THE FINANCE ACT 2021 ANALYSIS

The Finance Act 2021 herein referred to as "The Act" was assented to on the 29th June 2021.Our analysis highlights the tax and fiscal measures highlighted in the Act and the tax implications thereafter.

A. INCOME TAX ACT

Definition of Control

The Act has amended the definition of the term control. Control in relation to a person is 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 trademark, copyright, license, franchise, patent, know how or any other business or commercial right of a similar nature 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 broadened scope of control 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.

In order to ensure that this is avoided the section was amended to include a provision allowing the Commissioner to use their best judgement in determining if the taxpayer circumstances does in fact create control over the entity. This will likely still create conflicts in terms of interpretation.

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 as control is one of the criteria for determining control. The definition will likely impact residency status of body corporates as control is outlined as a criteria for determining residency in Kenya.

Effective date: 1 July 2021

Definition of "Infrastructure bond"

The definition of infrastructure bond in Section 2 of the Income Tax Act has been introduced as follows:

"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 definition will bring more clarity in terms of determining the interest income from these bonds that are exempted from Income Tax.

Effective date: 1 July 2021

Definition of Permanent Establishment

The Act has redefined what a Permanent Establishment ("PE") is, a PE has been defined as follows:

Fixed PE
The definition of a fixed place PE has been broadened further to include;

- 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.

Construction PE
A definition of a construction PE has been amended to include provisions that cater to fragmented construction projects or split contracts. The timelines have also been clearly defined in instances where projects will be carried out over a period of time with breaks in between construction. This is in line with BEPS action plan 7 recommendations on PE to where certain practices are in place to avoid creation of PE

Service PE
A service PE criteria has been introduced whereby a PE can be created through employees or other personnel are engaged in activities or provide services that are connected to the business in Kenya.

The time threshold in place is activities being undertaken 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.

Agency PE
The definition of an agency PE has been amended to include the condition that the agent would habitually conclude contracts on behalf of the other person without material modification by the person.

Auxiliary services/activities
The definition of a PE has been amended to include preparatory or auxiliary services or activities which will not create a PE for a person namely;

- The use of facilities solely for the purpose of storage, or display of goods or merchandise belonging to the enterprise;
- The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, or display;
- The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

- The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise;
- The maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity; and
- The maintenance of a fixed place of business solely for any combination of activities mentioned in paragraphs (1) to (5).

The amendments are in tandem with the proposals outlined under Action plan 7 of the BEPS Action plan aimed to address challenges relating to permanent establishments. The broadened scope will create clarity for taxpayers more so foreigners who should be keen to review their activities in Kenya to see if they will be creating a taxable presence in Kenya.

Effective date: 1 July 2021

Digital Service Tax (DST)

The charging section for DST is amended 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 new definition of a digital marketplace will be an online platform which enables users to sell or provide services, goods or other property to other users.

Further DST will be payable by non-residents only and will exclude resident persons and will be payable by the 20th of the month following the month the digital service was offered.

The tax shall also not be applicable to income that is subject to withholding tax or income from transmitting of messages via cable, TV, optical fibre cable or other means.

The 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

Income chargeable to tax for registered trusts

The Act has defined income subject to tax for registered trusts shall include;

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

This provides specificity in terms of determining income subject to tax for registered trusts. These income distributions shall however be subject to tax at a rate of 25%.

The Act further outlines exemptions of income subject to tax in the case of registered trusts which will include;

- Gains on transfer of property, including investment shares, which is transferred or sold for the purpose of transferring the title or the proceeds into registered family trust.

- The income or principal sum of a registered family trust.
- Any capital gains relating to the transfer of title of immovable property to a family trust.

This will be incentives for income from registered trusts.

Effective date: 1 July 2021

Minimum Tax exemptions

The Act has outlined taxpayers who shall not be subject to Minimum tax. Minimum tax shall not be applicable to;

- a person who is engaged in business whose retail price is controlled by the Government;
- a person who is engaged in insurance business;
- a person who is engaged in manufacturing and that person's cumulative investment in the preceding four years from assent is at least ten billion shillings;
- a person who is licensed under the Special Economic Zones Act, 2015; and
- A person who is engaged in distribution business whose income is wholly based on a commission.

This follows exemptions issued to Kenya airways. This creates reprieve for taxpayers falling within the exemption list more those who have made significant investments specifically ten billion or more hence are in a loss position. This however does not benefit taxpayers who have not invested within such thresholds but are likely in loss positions.

Effective date: 1 July 2021

Removal of the 10-year carry forward tax losses cap

The Act removed the cap on carrying forward of tax losses as such tax losses shall be carried forward for an indefinite time period.

This 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 within the stipulated 10 year period.

Effective date: 1 July 2021

Overhaul of thin capitalization provisions

The Act has overhauled 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 thin capitalization provisions will be;

i. Applicable to all persons local and foreign controlled persons excluding banks or financial institutions licensed under the Banking Act and Micro and small enterprises licensed under the Micro and small enterprises Act;
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. The computation of EBITDA shall exclude any exempt income;
iv. Apply to taxpayers in the extractives industry who currently have a different debt to equity ratio; and

v. Apply to interest and payments similar to interest including payments made to secure debt financing.

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

Effective date: 1 January 2022

Deemed interest

The definition of deemed interest has been reintroduced in the Income Tax Act. This has been reintroduced alongside the new thin capitalization provisions and will affect persons with interest free loans controlled by a non-residents alone or together with four or less persons.

Effective date: 1 January 2022

Country by Country (CBC) reporting

The Act has introduced 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 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 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 Act has included 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 scope of tax rebate enjoyed by employers who employ at least 10 university graduates under 6-12 months, apprentice contracts has been broadened to include to include graduates from technical, vocational education and training institutions ("TVETS").

This will incentivize 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 Act has amended 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. The LOB provisions will however not apply to companies listed in the stock exchange.

Effective Date: 1st July 2021

Transitional provisions for ID on bulk storage facilities

The Act has extended the transitional period for 150% ID on construction of bulk storage facilities in support of construction of the SGR. The investment allowance shall be computed at 150% of the capital expenditure. The transition period has been extended to 31st December 2021.

Effective Date: 1st January 2022

Computation of Capital Allowances

The Act has amended various provisions under the second schedule of the ITA relating to capital allowances as follows;

- Capital allowances will be computed on a straight-line basis instead of reducing balance 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. That is, 50% in the first year of use and 25% per year, on a straight-line basis for the balance.
- Civil works have been included and defined in the second schedule as well as farmworks which are eligible for capital allowances.
- Introduction of 100% ID on capital expenditure incurred on cumulative investments outside Nairobi and Mombasa of at least Kes 2B.
- For investments of the same value made in preceding years on or before 25th April 2020, the ID rate of 150% shall be applicable.
- For investments made outside Nairobi and Mombasa County of up to 250 M, ID of 100% of the capital expenditure will be allowable this includes persons in a SEZ.

These amendments will serve to hasten align the treatment of capital allowances across industries. Further the reintroduction of ID at 100% will be an incentive to persons making substantial capital investments.

Effective Date: 1st January 2022

Investment Allowance for Independent Electricity Producers

Producers of electricity who do not supply to the National grid will be able to enjoy investment allowance. 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

Withholding Tax in the Mining and Petroleum Sector

Withholding tax rate on payments made by a licensee or contractor to non-resident subcontractors shall increase 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 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 Act will align interest restriction for contractors or licensees in mining and petroleum operations to other sectors (30% of EBITDA).

Effective Date: 1st January 2022

B. VALUE ADDED TAX

VAT treatment of exported services

The Finance Act has moved exported taxable services from Zero rated to exempt. However, transportation services related to goods originating in Kenya where transportation ends outside Kenya shall remain zero rated.

The amendment 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 as they will not be able to claim input VAT and will no longer be eligible for VAT refunds.

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 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 Act has amended 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 charging section for DST has been amended to include supplies carried out over the **"internet or an electronic network"** or through a digital marketplace. Previously, the provision only refers to digital services as supplies made through a digital marketplace.

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

Effective: 1st July 2021

Restricted for Input VAT

Blocked items have been increased to include input VAT incurred in hiring or leasing of passenger cars or minibuses.

Effective: 1st July 2021

Changes in VAT status

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

Item	Previous rate	Current 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 to this Chapter	16%	Exempt	
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 exemption from value added tax: Provided that this /;;;shall apply to the unexpired period of the contract or agreement and upon recommendation by the CS responsible for matters relating to energy.	16%	Exempt	This will be beneficial for persons investing in projects with the Government. VAT incurred will not be claimable for the taxpayer 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 therapeutic respiration apparatus upon approval by the CS responsible for matters relating to health.	16%	Exempt	
Other breathing appliances and gas masks, excluding protective masks having neither mechanical parts nor replaceable filters	16%	Exempt	

upon approval by the CS responsible for matters relating to health.			
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 matters relating to health.	16%	Exempt	
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	
Pre-fabricated bio digesters and Biogas	16%	Exempt	
Exportation of taxable services excluding The transportation of goods originating in Kenya to a place outside of Kenya	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.
Transportation of sugarcane from farms to milling farms	Exempt	Zero rated	An incentive for transportation costs associated with sugar industry

C. EXCISE DUTY

Introduction of the Definition of "compound"

The Finance Act 2021 will introduce 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 Act 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

Notice for remission of excise duty

A notice of remission of beer or wine made from sorghum, millet, cassava or any other agricultural will be laid before parliament for review. The notice shall be laid within 21 days of the notice being issued. This should provide clear procedures and timelines of applying for the remission.

Provision for rebate on Excise Duty on the Bulk Data

Excise duty paid for internet data by a licensed person who purchases the bulk data for resale, 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 Act has amended the definition of other fees to the exclude on fees or commissions earned in respect of a loan from excise duty. This is meant to expand the tax base.

Effective: 1st July 2021

Amendments to the First Schedule of the Excise Duty Act

Amendments	Previous Status	Current Status	Comment
Imported Sugar confectionary	Taxable at Kes 20 per Kg	Taxable at Kes 35 per Kg	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	This will now exclude glass bottles imported from within the EAC	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	This will increase the tax base as the advalorem rate will be based on the value of the motorcycle.

		the value of the motorcycle.	
Jewelry of tariff 7113 and 7117	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 1,200 per kg	This provision will capture such products previously not within the ambit of excise duty.
Betting, lottery, gaming transactions and prize competitions	Not subject to excise as per Finance Act 2020.	Subject to excise duty at 7.5% 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
Imported items such as eggs, furniture, pasta, onions, potatoes, potato crisps	Not subject to excise duty	Subject to excise at 25% except pasta taxable at 20%	This will increase the tax base whilst making locally sourced items more competitive.
Articles of plastic tariff 3923:30:00, homopolymers and emulsion B.A.M	Not subject to excise duty	Subject to excise at 10%	This will increase the tax base of excise duty.
Telephone and internet data services	Subject to excise at 15%	Subject to excise at 20%	This will increase the tax base of excise duty.
Illuminating kerosene supplied to manufacturers of paint, resin and shoe polish subject to amounts approved by the Commissioner	Subject to excise	Exempt from excise duty.	This will incentivize manufacturers of the finished products.
Services provided by a telecommunications service provider on the sale of ring back tune to subscribers	Subject to excise	Exempt from excise duty	This is a benefit to subscribers of such services.

D. TAX PROCEDURES ACT

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

The scope of the Tax Procedures Act will include fees, levies and taxes provided for under the Miscellaneous Fees and Levies Act 2016. The TPA will now provide for procedural issues on these levies such as the administration of refunds, penalties and interest. This will in turn consolidate the administration of procedures for tax laws.

Effective date: 1st July 2021

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

The TPA will now 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 Act 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 TPA will now 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 Act has introduced 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 Act has introduced 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 or nil	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

Relief from liability due to difficulty in recovery of taxes

The TPA has been amended 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 Act has amended the TPA to exempt 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 TPA provisions outlining powers that the Commissioner has to exempt a supplier who is in continuous credit position for a period of not less than 24 months from WHVAT have been deleted.

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. The amendment has not provided for transitional period for taxpayers who currently have an exemption.

Effective date: 1st July 2021

Abolition of rental income amnesty

Rental income amnesty provisions have been deleted from the TPA. Taxpayers can still however take advantage of the Voluntary tax disclosure program to apply for amnesty of penalties and interest on undisclosed income.

Effective date: 1st July 2021

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

The TPA is amended with regards to refund applications such that once 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 scope of admissible evidence will 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

Other amendments include 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

Compliance measures for digital marketplace suppliers

The Act requires persons subject to DST to obtain a PIN in order to carry out business of an electronic nature including through a digital marketplace.

The Act will allow the Commissioner to seek the intervention of other relevant authorities in order to ensure compliance for Non-residents required to account for DST. This is a move to ensure compliance with 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 Act 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 Act has amended the TPA to include provisions 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 TPA will be amended to include the Miscellaneous Fees and Levies Act 2016 as part of the Tax Procedure Act (TPA). This means that administrative procedures relating to levies and fees shall be catered for under the TPA. This includes procedures related to refunds.

Effective date: 1st January 2022

Exemption of goods for RDL and IDF for public interest purposes

Goods, materials, machinery and vehicles imported by the Police Service and the KDF shall be exempt from RDL and IDF, if imported for the use of projects that are of public interest.

Effective date: 1st January 2022

Exemption of Anti-adulteration levy

Registered manufacturers of paints, resin and shoe polish shall be exempt from anti-adulteration levy on imported illuminating kerosene.

Effective date: 1st January 2022

F. MISCELLANEOUS LAWS

The Finance Act 2021 has amended various pieces of legislations. We outline the amendments and their implications below;

Stamp Duty Act

Conveyances or transfers in favor of a registered family trust shall be exempt from Stamp duty. This includes dispositions related to registered trusts.

Effective date: 1st July 2021

Capital Markets Act

Tribunal

An appeal 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 term “broker” has been redefined to include 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, a prescribed annual license fee to be paid by a registered insurer which will be **effective from 1st January 2022.**

Closed Fund Business

The Act has introduced “closed fund business” which 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 **KRA Act** has been amended to increase the reward fees given to a whistle blower from KES. 100,000 to KES. 500, 000. Likewise, there is an increase the reward fees for an individual who voluntarily gives up information that leads to recovery of taxes to be raised from KES 2M - 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 Act has included 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 Retirements Benefits Act will be amended 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 Retirement Benefits Act has been amended 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 measure is going to increase the public confidence while dealing with corporate trustees.

Further amendments include 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 Central Depositories Act has been amended by introducing provisions on authorized nominees. An authorized nominee 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

Further provisions have been put in place 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

The amendments in the Finance Act have not varied much from the provisions outlined in the Budget speech as well as Finance Bill 2021. It is worth noting that various provisions were amended such as VAT status on exported services, minimum tax exemptions, amendments to excise duty status among others.

Let's talk

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

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