and Country-by-Country Reporting.

**Effective Date: 1stJuly 2022**

**Special Operating Framework**

The Finance Act introduces a provision defining the application of special operating framework arrangements which are arrangements entered into by business entities with the Government that subject the operations of these entities to lower tax rates.

The provision for special operating framework arrangements will apply to:

- businesses approved by the Government for the SOF arrangement;
- businesses dealing in manufacture of human vaccines; and
- businesses whose capital investment is at least ten billion shillings

This is with a view to encourage investment in Kenya where the Government offers large scale investors subsidized tax rates.

**Effective Date: 1st July 2022**

**Capital Gains Tax**

The Finance Act introduces an increased rate of Capital Gains Tax (CGT) from 5% to 15%. This provision will largely affect the real estate sector and investment generally in Kenya.

It should be noted that the Act includes as proviso to the effect that in the case of a firm certified by the Nairobi International Financial Centre Authority that invests five billion shillings in Kenya; and the transfer of such investment is made after five years, the applicable rate shall be the rate that was prevailing at the time that the investment was made.

**Effective Date 1st January 2023**

**Imposition of Withholding Tax on gains from financial derivatives**

The Finance Act has introduced the charge of Withholding Tax on gains from financial derivatives earned by a non-resident person not having a permanent establishment in Kenya. The same shall be subject to Withholding Tax at the rate of 15%.

**Effective Date 1st January 2023**
**Harmonization of Restrictions on Remittal of Penalties by the Commissioner**

The Finance Act removes the restriction that the Commissioner may only remit of Kshs. 500,000 annually in respect of penalties imposed on an employer for failure to deduct and remit tax on emoluments to KRA unless the Commissioner obtains the prior approval of the Cabinet Secretary.

The deletion of this provision in the Income Tax Act is an administrative move that is likely aimed at aligning tax laws as the Tax Procedures Act already provides a cap of Kshs. 1,500,000 on the amount that the Commissioner may remit in respect of penalties and interest payable by a Taxpayer. Any amount in excess may only be collected by the Commissioner with the prior approval of the Cabinet Secretary. The TPA also provides for reporting requirements imposed on the Commissioner.

**Effective Date: 1st July 2022**
**Tax Exemptions for Manufacturers of Human Vaccines**

The Finance Act introduces various provisions for tax exemptions on companies that manufacture human vaccines. The tax exemptions that will be enjoyed by these manufacturing entities include:

- deemed interest on interest free loans advanced to these companies
- withholding tax on payments made to non-residents for services provided
- compensating tax
- dividends paid out to non-resident persons
- corporate income tax

The introduction of these tax exemptions to the Income Tax Act is aimed at incentivizing investment in production of human vaccines in Kenya. In the midst of the COVID-19 pandemic, it follows that the Government would seek to facilitate a conducive environment for investment in manufacture of vaccines.

**Effective date: 1st July 2022**
**Special Economic Zones**

The Finance Act introduces the provision to the ITA that SEZ enterprises, developers and operators will enjoy a tax exemption on dividends paid by the SEZ irrespective of whether the dividends are paid to resident or non-resident persons.

With the operationalization of special economic zones revealing high tax costs for manufacturers operating within the SEZ with goods heading to the Kenyan market, the clarification on tax benefits for SEZ entities are a welcome change.

**Effective date: 1st July 2022**

**Definition of the term "manufacture" for purposes of claim of investment allowance**

The Finance Act amends the definition of manufacture under Paragraph 1 of the Second Schedule of the ITA by removing the limitation of the term to the generation of electrical energy for supply to the national grid.

As such, the restriction of investment allowance to manufacture for supply to the national grid has been scrapped hence widening the scope of interpretation of manufacture and the application of the benefit of investment allowance.

**Limitation of Investment Allowance**

The amendment provides for investment deduction of one hundred and fifty per cent (150%) where the investment is outside Nairobi and Mombasa County and the total investment value for the preceding four years from the date of commencement or for the succeeding three years is at least two billion shillings.

The Finance Act imposes the qualification for investment allowance for investments which are located outside Nairobi and Mombasa County.

This amendment clarifies that the tax benefit for investment deduction applies all investments that meet these criteria. This move will likely encourage investment outside Nairobi and Mombasa to allow investors to claim this deduction.

**Effective Date: 1stJuly 2022**

**Corporate Income Tax Rate for Companies operating a Carbon Market Exchange**

The Finance Act introduces a lower tax rate of 15% for the first ten years for companies operating a carbon market exchange or emission trading system provided that the entity is certified by the National International Financial Centre Authority (NIFCA).

**Effective Date: 1stJuly 2022**

**Corporate Income Tax Rate for Shipping Companies**

The Income Tax Act now provides for the revised corporation tax rate of 15% for shipping Companies for the first ten years from commencement of its operations.

**Effective Date: 1stJuly 2022**

**Withholding Tax for Interest & Deemed Interest on Bearer Bonds Issued outside Kenya**

The Finance Act introduces a provision to the ITA for a lower WHT rate of 7.5% on interest and deemed interest arising out of bearer bonds of at least two years issued out of Kenya.

**Effective date: 1st July 2022**

**B.STAMP DUTY**

Exemption to stamp duty

Section 117 of the Stamp Duty Act is amended to the effect that an instrument executed in favor of a mortgage refinance company shall be exempted from payment of stamp duty. This is a welcome move as the costs of mortgages will be reduced due to exemption of stamp duty.

**C.VALUE ADDED TAX ACT**

**Change of applicable VAT rate on LPG**

The Finance Act has amended the VAT Act to the effect that liquefied petroleum gas including propane are now subject to VAT at the rate of Eight Percent (8%) from the previous standard rate.

This is a reprieve to the Taxpayer as the costs of the said products are likely to go down.

**Clarity as to the definition of Digital Market place**

The definition of the digital market place has been amended by the Finance Act by providing clarity as to the applicability of the term digital market place to users who sell goods or provide services. The term other property has been deleted from the earlier definition. This has provided further clarity as to the application of definition of Digital Market place.

**Effective Date: 1st July 2022**

**Treatment of Imported services on services under the digital marketplace**

The Finance Act has introduced a new Section 10 (1A) to the effect that a supply of imported taxable services to any person made over the internet or an electronic network or through a digital marketplace shall not be deemed to be a taxable

supply made to himself hence not subject to accounting of the reverse VAT.

**Effective Date: 1st July 2022**
**Clarity as to time for deduction of input tax**

The Finance Act has amended Section 17(1) of the VAT Act to the effect that the deduction of input tax shall be captured in a return for the period in which the supply or importation occurred.

**Effective Date: 1st July 2022**
**Documentation for claim of input tax by participants in Open Tender System for the importation of petroleum products**

The Finance Act has amended Section 17(3) of the VAT Act to the effect that the Commissioner for purposes of validating input tax in case of a participant in an Open Tender System for the importation of petroleum products that have been cleared through a non - bonded facility, shall request for the custom entry showing the name and PIN of the winner of the tender and the name of the other oil marketing company participating in the tender.

**Effective Date: 1st July 2022**
**Utilization of excess input tax by registered manufacturers working in official aid funded projects**

The Act has amended Section 17(5) of the VAT Act to the effect that the excess input VAT shall be paid to the registered person by the Commissioner where such excess arises in respect of a registered manufacturer who makes a deduction for input tax with respect to taxable supplies made to an official aid funded project as may be approved by the Cabinet Secretary in accordance with the First Schedule.

**Effective Date: 1st July 2022**
**Charge of interest in respect of imported goods subject to custom control**

The Act has amended Section 22 of the VAT Act to the effect that goods that are subject to custom control and are conferred under the East African Community Customs Management Act, 2004 (No. 8 of 2004) shall for purposes of charge of any interests and penalties be subject to the Tax Procedure Act, 2015.Further, where the interest is payable, the same shall not exceed the principal tax.

**Effective Date: 1st July 2022**

**Repeal of refund of tax paid in error**

Section 30 of the VAT Act has been repealed. As such for refund of tax made in error, the same shall now be governed by the provisions of the Tax Procedure Act.

**Effective Date: 1st July 2022**

**Amendment to requirement for registration**

Section 34 of the VAT Act is amended such that the requirement to register for VAT obligations in terms making or expecting to make taxable supplies the value of which is five million shillings or more in any period of twelve months does not apply to persons supplying imported digital services over the internet or an electronic network or through a digital market place.

## D.**EXCISE DUTY ACT**

**Adjustment of Inflation**

The Finance Act has amended Section 10 of the Excise Act to the effect that the Commissioner may, by Gazette notice and with the approval of the Cabinet Secretary exempt specified products from the inflation adjustment after considering the prevailing economic and social environment facing the products.

The annual increase of excise duty on some important products might have negative economic implication. As such, the Commissioner general will be expected to protect some key industries from negative economic impacts arising from increased costs of the excisable products through provision of exemptions.

**Effective Date: 1st July 2022**

**Changes in VAT status**

The Act has introduced the following changes in VAT status as outlined in the table below;

**Effective Date: 1st July 2022**

| Item | Previous rate | Current rate as per Finance Act, 2022 |
|---|---|---|
| Fertilizers of Chapter 31. | Exempt | Zero rated |
| Taxable goods for the direct and exclusive use in the construction and equipping of specialized hospitals with a minimum bed capacity of fifty, approved by the Cabinet Secretary upon recommendation by the Cabinet Secretary responsible | Exempt | 16% |
| Bioethanol vapour (BEV) Stoves classified under HS Code 7321.11.00 (cooking appliances and plate warmers for liquid fuel) | 16% | Exempt |
| Plant and machinery of chapter 84 and 85 imported by manufacturers of pharmaceutical products or investors in the manufacture of pharmaceutical products upon the recommendation of the Cabinet Secretary responsible for matters relating health. | 16% | Exempt |
| Medical oxygen supplied to registered hospitals | 16% | Exempt |

| | | |
|---|---|---|
| Urine bags, adult diapers, artificial breasts, colostomy or ileostomy bags for medical use. | 16% | Exempt |
| Inputs and raw materials used in the manufacture of passenger motor vehicles | 16% | Exempt |
| Locally Manufactured passenger motor vehicles:<br><br>Provided that in this paragraph "locally manufactured passenger motor vehicle" shall mean a motor vehicle for the transportation of passengers which is manufactured in Kenya and whose total value comprises at least thirty per cent of parts designed and manufactured in Kenya by an original equipment manufacturer operating in Kenya. | 16% | Exempt |
| Taxable goods, inputs and raw materials imported or locally purchased by a company which is-<br>(a) engaged in business under a special operating framework arrangement with the Government; and<br><br>(b) incorporated for purposes of undertaking the manufacture of human vaccines; and whose capital investment is at least ten billion shillings, subject to approval of the Cabinet Secretary for the National Treasury, on recommendation of the Cabinet Secretary for health. | 16% | Exempt |
| Such capital goods the exemption of which the Cabinet Secretary may determine to promote investment in the manufacturing sector:<br><br>Provided that the value of such investment is not less than two billion shillings | 16% | Exempt |
| The exportation of taxable services in respect of business process outsourcing | Exempt | Zero Rated |
| The exportation of taxable services | Exempt | 16% |

| | | |
|---|---|---|
| imported by manufacturers of fertilizer as approved from time to time by the Cabinet Secretary responsible for Agriculture. | | |
| Articles of apparel, clothing accessories and equipment specially designed for safety or protective purposes for use in registered hospitals and clinics or by county government or local authorities in firefighting. | Zero rated | 16% |

**Effective date: 1st January 2023**
**Inclusion of price payable by purchase in definition of ex-factory selling price**

The ex-factory selling price has been amended to include the price payable by the purchaser of the excisable good sold by the manufacturer.

**Effective date: 1st July 2022**
**Charge of interest in respect of imported goods subject to custom control**

Section 36 of the Excise Duty Act has been amended in subsection (4) by adding provisions for conflict resolutions, which might arise from; assessing, accounting, collecting and enforcing the payments of excise duty on the importation of goods in Kenya, which is applied under the East Africa Community Customs Management Act, 2005.

In case of interests and penalties, the Tax Procedures Act, 2015 shall apply. Further, the interest payable shall not exceed the principal tax.

**Effective date: 1st July 2022**
**Amendments to the PART I of First Schedule of the Excise Duty Act**

| Item | Previous Rate rate | Current rate as per Finance Act, 2022 |
|---|---|---|
| Electronic cigarettes | Shs. 3,787 per unit | Deleted |
| Cartridge for use in electronic cigarettes | Shs. 2,525 per unit | Deleted |
| Fruit juices (including grape must), and vegetable juices, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter | Shs. 12.17 per litre | Shs. 13.30 per litre. |
| Cosmetics and Beauty products of tariff | 10% | 15% |
| Beer, Cider, Perry, Mead, Opaque beer and mixtures of fermented beverages with non-alcoholic beverages and spirituous beverages of alcoholic strength not exceeding 6% | Shs 121.85 per litre | Shs 134 per litre |
| Wines including fortified wines, and other alcoholic beverages obtained by fermentation of fruits | Shs.208.20 per litre | Shs.229 per litre |
| Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 6% | Shs.278.70 per litre | Shs. 335.30 per litre |
| Cigars, cheroots, cigarillos, containing tobacco or tobacco substitutes | Shs. 13,906.04 per kg | Shs. 15,296.6 per kg |

| | | |
|---|---|---|
| Cigarette with filters (Hinge lid and soft cap) | Shs. 3,447.61 per mille | Shs. 3,825.99 per mille |
| Cigarettes without filters (plain cigarettes) | Shs. 2,502.74 per mille | Shs. 2,752.97per mille |
| Other manufactured tobacco and manufactured tobacco substitutes; "homogenous" and "reconstituted tobacco"; tobacco extracts and essences | Shs.9,734.45 per kg | Shs.10,707.88 per kg |
| Imported sugar confectionary | Shs. 36.74 per kg | Shs.40.37 per kg |
| Importer white chocolate, chocolate in blocs, slabs or bars of tariff Nos. 1806.31.00, 1806.32.00, 1806.90.00 | Shs.200 per Kg | Shs. 242.29 per kg |
| Jewellery of tariff 7113 and 7117 | 10% | 15% |
| Products containing nicotine or nicotine substitutes intended for inhalation without combustion or oral application but excluding medicinal products approved by the Cabinet Secretary | Kes 1,200 per kg | Kes.1,500 per Kg |
| Electronic cigarettes and other nicotine delivery devices | N/A | 40% |
| Liquid nicotine for electronic cigarettes | N/A | Shs. 70 per milliliter |
| Imported ready to use SIM cards | N/A | Shs. 50 per SIM card |

Effective Date 1st July 2022

**Amendments to the PART II of First Schedule of the Excise Duty Act**

| Item | Previous Rates | Current rate as per the Finance Act 2022 |
|---|---|---|
| Betting excluding horse racing | 7.5% | 7.5% |
| Fees charged by digital lenders | N/A | 20% |
| Importation of cellular phones | N/A | 10% |

**Effective Date 1st July 2022**

Amendments to the Second Schedule

The second schedule to the Excise Duty Act, 2015 has been amended in Part A to include the following items as exempt for purposes of Excise Duty:

- Neutral spirit used by the registered pharmaceutical manufacturers upon approval by the Commissioner General has been exempted from the excise duty. This is aimed at addressing the cash flow challenges faced by these manufacturers because of the lengthy process of claiming refund of excise duty paid on the neutral spirits.
- Locally manufactured passenger motor vehicles have been included in the list of excise duty exempt goods. The current Excise Duty Act currently excludes locally assembled motor vehicles from the excise duty. This proposal is aimed at ensuring equal treatment of all the locally assembled motor vehicles.

**Effective date: 1st July 2022**

**E. TAX PROCEDURES ACT**

Supply of information upon change of particulars by Trusts

The Act has provided clarity on the requirement for trusts to notify the Commissioner of any change in particulars whether the trust is carrying out business or not.

should be made to the Commissioner within thirty days of the occurrence of a change.

**Effective date: 1st July 2022**
**Input VAT claimable on Amendment of assessments**

The Finance Act has amended the Tax Procedure Act to the effect that the same now allows for the deduction of input VAT on amendment of VAT returns within six months after the end of the tax period in which the supply or importation occurred. As such, taxpayer's amending their VAT returns will not be able to claim input previously not claimed if the amendment occurs six months after the supply.

**Effective date: 1st July 2022**
**Increased scope on Security on property for unpaid tax**

The Finance Act has now broadened the assets available to Commissioner as security for unpaid taxes to include ships, aircrafts, motor vehicles and any other properties that the Commissioner may deem sufficient as a security.

Further, the Act has granted the Commissioner the right to dispose the said property, at the taxpayer's cost, upon the expiry of two month following the receipt of notification, should the taxpayer fail to pay the tax liability.

**Effective date: 1st July 2022.**
**Response Time for an Agent's inability to comply with an Agency Notice**

The Act has amended the timelines for which an Agent can notify the Commissioner of its inability to comply with an Agency Notice from Seven Days to Fourteen Days. This will give the Agent ample time to assess and respond to the Commissioner of its inability to comply with an Agency Notice.

**Effective date: 1st July 2022**
**Service of the Agency Notice on the Taxpayer**

The Act has now provided guidelines as to the service of the Agency Notice to the Tax payer being at the time of serving the Agent.

**Effective date: 1st July 2022**
**Time of issuance of the Agency Notice**

The Finance Act has introduced a new Section 42(14) of the TPA to the effect that an Agency Notice shall not be issued unless the Commissioner has either confirmed its assessment through an Objection Decision and the taxpayer has defaulted to appeal to the Tax Appeals Tribunal within the prescribed timelines.

**Effective date: 1st July 2022**
**Applicability Withholding Value Added Tax by Withholding Agents**

The Finance Act has included as part of the proviso under Section 42A that Withholding Value Added Tax shall not be applicable in respect of registered manufacturers whose value of investment in the preceding three years from the commencement of the Finance Act 2022 is at least three billion.

This will act as boost of such manufacturers as it will boost their cashflows without amounts being withheld by the Withholding Agents.

**Effective date: 1st July 2022.**
**Refund of overpaid tax**

The Act has repealed Section 47 of the TPA and replaced it with new provisions. Based on the new provision, a taxpayer is required to apply for a refund within 5 years for all other taxes and within six months in the case of VAT, following the date of payment.

The Commissioner may offset the refund against existing taxes, further taxes or refund the amount to the tax payer within two years following the date of application.

Further, overpayment of instalment tax shall be offset against future instalment taxes payable by the taxpayer. However, should the commissioner determine that there was no overpayment, the tax including penalties and interest therefrom shall be due following the date the Commissioner notifies them of the same. This is a welcome relief owing to the current delayed processing of refunds.

**Effective date: 1st July 2022**
**Refund of Tax Paid in Error**

The Act now expressly provides for refund on tax paid in error which will include any tax paid which the Commissioner is satisfied ought not to have been paid. The application will be lodged and applied in a similar manner to refunds on overpaid taxes.

**Effective date: 1st July 2022**
**Refund of tax paid on exempted or zero-rated supply**

Subject to approval by the CS to National Treasury, taxpayers will be refundable on VAT paid on exempt and zero-rated supplies where the exemption or the zero rating was not processed within the specified period due to circumstances beyond the control of the taxpayer. This will offer reprieve to taxpayers who incur VAT prior to approval of their application for exemption.

**Extension of time on invalidation of objection**

The Finance Act has amended the TPA to the effect that the Commissioner will have up to fourteen days to notify the taxpayer that their objection was not validly lodged. This grants the Commissioner adequate time to review the objections lodged prior to invalidating them where necessary.

**Effective date: 1st July 2022.**
**Clarity on Extension of time to file notice of objection**

The Act has amended the TPA to the effect that it now expressly provides for extension of time to file a notice of objection to be at the Commissioner's discretion subject to his consideration and approval.
Further the Commissioner is mandated to notify a taxpayer of his decision within fourteen days of receipt of the application.

**Effective date: 1st July 2022**
**Fixed timelines for issuance of Objection Decision**

The Act has amended the TAP to the effect that the period in which the Commissioner should issue an objection decision has been fixed to sixty days upon receiving a validly lodged objection.

With such timelines, the KRA will have to issue their Objection Decision within Sixty Days hence leading to it

expediating the resolution of tax disputes at the Objection stage so as to avoid being hit by the timelines.
Once a Taxpayer has been notified of the said Objection Decision, it shall have Thirty days to file its appeal with the Tax Appeals Tribunal

**Effective date: 1st July 2022**
**Transaction requiring a PIN**
The Act has introduced the requirement for a PIN on the registration of a Trust.

**Effective date: 1st July 2022**
F**.MISCELLANEOUS FEES AND LEVIES**

Recommendation of Cabinet Secretary in charge of specific industry to suffice for IDF and RDL

This Act has been amended by the Finance Act to the effect that the charge import declaration fee (IDF) on the custom value raw materials and intermediate products imported by manufacturers at the rate of at the rate of One-point five percent shall be applicable upon recommendation to the Commissioner by the Cabinet Secretary responsible for matters relating to industry.

Similarly, in respect charge of IDF at the rate of One-point five percent on input for the construction of houses under an affordable housing scheme, the recommendation by Cabinet Secretary in charge of housing to the Commissioner shall be sufficient.

The same shall also suffice for the charge of the Railway Development Levy (RDL)in respect of the abovementioned subject matters.

Previously, the approval of the Cabinet Secretary in charge of finance was required. However, with the amendment, the same recommendation to the Commissioner will be sufficient hence expediating release of imported products.

**Effective date: 1st July 2022**
**Exemption of additional duty in respect of currency notes and coins imported by CBK from EPZ**
The Act has been amended to the effect that imports by the Central Bank of Kenya in respect of currency note and coins shall not be subject to additional duties where the same have been imported from an export processing zone (EPZ).

This will ensure that the cost of importation of currency notes and coins is reduced hence free circulation.

**Effective Date: 1st July 2022**

**Expansion on the scope of the TPA in determining penalties and Interest to excess tax refunds**

The Act has been amended at Section 9B (b) by inserting the words 'and levies' immediately after the word "fees" to read as 'the determination by the Commissioner of penalties and interests on fees and levies that remain unpaid.'

This will bring clarity on the application of Section 47 of the Tax Procedures Act in determining penalties and interests on excess tax refunds.

**Charge of Export Levy on new items**

The Act has brought to charge of export levy iron ores and concentrates, including roasted iron pyrites under tariff No. 2601 at the rate of USD 175 per tonne.

**Effective Date: 1st July 2022**

**Change of timelines for Adjustment of rates of export levy**

**Tariff Description**

- Inputs and raw materials imported by manufacturers of pharmaceutical products on the recommendation of the Cabinet Secretary responsible for matters relating to health
- Goods imported for use in the construction and maintenance of human vaccine manufacturing plants as approved by the Cabinet Secretary for the National Treasury on recommendation of the Cabinet Secretary for Health;
- goods, inputs and raw materials imported by a company which is – (a)engaged in business under a special operating framework arrangement with the Government; and

(b)incorporated for purposes of undertaking the manufacture of human vaccines; and whose capital investment is at least ten billion shillings;

subject to approval of the Cabinet Secretary for the National Treasury, on recommendation of the Cabinet Secretary for health.

**Effective Date 1st July 2022**

**G. MISCELLANEOUS LAWS**

The Finance Act 2022 has amended various pieces of legislations. We outline the amendments and their implications below;

The Act has been amended in respect of the timeline to which the export levy shall be adjusted to cater for inflation from the beginning of every financial year to a date not later than the 1st October of every financial year.

**Effective Date: 1st July 2022**

**Introduction of new items exempted from Import Declaration Fee (IDF) and Railway Development Levy (RDL)**

The following items are exempted from IDF and RDL as follows;

**Evidence Act**

A revenue officer shall not be compelled to reveal the source of their information in regards to any offence against the law in relation to all the written laws relating to revenue unlike previously where only specific taxes were covered.
This is intended to ensure that all the offences against the law on all the written laws relating to revenue are handled effectively.

The term "revenue officer" has been redefined to include any officer who is in a public office or carrying on business in relation to a public office for the collection of public revenue.

**Effective date: 1st July 2022**

**Capital Markets Act**

**Amendment to the definition of an "investment advisor"**

The definition of an "investment advisor" has been amended to exclude the aspect of an individual acting on behalf of a client to manage their portfolio of securities for the purpose of investment and receiving remuneration pursuant to a contract or agreement with the client.

Further, this is meant to expand the spectrum of persons who may act as investment advisors in offering the much-needed investment advisory services.

**Company Licensing**

A company seeking to be licensed should be a legal entity as prescribed by the regulations in place.

The scope of the individuals who are required to have satisfied the minimum qualifications required has been

**Effective date: 1st July 2022**
**<u>Insurance Act</u>**
**Closed Fund Business**
The Act defines “closed fund business” to mean the continuance of insurance business for the purpose of maintaining, without renewal, any policy or contract of insurance issued before the appointment date.

**Effective date: 1st July 2022**
**<u>Kenya Road Boards Act</u>**
The object and purpose of the Kenya Roads Board in terms of management of funds has been widened to include the aspect of allocation of monies. Fifty per cent of the fund is to be allocated as approved by the Minister of Finance for the allocation of financial resources required by road agencies for the maintenance, rehabilitation and development of the road network. The other fifty per cent of the fund is to be allocated for borrowings required for proper discharging of duties as per the Act and for securing additional funding.

The aspect of linking resources allocation in line with fuel levy only has been eliminated such that the resource allocation will be as required by the road agencies for the maintenance, rehabilitation and development of the road network and not relating to fuel levy as initially indicated. This has increased the scope of resource allocation to include all aspects as may be required by the road agencies to enhance effective resource allocation.

The monies as initially referenced to those resulting from fuel levy and those from the constituency Roads Fund Account respectively has been eliminated such that all monies refer to the allocated funds. This is to cover the scope of all the allocated funds and not specific funds as initially provided.

**Effective date: 1st July 2022**
**Betting, Lotteries & Gaming**
The Act has added an exclusion of Betting Tax from applying to Horse racing.

**Effective date: 1st July 2022**
**Road Maintenance Levy Fund**
The use of the specific amount paid into the Road Annuity Fund out of the levy collected has been included such that it will be to fund the construction of roads under the Road Annuity Program and similar roads approved by the National Assembly.

This is to ensure that the funds are used accordingly.

**Effective date: 1st July 2022**
**<u>Unclaimed Finance Assets Act</u>**

The penalties payable under Section 33 (1), (4) and (5), on failure to pay or deliver assets, shall be collected as civil debts, not exceeding the value of the asset determined to be reported and deliverable in whole, unlike previously where a person was liable to pay penalty of seven thousand shillings but not more than fifty thousand shilling for each day the duty is not performed.

This is intended to handle situations when the asset's worth may grow above its market value, discouraging compliance in order to avoid penalties.

**Effective Date: 1st July, 2022**
**Waiver of Penalties, Fines and Audit Fees**

Section 33A has been inserted immediately after section 33, which states that with the Cabinet Secretary's consent, the Authority may waive payment of any of the penalties and fines imposed under section 33, in part or in full, in grounds that; (a) the waiver is designed to make it easier for the asset holder to reveal and surrender the undeclared asset to the Authority, (b) there are valid grounds to do so in the Authority's judgement or (c) it is in the public interest to do so. The aim is to encourage more compliance with the law.

**Effective Date: 1st July, 2022**
**Voluntary Unclaimed Finance Assets Disclosure Program**

The Voluntary Unclaimed Financial Assets Disclosure Program has been created for a period of twelve months from the date of the beginning of this section.

It is aimed at granting penalty and interest relief to holders of unclaimed assets who reveal, submit and deliver the assets to the Authority in accordance with this Section, 33 B. However, the provisions of this section will only apply to assets held until 30th June 2022.

This measure seeks to draw more holders to reveal, report and distribute unclaimed assets to the Authority so as not to be subjected to the fines or interest imposed by Sections 33 (1), (4) and (5).

This is to ensure that the funds are used accordingly.

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**Effective Date: 1st July, 2022**
**Statutory Instruments Act**
Section 15 of the Statutory Instruments Act of 2013 is amended by highlighting that The National Assembly shall, within twenty-eight sitting days from the date of receipt of the notice under section 11, consider the notice and make a resolution either to approve or reject any statutory instrument that contains provisions dealing with taxes, levies, or fees, or has the effect of imposing a charge on a public fund, or variation or repeal of such charge, without prejudice to the provisions of section 12 and section 15.

In addition, the following new subsection is added immediately after subsection (3) in Section 21 of the Statutory Instruments Act of 2013 to ; (4) With effect starting on the twenty-fifth day of January 2023, the automatic revocation period for statutory instruments issued under the Income Tax Act, the Stamp Duty Act, the Value Added Tax Act, 2013, the Tax Appeal Tribunal Act, 2013, the Excise Duty Act, 2015, and the Tax Procedure Act, 2013 is hereby extended for a period of twenty-four months.

**Effective Date: 1st July, 2022**
**Retirement Benefits Act**
The Act has amended Section 13 of the Retirement Benefits Act, 2015 by inserting the following new subsections which stipulates that the benefits provided under this Act to an eligible individual or his or her surviving spouse, if applicable, shall be administered;

(a) by the Office of the President in the event of a retired Deputy President, retired Prime Minister, or retired Vice President, and shall be included in the national government's estimates as described in Article 221(1) of the Constitution;
(b) the Parliamentary Service Commission, in the case of a retired Speaker of the National Assembly or the Senate, and shall be included in the estimates of the parliamentary service made in accordance with Article 127(6) of the Constitution; and
(c) the Judicial Service Commission, and must be included in the estimates of the judiciary created in accordance with Article 173(3) of the Constitution, in the event of a retired Chief Justice or retired Deputy Chief Justice.

The respective bodies described above are responsible for developing administrative rules for the administration of this section, including rules for calculating benefits owed to those who are eligible. However, pension contributions, lump sum payment upon retirement, and gratuity provided for by this Act are exempt from the provisions of the amended section above.

**Let's talk**

For further information on these amendments and how they will affect your business or need assistance on any other legal and tax matter kindly contact your regular Taxwise Africa Analyst through the contacts below.

**Phone: 020 2025320**
**Email: info@taxwiseconsulting.com**
**Website: taxwiseconsulting.com**