HIGHLIGHTS OF THE 2021-2022 BUDGET AND THE FINANCE BILL 2021

The Cabinet Secretary for National Treasury and Planning Ministry (CS) presented the budget speech for the financial year 2021/2022. The 3.6 Trillion budget outlined measures by the Government to address economic growth and recovery aimed at building back the Kenyan economy during the Covid-19 pandemic. The budget highlighted measures to deal with unemployment, the current health crisis, economic recovery and stimulation of economic growth. Our analysis highlights the tax and fiscal measures proposed in the budget speech as well as the Finance Bill 2021 herein referred to as "the Bill". The analysis looks at the proposed measures as well as the impact and implications.

A. INCOME TAX ACT

Redefining "control" in the context of the Income Tax Act

The Bill proposes to amend the definition of the term control. As per the proposal, "**control**" in relation to a person has been defined as follows:

i. The person, directly or indirectly, holds at least 20% of the voting rights in a company;
ii. A loan advanced by the person to another person constitutes at least 70% of the book value of the total assets of the other person excluding a loan from a financial institution that is not associated with the person advancing the loan;
iii. A guarantee by the person for any form of indebtedness of another person constitutes at least 70% of the total indebtedness of the other person excluding a guarantee from a financial institution that is not associated with the guarantor;
iv. A person has the power to appoint more than half of the board of directors or at least one director or executive member of the governing board;
v. A person owns or has exclusive rights over intellectual property on which another person wholly depends for the manufacture or processing of goods or articles or business;
vi. A person or their assignee supplies at least 90% of the purchases of the other person or influences pricing or other conditions relating to such supply;
vii. A person or their assignee purchases at least 90% of the sales of another or influences pricing or conditions related to the sales; and
viii. A person deals or relates with another in a way which the commissioner deems to constitute control.

The proposed amendment, will broaden the definition of control which is currently based on shareholding, voting rights or powers as outlined in the Article of association. The proposal aims to introduce conditions pegged on shareholding, voting rights, financing, and IP rights among others. The broadened scope will create clarity for taxpayers but will likely capture instances where entities may be deemed to be in control but have no vested interest or control of other entities.

From a tax perspective the broadened definition will have implications for a Transfer Pricing ("TP") perspective in terms of determining whether entities are related parties hence subject to TP rules. The definition will likely impact residency status of entities as control is outlined as a criteria for determining whether a body corporate is resident in Kenya.

Effective date: 1 July 2021

Introduction of definition of "Infrastructure bond"

The Bill proposes to introduce the following definition in Section 2 of the Income Tax Act:

"Infrastructure bond" means a bond issued by the Government for the financing of a strategic public infrastructure facility including a road, hospital, port, sporting facility, water and sewerage system, or a communication network."

The term is not defined in the Income Tax Act leaving it open to varying interpretations, the proposed definition will tend to bring more clarity in terms of determining the interest income from these bonds that are exempted from Income Tax.

Effective date: 1 July 2021

Proposed Amendments of the definition of Permanent Establishment

The Bill proposes to delete the current definition of Permanent Establishment ("PE") and introduce a new definition to the term as seen below:

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;
- 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; and
- a farm, plantation or other place where agricultural, forestry plantation or related activities are carried on and a sales outlet;

ii. a building site, construction, assembly or installation project or any supervisory activity connected to the site or project, but only if it continues for a period of more than one hundred and eighty-three days;

iii. the provision of services, including consultancy services, by a person through employees or other personnel engaged for that purpose, but only where the services or connected business in Kenya, continue for a period of, or periods exceeding in the aggregate, ninety-one days in any twelve-month period commencing or ending in the year of income concerned;

iv. An installation or structure used in the exploration for natural resources: Provided that the exploration continues for a period of not less than ninety-one days; and

v. a dependent agent of a person who acts on their behalf in respect of any activities which that person undertakes in Kenya including habitually concluding contracts, or playing the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the person.

But excludes the following activities where the activities are of a preparatory or auxiliary character -

i. The use of facilities solely for the purpose of storage, or display of goods or merchandise belonging to the enterprise;
ii. The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, or display;
iii. The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
iv. The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise;
v. The maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity; and
vi. The maintenance of a fixed place of business solely for any combination of activities mentioned in paragraphs (1) to (5).

The proposed amendments intend to widen the definition of PE according to the domestic laws to align with international best practice as well as proposals outlined under Action plan 7 of the BEPS Action plan aimed to address challenges relating to permanent establishments.

Effective date: 1 July 2021

Digital Service Tax (DST)

The Bill proposes to amend the charging section for DST as follows;

3 (2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of—

"Income accruing from a business carried out over the internet or an electronic network including through a digital marketplace."

The Bill also proposes a new 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.

Further to that the Bill proposed to limit the application of DST to non-residents only excluding resident persons. The Bill also aims to introduce provisions on the due date, exclusion of income subject to withholding tax as well as income taxable under Section 9 (2) of the ITA. These provisions are currently outlined in the DST regulations 2020.

The proposed definition will broaden the tax base as it will capture various digital business models. The proposed exclusion of residents will also be a welcome amendment as it eases the administrative tax burden for resident tax payers.

Effective date: 1 July 2021

Removal of the 10-year carry forward tax losses cap

The Bill proposes to eliminate the 10-year limit provided to utilize taxable losses and re-introduce the indefinite carry forward of the losses.

This proposal is a welcomed amendment as it caters for the taxpayers who put in large capital investments who get huge tax losses which they rarely get to utilize as there is a 10 year carry forward allowance in the ITA as taxpayers seeking to carry forward any tax losses beyond 10 years have to make an application to the Cabinet Secretary of the National Treasury and Planning upon recommendation by the Commissioner providing evidence of the inability to extinguish the losses within the 10-year period.

This proposal seems like a bold move on the part of the Government and confirms that the proposal was motivated by the introduction of the Minimum Tax which affects persons in a tax losses position.

Effective date: 1 July 2021

Overhaul of thin capitalization provisions

The Bill proposes to amend the current thin capitalization provisions which capped interest deductions for foreign controlled entities based on the ratio of debt to equity which is 3:1 respectively.

The proposed thin capitalization provisions will be;

i. Applicable to all persons local and foreign controlled persons;
ii. Be determined on a fixed ration of 30% of Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA) excluding income exempt from tax from the calculation of EBITDA;
iii. Apply to taxpayers in the extractives industry who currently have a different debt to equity ratio; and
iv. Apply to interest and payments similar to interest including payments made to secure debt financing.

The proposed changes represent a significant overhaul of the current thin capitalization provisions. The proposals are in line with recommendations under BEPS Action plan 4 which provide for limitation of interest deductions.

Of note is the proposal to apply the provisions to all entities including locally controlled entities. Secondly the interest deduction will be disadvantageous for taxpayers with substantial debt financing and low returns such as taxpayers in the extractives industry. This limitation will greatly impact taxpayers as they will have limited deductibility of their interest expenses.

Effective date: 1 January 2022

Country by Country (CBC) reporting

The Bill proposes to introduce the requirement for MNE groups to submit CBC reports particularly group entities with two or more entities resident in other jurisdictions or operating through a PE based in Kenya.

The proposal will require ultimate entity shall be required to file the return not less than 12 months after the company's financial year end which shall include information on the entities' income, taxes paid/accrued, employees, assets and operations within the jurisdictions where the entities are based.

This proposal also serves to align with the OECD Base Erosion and Profit Shifting (BEPS) Action Point 13 on Country-by-Country (CbC) reporting which will be instrumental for exchange of information. Further the CBC reports filed in line with TP local and master files shall provide a suitable basis for assessment of TP risks.

Effective Date: 1st January 2022

NHIF Relief

The Bill proposes to include NHIF payments as part of insurance relief when PAYE is being computed. This relief will be equivalent to 15% of contributions to the NHIF and other insurance premiums, not exceeding Kshs 60,000 p.a. This measure is intended to encourage Kenyans to contribute to the NHIF as they will enjoy insurance relief.

Effective Date: 1st January 2022

Extension of Tax Rebate for Apprenticeships

The Bill seeks to extend the scope of tax rebate enjoyed by employers who employ at least 10 university graduates under 6-12 months apprentice contracts to include graduates from technical, vocational education and training institutions (“TVETS”).

This will incentives entities that provide apprenticeships to graduates as they will qualify for the rebate equal to 50% of salaries and wages paid to the graduate.

Effective Date: 1st January 2021

Limitation of Benefits (LOB) Clause

The Bill proposes to amend the restrictions imposed by the limitation of benefits clause by expanding the criteria to include an entity owned by either a natural or legal person resident in the other contracting state. The amendment will extend the limitations to entities that are ultimately owned by a company or association or body of persons, corporate or incorporate as currently the clause is limited to ownership by an Individual.

Effective Date: 1st July 2021

Computation of Capital Allowances

The Bill seeks to alter how capital allowances on buildings and machinery are computed from the reducing balance basis to a straight-line basis.

In addition, depreciation of machinery first used to undertake prospecting and exploration operations is to be aligned with other industries as per the Second Schedule as proposed by the Bill. That is, 50% in the first year of use and 25% per year, on a straight-line basis for the balance.

These proposed amendments will serve to hasten align the treatment of capital allowances across industries.

Effective Date: 1st January 2022

Capital Allowances for Mining sector

Under the new proposal by the Bill, one does not require a mining right to claim capital allowances on machinery used to undertake mining operations. This will be beneficial for taxpayers in the mining industry who will now be able to claim capital allowances on capital investments.

Effective Date: 1st January 2022

Investment Allowance for Independent Electricity Producers

The Bill seeks to include producers of electricity who do not supply to the National grid. Currently on producers supplying to the National Grid are allowed to claim investment deduction of 50% on capital expenditure on equipment, machinery and buildings used in production of electricity. This will incentivize independent power producers and spur the growth of off-grid power supply.

Effective Date: 1st January 2022

Capital Expenditure on Civil works

The Bill proposes the reintroduction of capital allowances on civil works such as roads and parking areas, railway lines and related infrastructure, water, industrial effluent and sewerage works, communications and electrical posts and pylons and other electrical supply works as well as security walls and fencing. This proposed amendment will clarify additional works qualifying for investment allowance.

Effective Date: 1st January 2022

Withholding Tax in the Mining and Petroleum Sector

The Bill proposes to increase the withholding tax rate on payments made by a licensee or contractor to non-resident subcontractors to 10% from 5.625%. Further payment of management and professional fees to any non-resident person without a PE will be reduced from 12.5% to 10%. The proposed new rates are subject to the lower rates that may be provided in double tax treaties that may be in force between Kenya and the country of residence of the recipient of the fees.

Effective Date: 1st July 2021

New Interest Restriction for Licensees/

Contractors in Mining and Petroleum

The Bill proposes to align interest restriction for contractors or licensees in mining and petroleum operations to other sectors (30% of EBITDA). Contractors or licensees in mining and petroleum operations will now enjoy more favorable interest restriction terms. This will encourage investment in mining and petroleum operations and thereby create more employment opportunities.

Effective Date: 1st January 2022

B. VALUE ADDED TAX

VAT treatment of exported services

The Bill proposes to move exported services from Zero rated to exempt. This coincidentally follows the losses by KRA on various tax appeals lodged on the above subject matter. The cases related to refunds lodged as a result of zero rated supplies stemming from supply of exported services.

The move mirrors various amendments made in the past to reduce zero rated supplies and subsequently reducing refunds lodged by exempting the same supplies. The exemption of such supplies renders the taxpayers unable to claim input VAT incurred in providing such services hence no credits and thus no refunds.

The amendment will have dire consequences on suppliers of exported services as it will make the cost of doing business higher for these taxpayers and will put them at a disadvantage compared to other jurisdictions where the services will be zero rated. This proposal will greatly affect industries like Logistics industry which deal with exported services will put Kenya at an economic disadvantage compared to other jurisdictions which is something that contradicts the theme of economic growth that the budget aims to achieve.

Further it contravenes the destination principle which aims at achieving neutrality by ensuring that VAT is charged on the final consumer. In the case of exports, the supply is zero rated during exportation and taxed on the consumer at the point of importation for goods or through reverse VAT mechanism in the case of services.

Further the proposed amendment provides an oxymoron in that the amendment aims to exempt a taxable service. The VAT Act provides that a supply can either be taxable or exempt and therefore it would not make sense to exempt a taxable supply.

It would therefore be pertinent to reconsider this proposal as it will have dire consequences economically across multiple industries.

Effective: 1st July 2021

Definition of "Supply of Imported Services"

The Bill proposes to amend the definition of ***"supply of imported services"*** to provide clarity on the applicability of reverse charge VAT. The amendment provides clarity that in the case of a registered person importing a service they will not be required to account for reverse charge VAT if the registered person is entitled to fully claim input tax.

Effective: 1st July 2021

Expansion of the scope and definition of Digital Services & Digital Market place

The Bill proposes to amend the charging section for DST to include supplies carried out over the ***"internet or an electronic network"*** or through a digital marketplace. Currently, the provision only refers to digital services as supplies made through a digital marketplace.

Further the bill seeks to expand the definition of digital platform to a platform that enables users to sell or provide services, goods or other property to other users. This proposal will expand the meaning of the digital marketplace and hence increase the tax base for VAT on digital services.

As to clarity of the same, this is debatable as the proposed provision in essence stipulates that all supplies carried over the internet or electronic network fall under the taxation. This expansion of the definition may lead to tax disputes as it essentially covers everything relating to the internet and yet some activities may not transactions within the digital space.

Effective: 1st July 2021

Restricted for Input VAT

Further, the Bill proposes to amend Section 17(4), to expand the restriction on deductibility of input VAT to include input VAT incurred in hiring or leasing of passenger cars or minibuses, and the repair and maintenance thereof including spare parts, entertainment, and restaurant and accommodation services.

The proposal will expand the limitation to claiming input VAT, to include input VAT incurred in leasing or hiring of passenger cars or minibuses. Previously this was limited to acquisition of the vehicles hence bringing disputes on whether acquisition included hiring and leasing. This implies that input VAT incurred is not deductible hence the VAT an increased cost for business acquiring these supplies.

Effective: 1st July 2021

Group VAT Registration & Deregistration

The Finance Bill proposes to delete the provision relating to group VAT registration. This measure will limit the consolidation of transactions for group entities when accounting for VAT. This means that each entity within the group will now be required to account for VAT on intra-group transactions individually. This measure will bring in more VAT administrative procedures and costs for the group entities.

Of note is that Section 34(9) of the VAT Act, however, requires the Cabinet Secretary (CS) to publish regulations on Group VAT registrations, which has not been done yet. These regulations will likely offer clarity on accounting for VAT as group entities.

Effective: 1st July 2021

Effective Date for VAT Regulations

The Bill proposes to delete Section 67(2) of the VAT Act which provides for tabling of draft regulations before the National Assembly for approval before they can take effect.

It's important to note that the procedure for the enactment of regulations is already provided for in the Statutory Instruments Act, 2013 (SIA), under Section 11(1), and regulations made under the VAT Act also falls under the provisions of the SIA, 2013. Further the National Assembly is mandated to make laws hence the need to table regulations for discussion and approval. The amendment would mean that the CS can pass regulations by simply gazetting them which deem the regulations unconstitutionally passed.

Effective: 1st July 2021

Changes in VAT status

The Bill proposes the following changes in VAT status as outlined in the table below;

Item	Current rate	Proposed rate	Comment
Disposable plastic syringes.	Exempt	16%	Items have been exempted in order to reduce the cost and make the items more affordable as these are essential to the provision of medical and health services key in implementing measures to fight against the Covid-19 Pandemic.
Other Syringes with or without needles.	Exempt	16%	
Protein concentrates and textured protein substances	16%	Exempt	
Food preparations specially prepared for infants	16%	Exempt	
Other Food preparations not elsewhere specified or included	16%	Exempt	
Vitamin C and its derivatives	16%	Exempt	
Other medicaments, containing alkaloids or derivatives containing nor ephedrine or its salts	16%	Exempt	
Other, containing antimalarial active principles described in Subheading Note 2	16%	Exempt	

to this Chapter			
Food supplements	16%	Exempt	
Malaria diagnostic test kits	16%	Exempt	
Orthopedic or fracture appliances	16%	Exempt	
Other artificial parts of the body: Pacemakers for stimulating heart muscles, excluding parts and accessories	16%	Exempt	
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.	16%	Exempt	
Airway Guedel and Ambu bags	16%	Exempt	
Taxable goods, excluding motor vehicles, imported or purchased for direct and exclusive use in geothermal, oil or mining prospecting or exploration by a company granted a prospecting or exploration license.	16%	Exempt	This will incentivize the Mining sector although a VAT incurred will not be claimable for the taxpayer.
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 CS for energy.	16%	Exempt	This will incentivize producers of solar and wind energy although a VAT incurred will not be claimable for the taxpayer.
Physiotherapy accessories, treadmills for cardiology therapy and treatment for use by licensed hospitals upon approval by the CS responsible for matters relating to health.	16%	Exempt	This will incentivize Investments by Physiotherapists.
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	16%	Exempt	This will be beneficial for persons investing in projects with the Government. VAT incurred will not be claimable for the taxpayer

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 CS responsible for matters relating to energy.			if they are subject to VAT.
Medicaments (excluding goods of heading 30.02, 30.05 or 30.06) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses	16%	Exempt	This will incentivize operators with the medical field including providers of dental services.
Medical ventilators and the inputs for the manufacture of medical ventilators upon recommendation by the CS responsible for matters relating to health.	16%	Exempt	
Electro-diagnostic apparatus upon approval by the CS responsible for matters relating to health.	16%	Exempt	
Dexpanthenol used for medical nappy rash treatment by licensed hospitals upon approval by the CS responsible for matters relating to health.	16%	Exempt	
Other instruments and appliances used in dental sciences, dental drill engines, whether or not combined on a single base with other dental equipment, upon approval by the CS responsible for matters relating to health.	16%	Exempt	
Diagnostic or laboratory reagents 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 CS responsible for matters relating to health.	16%	Exempt	
Other instruments and appliances, including surgical blades used in dental sciences upon approval by the CS responsible for matters relating to health.	16%	Exempt	
Ozone therapy, oxygen therapy, aerosol therapy, artificial respiration or other	16%	Exempt	

therapeutic respiration apparatus upon approval by the CS responsible for matters relating to health.			
Other breathing appliances and gas masks, excluding protective masks having neither mechanical parts nor replaceable filters upon approval by the CS responsible for matters relating to health.	16%	Exempt	
Artificial teeth and dental fittings, & Artificial parts of the body; upon approval by the CS responsible for matters relating to health.	16%	Exempt	
Apparatus based on the use of x-rays, whether or not for medical, surgical or dental, upon approval by the Cabinet Secretary responsible for matters relating to health.	16%	Exempt	
Apparatus based on the use of alpha, beta or gamma radiations, whether or not for medical, surgical or dental, upon approval by the CS responsible for matters relating to health.	16%	Exempt	
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, including matrices and masters for the production of discs, but excluding products of Chapter 37; software upon approval by the CS responsible for matters relating to health.	16%	Exempt	
Weighing machinery (excluding balances of a sensitivity of 5 cg or better), including weight operated counting or checking machines; weighing machine weights of all kinds upon approval by the CS responsible for matters relating to health.	16%	Exempt	
Fetal Doppler-Pocket (Wgd-002) Pc and pulse oximeter-finger held (Gima brand) Pc, upon approval by the CS responsible for	16%	Exempt	

matters relating to health.			
Sterilizer Dry Heat (Wgd-001-Grx-05A) Pc, autoclave steam table tops, upon approval by the CS responsible for matters relating to health.	16%	Exempt	
Needle holders and urine bags.	16%	Exempt	
Tourniquets for use by licensed hospitals upon approval by the CS responsible for matters relating to health.	16%	Exempt	
Asset transfer into Real Estate Investment Trusts and Asset Backed Securities.	16%	Exempt	
Exportation of taxable services.	0%	Exempt	This will likely have a detrimental effect on suppliers of such services. We analyze the impact of this in detail in our analysis above.
Supply of ordinary Bread.	0%	16%	This will increase the cost pf bread and will likely have a negative impact for consumers.

C. EXCISE DUTY

Introduction of the Definition of "compound"

The Finance Bill proposes to amend Section 2 of the Excise Duty Act by introducing the definition for the term "compound" in relation to spirits to mean the definition as provided under the Compounding of Potable Spirits Act. Of note is that the Compounding of Potable Spirits Act defines compound **as**

"Compound" means to communicate any flavor to, or to mix any ingredient or material with, spirits, but not so as to denature the spirits;

Effective: 1st July 2021

Introduction of the definition of "possession"

The Bill has introduced a definition for the term "possession" in relation to excisable goods has been introduced. The definition notes that the same means having, owning or controlling any excisable goods. The same also provides for the circumstances and clarity under which the possession of excisable goods would be concluded to exist. This definition is meant to ensure that actual owners and persons who have control over non-compliant products are held accountable for excise duty.

Effective: 1st July 2021

Provision for rebate on Excise Duty on the Bulk Data

The Bill proposes to introduce amendments to Section 14 of the Excise Duty Act to the effect that where excise duty has been paid for internet data by a licensed person who purchases the balk data for resale, then the excise duty so paid shall be offset against the excise duty payable by that person on internet data services supplied to the final consumer. The implication of this is a person who purchases internet data in bulk for resale is able to claim for the excise duty they paid on the bulk data hence avoiding double taxation.

Effective: 1st July 2021

Amendment of the definition of the term "Other Fees"

The Bill proposes to delete the exclusion from excise duty granted on fees or commissions earned in respect of a loan. This is meant to expand the tax base by removing this exclusion and also discourage financial institutions from charging exorbitant fees for processing loans.

Effective: 1st July 2021

Amendments to the First Schedule of the Excise Duty Act

Proposed Amendment	Current Status	Proposed New Status	Comment
Sugar confectionary	Only imported Sugar confectionary is subject to excise	Both Locally produced and imported sugar confectionary will be subject to excise	This will widen the tax base for excise duty.
White Chocolate	Only imported Sugar confectionary is subject to excise	Both Locally produced and imported white chocolate will be subject to excise	This will widen the tax base for excise duty.
Imported glass bottles excluding those used to package pharmaceutical products.	Subject to excise duty	Will no longer be subject to excise duty	This will boost the manufacturing industry particularly where these bottles are used as inputs for the final products hence reduction in production costs.

Motorcycles other than motorcycle ambulances and locally assembled motorcycles	Subject to excise duty at a specific rate of Kshs. 11,608.23 per unit	Subject to excise duty at an advalorem rate- flat rate of 15% of the value of the motorcycle.	This will increase the tax base as the advalorem rate will be based on the value of the motorcycle.
Jewelry made of precious metals	Not subject to excise duty	Subject to excise duty at a rate of 10%	This will impact jewelry made using precious metals only.
Products made of nicotine and nicotine substitutes	Not subject to excise duty	Subject to excise duty at a rate of Kes 5,000 per kg	This provision will capture such products previously not within the ambit of excise duty.
Betting transactions	Not subject to excise as per Finance Act 2020.	Subject to excise duty at 20% of the amount wagered.	This will impact the betting industry and increase the tax base as anyone who engages in betting will be taxed regardless of the outcome

D. TAX PROCEDURES ACT

Miscellaneous fees and levies to be governed by the Tax Procedures Act, 2015

The Bill proposes to amend the definition of ***'tax law***' to include the Miscellaneous Fees and Levies Act 2016. The amendment will bring the procedural issues such as the administration of refunds, penalties and interest relating to the Miscellaneous Fees and Levies Act 2016 under the scope of the Tax Procedures Act (TPA) thus providing for consolidation in the administration of tax laws.

Effective date: 1st July 2021

Clarity on the precedence of International Tax Agreements and Treaties over domestic law

The Bill intends to provide clarity on the implementation of the multilateral agreements and treaties entered into by or on behalf of the Government of Kenya by providing that the same should be effected as stipulated in such agreements or treaties. This clarification grants international tax agreements precedence over domestic tax laws.

The Bill also provides that any information obtained pursuant to such agreement shall only be disclosed in accordance with the conditions specified in said agreements. This move will ensure confidentiality and protection of private taxpayers' information.

Effective date: 1st July 2021

Restricted disclosure of information exchanged pursuant to international tax agreement

The Bill proposes to restrict the disclosure of information obtained by the government under multilateral tax agreements thus ensuring privacy and confidentiality of records that have been obtained.

Effective date: 1st July 2021

International tax agreements and common reporting standards obligations by financial institutions

The Bill proposes to introduce a mandatory requirement for residents and branches of non-resident financial institutions in Kenya to conduct due diligence procedures and report to the Commissioner reportable accounts in accordance with the Common Reporting Standards (CRS). The aforementioned requirements do not apply to foreign branches of Kenyan financial institutions.

The Cabinet Secretary for National Treasury has been tasked with publishing the CRS Regulations.

The Finance Bill proposes to impose the following penalties in instances of non-compliance;

Offence	Penalty
Making a false statement or omission of any information from the return	Kshs 100,000 for each false statement/omission or imprisonment for a term not exceeding three years or both
Failure to file a return	Kshs 1,000,000 for each unfiled return
Failure to comply with a duty or obligation where no other penalty is prescribed	Kshs 20,000 and Kshs 20,000 for each day that the non-compliance continues up to a maximum of 60 days

Effective date: 1st July 2021

Statute of limitation

The Bill seeks to extend the timeframe for the requirement for taxpayers to maintain records from five years to seven years. This extends the statute of limitation period, thus granting the Commissioner the powers to audit a taxpayer up to seven years back.

Effective date: 1st July 2021

f) Relief from liability due to difficulty in recovery of taxes

The Bill proposes to expand the instances in which the Commissioner may refrain from assessing or recovering unpaid tax from a taxpayer to include instances where there is any other reason occasioning inability to recover the unpaid tax. This move may see an increase in tax waivers by the Commissioner.

The amendment will also require the Commissioner to submit to the CS on or before the 30th June and on or before the 31st of December. a report containing the details and amounts of taxes abandoned on grounds of doubt or difficulty in recovery of tax.

Effective date: 1st July 2021

Reporting currency for non-resident digital marketplace providers and suppliers

In an aim to ease administration and compliance with DST by non-residents operating or carrying on business on a digital marketplace, the Bill proposes to amend the TPA to exempt the said non-residents from the requirement to maintain their books of accounts, records, paper registers, tax returns or tax invoices in Kenyan shillings.

The amendment will allow these non-residents to maintain their records in a convertible foreign currency as may be approved by the Commissioner. This provision will however not apply to non-residents with tax representatives or permanent establishments in Kenya.

Effective date: 1st July 2021

Removal of withholding VAT exemption

The Bill proposes to delete the provisions of the TPA granting the Commissioner Powers to exempt a supplier who is in continuous credit position for a period of not less than 24 months from WHVAT.

While the Act provides for refund of WHVAT credits, this move is likely to adversely affect the cash flow of the affected taxpayers as refunds generally take time to be approved and paid out.

Effective date: 1st July 2021

Abolition of rental income amnesty

The Bill proposes to delete provisions of Section 37A from the TPA. The said provision bars the Commissioner from recovering taxes, interests and penalties for rental income accrued prior to or during the financial year 2013 and penalties or interest in respect of the 2014 and 2015 where the taxpayer had paid the principal tax on or before the 30th June 2016.

The time frame for the enjoyment of this amnesty has since lapsed, hence the deletion.

Effective date: 1st July 2021

Treatment of penalties and interest on approved refunds to be offset against outstanding taxes

The Bill proposes where the Commissioner notifies a taxpayer on the offset of a refund against taxes payable, then penalties and interest shall cease to accrue on the principal to the extent covered by the refund from the date of notification. However, penalties and interest will continue to accrue on any outstanding amounts not offset after application of the refund.

This move will ensure that penalties and interest do not accrue where no outstanding principal exists thus ensuring that taxpayers are not penalized unnecessarily.

Effective date: 1st January 2022

Admissibility of Evidence

The Bill proposes to expand the scope of admissible evidence to include inspection of records and goods as per Section 58 of the TPA which grants any authorized officer powers to inquire into the affairs of a person including access to records, assets and powers to question relevant persons such as staff.

This amendment is meant to allow for admission of evidence obtained as a result of inspection of records or goods by the Commissioner.

Effective date: 1st July 2021

Clarification of due date for electronic filings in case the same falls on a weekend or public holiday

The Bill proposes that the due date for submitting or lodging a notice of objection, tax return or making a payment of tax where the due date falls on a weekend or public holiday shall remain the date specified in the relevant tax law.

Previously, the Act provided that where the due date for the above falls on a weekend or public holiday, then the due date shall be the previous date. This is a welcome move in light of technological advancements allowing for online filing and payments.

Effective date: 1st July 2021

No stay of proceedings in case of concurrent civil and criminal proceedings

The Bill proposes to introduce a provision to ensure that there is no stay of proceedings where there is a concurrent civil or criminal case. This provision will ensure faster resolution of tax disputes in light of ongoing criminal or civil proceedings.

However, considering that the burden of proof in both criminal and civil cases are different, there is a risk that the same may lead to conflicting decisions in the decisions of the civil and criminal courts. Moreover, where one decision is delivered before the other, it may lead to bias in the pending proceedings for the other court case.

Effective date: 1st July 2021

PIN requirement for digital marketplace suppliers

The Bill proposes to obligate suppliers of goods and services over a digital marketplace including non-residents to obtain PINs from the Commissioner. This move will promote compliance with the DST provisions.

Effective date: 1st July 2021

The offence of failing to appear before the Commissioner has been broadened

Currently, the failure to appear before the Commissioner is only an offence to the extent that the Commissioner or an authorized person had notified the person being summoned in writing to attend at the time and place specified for purposes of giving evidence in relation to a tax matter.

The Bill however does not elaborate the circumstance under which a person may be summoned by the Commissioner. As such, taxpayers can only hope that the KRA does not abuse the powers granted by the above provision.

Effective date: 1st July 2021

Protection of officers acting in good faith

The Bill proposes to amend the provision relating to protection of officers from being personally liable for acts or omissions done or committed in performing their functions under a tax law where the acts or omissions were conducted "in good faith" in the course of executing their duties. This provision is aimed at ensuring that the KRA exercises care in handling taxpayer matters.

Effective date: 1st July 2021

E. MISCELLANEOUS FEES AND LEVIES

Inclusion of scope of refund to include levies and fees paid in error or in excess

The Cabinet Secretary in charge of National Treasury has through the Finance Bill of 2021 and his budget speech sought to amend the Tax Procedures Act by proposing that the TPA be amended to include the Miscellaneous Fees and Levies Act 2016 as part of the Tax Procedure Act (TPA).

By virtue of the proposed amendment, refund of levies and fees paid in error or excess shall be subject to the refunds process as outlined under the TPA. The implication of this is that the Railway Development Levy (RDL) and the Import Declaration Fee (IDF) which were under the repealed Customs and Excise Duty Act if paid in error shall be refundable within 2 years or be subject to a 1% interest for every month thereafter.

Another implication is that the fees and levies paid in error over a period of 5 years shall now be refundable as opposed to the 1 year period under EACCMA.

Effective date: 1st January 2022

Exemption of goods for RDL and IDF for public interest purposes

The CS further proposes that goods, materials, machinery and vehicles imported by the Police Service and the KDF shall be exempt from RDL and IDF.

i. Bank Notes and Coins imported by the CBK are also to be exempted from IDF & RDL.
ii. The CS further proposes that goods from EPZs entered for home use shall be subject to IDF at the rate of 2.5% of the Customs Value.
iii. In addition, the CS proposed that goods imported under the EAC Duty Remission Scheme be subject to IDF at a rate of 1.5% of the Customs Value.
iv. Goods imported for implementation of projects under the special operating framework arrangement with the Government at a rate of 3.5%.

Effective date: 1st January 2022

F. MISCELLANEOUS LAWS

The CS has sought the amendment of various pieces of legislations i*nter alia*; The Kenya Revenue Authority Act, the Insurance Act, the Capital Markets Act and the Central Depositories Act which we outline below;

Capital Markets Act

Tribunal

The Bill proposes that appeals before the tribunal will be determined within 90 days of filing, unlike previously when the status quo of the appeal would remain as is until it is determined.

Effective: 1st July 2021

Insurance Act

Broker definition

The Bill intends to amend the **Insurance Act** by repealing the current definition of the term “broker” and replacing it with a new definition that includes foreign reinsurance brokers who do not undertake insurance business or have no place of business in Kenya. In effect, foreign reinsurance brokers will now be regulated by the Insurance Regulatory Authority.

Annual fee for Licensed Insurers

Further, the CS seeks to introduce a prescribed annual fee to be paid by a registered insurer which will be **effective from 1st January 2022.**

Closed Fund Business

The Bill proposes provisions on "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. This will be carried out without registration and is subject to the provisions set out in the Insurance Act including the requirement to furnish information to the Commissioner of the Insurance.

Effective: 1st July 2021

Kenya Revenue Authority Act

Whistleblowing on tax cheats

The bill proposes to amend the **KRA Act** to increase the reward fees given to a whistle blower from KES. 100,000 to KES. 500, 000. Likewise, there is a proposal to increase the reward fees for an individual who voluntarily gives up information that leads to recovery of taxes to be raised from KES 2-KES. 5M. The aim is to encourage more compliance with the law and seek to have all Kenyans take collective responsibility in the revenue collection process and is line with the M-whistle program launched to encourage anonymous whistleblowing.

Effective: 1st July 2021

Retirement Benefits Act

Definition of Retirement Benefits Scheme

The Bill proposes to include post-retirement medical cover. This is a bid to encourage pensioners to join a medical cover fund and is in line with the Government big four agenda on Universal healthcare.

Effective: 1st January 2022

Post-retirement Medical Fund

Further the Bill seeks to introduce post-retirement medical regulations. These regulations will enable members to make additional voluntary contributions to a medical fund. Retirees will be able to access the funds or transfer their funds to a medical insurance provider.

This will go a long way to address numerous challenges that retirees face especially in accessing medical care.

Corporate Trustees

The Bill proposes to amend the Retirement Benefits Act to provide for the registration and regulation of corporate trustees that provide services to pension schemes.

Initially the Corporate trustees remained unregulated, a scenario which put the public at risk. This new proposed measure is going to increase the public confidence while dealing with corporate trustees.

Further the Bill proposes to amend the Retirement Benefits act and initiate regulations to stand alone Medical Funds.

This measure seeks to cushion members' funds and provide accountability therefore increasing member's confidence.

Effective: 1st July 2021

Central Depository Act

The Bill proposes to amend the Central Depositories Act by introducing provisions on authorized nominees. Authorized nominees which will be a person appointed by the beneficial or legal owner to open and operate a securities account. The authorized nominee will be required to operate on behalf of the legal/beneficial owner and furnish information as request and maintain the required records.

Record Keeping

The Bill proposes provisions to ensure that all purchases and sales of deposited securities and other dealings made in respect thereof, including the charges and credits arising therefrom, 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 favor the dealings are executed. This will enhance record keeping which allows for easier administration

Effective: 1st January 2022

G. CUSTOMS DUTY

The Cabinet Secretary of National Treasury and Planning proposed the stay application on a number of items that were either duty free or attracted a common external tariff rate of 25%. This proposals included a remission of duty on three items, aimed to support the manufacturing sector and sustain the fight against the Covid-19 Pandemic. Below is a table of the current and proposed custom duty rates

Item	Current Rates	Proposed Rates	Comment
Raw materials and input for manufacture of masks, sanitizers, ventilators and personal protective equipment	0%	0%	Extended the duty free importation window in order to support measures to fight against Covid-19 Pandemic
Inputs for manufacture of baby diapers	0%	0%	Extend Stay Order for another year – To support local manufacturing industry
Input for manufacture of roofing tiles	0%	0%	
Iron and steel products	25%	25%	Duty of 25% imposed further for another year to support local manufacturing industry.
Products for manufacture of leather and footwear products	25%	25%	Maintain the 25% duty rate and impose a further duty in order to support local manufacturing industry
Vegetable products including potatoes, peas, tomatoes among others	25%	30%	Increase of custom duty to support local farmers

Furniture	35%	35%	Maintain rate of 35% for another year to support local artisans.

Effective Date: 1st July 2021