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Key Tax Changes Introduced By The Finance Act, 2023

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Overview of the Key Tax Changes Introduced by The Finance Act 2023

In May 2023, we released a legal alert analysing the Finance Bill, 2023 and its proposed implications. The Bill underwent significant public participation and a contentious Parliamentary debate. It was ultimately enacted as the Finance Act, 2023, receiving Presidential assent on 26 June 2023. The Act includes provisions that were expected to take effect on 1 July 2023, 1 September 2023, and 1 January 2024.

However, on 30 June 2023, just one day before most of the legislative changes were set to take effect, the High Court granted conservatory orders delaying the implementation of the Act until 5 July 2023. This means that until the High Court provides further directions after its hearing on 5 July 2023, the Kenya Revenue Authority is prohibited from implementing the Act's provisions that were initially scheduled to take effect on 1 July 2023.

The Act introduces tax measures that are aimed at expanding the taxes collected by the Government of Kenya, against the backdrop of fiscal pressure in the currently prevailing economic circumstances. It makes a raft of amendments to tax-related laws in Kenya, including the Income Tax Act (Chapter 470, Laws of Kenya), the Value Added Tax Act, 2013, the Tax Procedures Act, 2015, the Miscellaneous Fees and Levies Act, 2016 and the Excise Duty Act, 2015 amongst others.

Please note that this alert provides a summary of the changes set out in the Act. It does not fully analyse the changes, nor does it fully describe their impact on any particular set of circumstances or group of persons. If you believe that any aspects discussed here apply to your circumstances, we advise seeking specific tax advice.

1. AMENDMENTS TO THE INCOME TAX ACT

a) Much-needed clarity for players in the betting, gaming and lottery sector

Effective Date: 1 July 2023

The Act has replaced the current definition of "winnings" with a much clearer definition of the term which is set out as "the payout from a betting, gaming, lottery, prize competition, gambling or similar transaction under the Betting, Lotteries and Gaming Act, excluding the amount staked or wagered in that transaction." The Bill had proposed to amend the definition of the term "winnings" to include the amount wagered or staked, the effect of which would have subjected punters to withholding taxes on the gross amounts paid to them upon winning. The Act has now provided clarity on this position and provided guidance on this issue which has also been litigated in the Tax Appeals Tribunal and in the High Court in the recent past.

b) Widening the tax base by imposing income tax on content creators

Effective Date: 1 July 2023

Kenya has been often ranked as having a large young population that has been active on platforms such as YouTube, TikTok, Instagram amongst others. In an apparent move to capture revenue from the digital content creators, the Act has introduced a new category of income derived from monetisation of digital content. The Act provides that income from these activities shall be subject to tax through the withholding tax mechanism at the resident rate of 5% (previously proposed at 15% by the Bill) when paid to Kenyan tax resident persons and 20% when paid to non-residents. The amount deducted should be remitted to the Kenya Revenue Authority (KRA) within a period of five (5) working days from the time of deduction and payment of the amount.

The Bill defines "digital content monetisation" to mean "offering for payment entertainment, social, literal, artistic, educational or any other material electronically through any medium or channel..." and it includes partnering with brands, sponsorships, affiliate marketing, subscription services for online content, earning commissions or fees from crowdfunding amongst others. It appears to us that the objective of this provision is to acknowledge the growing content creation and creative sector in Kenya and to bring such income into the tax net.

c) Immovable property now defined

Effective Date: 1 July 2023

The Act introduces a new definition for immovable property which will include land, any estate, rights, interest or easement and anything attached to the earth or permanently fastened to anything attached to earth. Interestingly, the definition also includes intangibles such as debt secured by mortgage or charge on immovable property, a mining right, interest in a petroleum agreement, mining information or petroleum information are included in the definition of immovable property.

This definition is relevant to the Eighth Schedule to the ITA (which deals with capital gains tax) and the Ninth Schedule to the ITA (which deals with taxation of extractive industries).

d) Limitation of period within which foreign exchange losses can be claimed

Effective Date: 1 July 2023

It has been the case for some years now that a company which is controlled by non-resident persons would not be allowed to deduct realised foreign exchange losses when it is thinly capitalised but would instead defer the deduction of these foreign exchange losses until such point as the company would cease to be thinly capitalised. The thin capitalisation provisions were however amended recently and replaced with a test based on Earnings Before Interest Taxes, Depreciation and Amortisation (EBITDA) test.

To align the foreign exchange losses deferral provisions with the new EBITDA test, the Act now limits the period within which foreign exchange losses can be deferred and claimed to not more than five (5) years from the date the loss was realised. This is a significant change from the previous provisions which did not expressly limit the time period within which a foreign exchange loss could be claimed.

Companies which are thinly capitalised and have foreign exchange losses should carefully monitor their finances to ensure that they do not lose out on foreign exchange losses deductions, and age their foreign exchange losses to ensure the oldest, being not more than 5 years old, are utilised first when the company is no longer thinly capitalised.

e) Spotlight on start-ups and taxation of share ownership schemes offered by start-ups

Effective Date: 1 January 2024

The Act has passed the proposals introduced by the Bill to defer the tax point for benefits obtained by employees who are offered company shares instead of cash payments by an eligible start-up. We believe that this amendment is geared towards continuing to bolster Kenya as a hub of an accelerated growing community of venture capital entrepreneurs, particularly in the fintech space. An "eligible start-up company" has been defined as a business incorporated in Kenya whose turnover is not more than KES 100 million and which does not carry out management, professional or training business, which has not been formed as a result of restructuring of an existing entity and which has existed for less than five (5) years.

Where a share ownership benefit has been granted by an eligible entity, it is to be taxed within thirty (30) days of the following occurrences, whichever happens earlier: a) the expiry of five (5) years from the end of the year the shares were awarded; b) disposal of the shares by the employee; or c) when the employee ceases to be an employee. The value of the benefit which will be subjected to tax will be the fair market value of the shares at the date on which any of the above scenarios apply.

f) Revised Turnover Tax thresholds expected to increase overall tax collection

Effective Date: 1 July 2023

During the COVID-19 pandemic, the Government of Kenya introduced a number of measures impacting taxation of small and medium businesses which generated a turnover of more than KES 1 million but less than KES 50 million. Under these changes, a small or medium business would pay turnover tax at the rate of 1% of the gross receipts received by it.

In an apparent change of policy, the upper limit of turnover tax threshold has now been reduced from KES 50 million to KES 25 million. Following the enactment of this provision, businesses whose turnover from business is between KES 1 million and KES 25 million will be subject to turnover tax. Additionally, residents whose turnover exceeds KES 25 million will now be subject to corporation tax at the rate of 30% of their taxable profits. The Act also revises the turnover tax rate from 1% to 3% of gross receipts.

Given the challenges of compliance with this tax in previous years, it remains to be seen what new measures the KRA will put in place to beef collection given the well documented challenges of informality including record keeping and attitude towards compliance.

g) Widening the tax net through taxation of digital assets

Effective Date: 1 September 2023

Most countries in the world have been grappling with the taxation of cryptocurrencies and similar digital assets. Kenya, being ranked as one of the leading African countries in relation to investments in cryptocurrency and other blockchain-related transactions has joined the fray and has decided to introduce an income tax referred to as the Digital Asset Tax (DAT) on the income derived from the transfer or exchange of digital assets.

The Act provides a definition of such “digital assets” to include anything of value that is not tangible such as cryptocurrencies, token codes and Non-Fungible Tokens (NFTs), among others. The DAT is intended to be payable at the rate of 3% by the person deriving the income of the gross fair market value consideration received. The obligation to remit the DAT shall be on the owners of platforms who facilitate exchanges of these assets. Where the owner of the platform is non-resident, they will be expected to be registered for tax in Kenya through the simplified registration regime which framework has already been tried and tested in the taxation of non-resident providers of electronic services through the digital services tax. We note however, that a policy framework for the taxation of such assets is not in place despite the new DAT regime that has been introduced.

h) Introduction of tax on repatriated income and reduced tax rate for branches of foreign companies

Effective Date: 1 January 2024

It was previously the case that permanent establishments in Kenya of foreign companies (usually described as branches of foreign companies) are taxable at the rate of 37.5% of their total taxable income with no further tax prescribed for repatriation of profits by the branch. The Act now reduces the income tax rate for a non-resident who carries on business in Kenya through a permanent establishment or branch to 30% from 37.5%. Furthermore, the Act introduces income tax on repatriated income using a prescribed formula to be used to compute the repatriated income.

Noting the changes to the corporation tax rate of a branch now match the rate applicable to a resident company, the Third Schedule now prescribes a tax rate of 15% equivalent to the withholding tax rate applicable on dividends paid by a resident company to a non-resident shareholder. This tax measure places the tax rates for Branches at par with resident companies operating in Kenya.

i) Disallowance of tax credits or refunds in relation to transfer pricing adjustments

Effective Date: 1 July 2023

The Act amends the ITA to disallow refunds or credits for withholding taxes paid in relation to management, professional fees, royalties, interest and rent, made to a non-resident that have been adjusted down in respect of such payments following a tax audit.

The implication of this is that in the event of a tax audit which results in a transfer pricing adjustment, resident companies that are deemed by the KRA to have made excessive payments to their non-resident related parties will not be allowed to take a credit of or claim a refund of the withholding tax deducted on such excess payments in order to settle additional tax assessed by KRA as a result of the disallowed payments.

j) Clarification on the filing requirements of the Country-by-Country (CbC) report, Master file and Local file

Effective Date: 1 July 2023

The Act clarifies the entities required to file a Country-by-Country report, Master File and Local File by introducing a new provision stating that each ultimate parent entity that is resident in Kenya and whose consolidated group turnover including extraordinary or investment income is at least ninety-five billion shillings in a financial year shall file a country by a country report with the Kenya Revenue Authority.

The Act also clarifies that a constituent entity will be required to file a Country-by-Country report where either, the ultimate parent entity is not obligated to file a Country-by-Country report, or the jurisdiction in which the parent entity is resident has a current international tax agreement with Kenya but does not have a competent authority agreement with Kenya at the time of filing the Country-by-Country report; or there has been a systemic failure of the tax jurisdiction of the ultimate parent entity.

This amendment appears to be a clean up to the Finance Act, 2022 amendment which created some ambiguity on the exclusion criteria for the resident companies from filing of country-by-country reports. The new amendment clarifies the three (3) criteria for filing of country-by-country reports are mutually exclusive. That is: (i) The ultimate parent entity is not obligated to file a country-by-country report in its jurisdiction of tax residence); (ii) the jurisdiction in which the ultimate parent entity is resident has a current international tax agreement which Kenya is a party to but does not have a competent authority agreement with Kenya at the time of filing the country-by-country report for the reporting financial year; or (iii) there has been a systemic failure of the jurisdiction of tax residence of the ultimate parent entity that has been notified by the Commissioner to the constituent entity resident in Kenya.

k) Relief for contributions made to a post-retirement medical fund

Effective Date: 1 January 2024

Taxpayers who contribute to a post-retirement medical fund will be entitled to a personal relief in the computation of the tax payable in each year of income up to a limit of either 15% of the contributed amount or KES 60,000 per year, whichever is lower. The post-retirement medical fund was operationalised in 2018 although there has been low uptake in the program considering that employees already make contributions to pension schemes where the lump sum pension payments made to persons above 65 years of age are tax exempt, as well as various insurance products with pension benefits, to cater for their retirement needs including medical expenses.

l) Deduction of expenses incurred outside Kenya to be permitted

Effective Date: 1 July 2023

The Act deletes the provision in the ITA limiting the deduction of expenses incurred outside Kenya for which the Commissioner determines that no adequate consideration has been given. In particular the amendment removes the cap of KES 150,000 on remuneration for services rendered by the non-resident directors (other than whole-time service directors) of a non-resident company the directors whereof have a controlling interest in excess of 5% of the total income of that company. The amendment also removes the discretion of the Commissioner to determine whether head office expenses are just and reasonable allowable deductions of executive and general administrative expenses incurred outside Kenya by the head office of a resident company.

With the removal of the Commissioner discretion to disallow expenditure incurred outside Kenya to related parties, businesses will be expected to fall back to the application of arm's length principle to justify all such expenditure.

m) Overhaul of taxation of member clubs and trade associations

Effective Date: 1 July 2023

The Act has made major revisions to clarify that only the gross receipts of the revenue account of member clubs and trade associations (excluding joining fees, welfare contributions and subscriptions) shall be considered income from a business subject to tax under the Act. This clarifies that joining fees, welfare contributions and member subscriptions earned by these entities are no longer subject to tax.

n) More manufacturers to benefit from SOFA arrangements

Effective Date: 1 July 2023

The Act amends the provisions relating to Special Operating Framework Arrangements to provide that in addition to manufacturers of human vaccines, other manufacturing activities including refining shall be subject to the rate of tax specified in the special operating framework arrangement with the Government. This amendment is likely to attract large capital investments in other manufacturing sectors as it did in the manufacture of human vaccines.

o) Determination of preferential regimes for qualifying intellectual property income paid to non-residents

Effective Date: 1 January 2024

The Act has introduced a new provision introducing a formula for determining how to compute qualifying intellectual property income that is entitled to receive preferential rate offered by preferential regimes established under Kenya law. The intention of this measure is to domesticate the OECD Base Erosion and Profit Shifting (BEPS) Action 5 minimum standard "nexus approach". The nexus approach uses expenditures as a proxy for substantial activity and ensures that taxpayers can only benefit from IP regimes where they engaged in research and development and incurred actual expenditures on such activities. This measure is designed to ensure that Kenya's preferential regimes such as SEZ and EPZ do not facilitate base erosion and profit shifting (BEPS) by requiring substantial activity for qualification of the preferential tax rates prescribed by that specific regime.

This amendment will impact foreign and Kenyan companies making royalty payments for patents, copyrights including copyrighted software programs, trademarks to Kenyan based preferential regimes by ensuring that the actual expenditure in development of the IP is incurred within the preferential regime.

p) Deduction of withholding tax from professional fees and remittance of rental income tax

Effective Date: 1 July 2023

The Act widens the scope of withholding tax to also apply on payments for sales promotion, marketing and advertising services in an attempt to widen the tax base that is aimed at meeting the Government's revenue target for the next financial year.

Separately, the Act also amends the ITA to provide that certain persons shall be appointed by the Commissioner and will now be required to deduct tax from rental income that they receive on behalf of owners of premises. Such persons will be expected to remit the tax deducted to the Commissioner within five (5) working days after the deduction is made, together with a return indicating the amount of tax deducted.

q) *Mandatory remittance of withholding tax within five (5) working days*

Effective Date: 1 July 2023

The new amendments require that the tax deducted from income subject to withholding tax should be remitted to the Commissioner within five (5) working days after making this deduction, which the Bill had earlier proposed to be a duration of twenty-four (24) hours. The previous provisions of the law required this deduction to be remitted before the twentieth day of the month following the month in which the deduction was made.

This requirement will now apply with respect to all forms of withholding tax, including payments on account of interest, dividends, management, and professional fees amongst others. This a drastic change which will require taxpayers to reconfigure their systems to ensure that the strict compliance obligations are met. It should be noted that penalties for non-compliance will apply for failure to remit the withholding taxes within the stipulated timelines.

r) *Investment Deductions for facilities supporting the Standard Gauge Railway extended for an additional year*

Effective Date: 1 July 2023

The Act has extended the period for claiming an investment deduction for construction of bulk storage and handling facilities supporting the Standard Gauge Railway operations where capital expenditure is at least KES 5 billion and minimum storage is one hundred thousand metric tonnes of supplies. Entities that qualify can now claim this investment deduction up to 31 December 2024 and will continue to benefit from investments deductions equal to 150% of the capital expenditure.

s) *Income of Human Vaccines manufacturers no longer exempt*

Effective Date: 1 July 2023

The Act deletes the provisions which exempted the income of a company undertaking manufacture of human vaccines from tax, however, royalties and interest paid by a company undertaking manufacture of human vaccines are now exempt from tax to further support local manufacturing of human vaccines in Kenya.

t) *New benefits for SEZs*

Effective Date: 1 July 2023

The Act introduces new provisions that exempt gains arising on transfer of property within a special economic zone (SEZ). Additionally, it also exempts royalties, interest, management fees, professional fees, training fees, consultancy fees, agency or contractual fees paid by a SEZ developer, operator or enterprise to a non-resident person from tax in the first ten (10) years of its establishment. We expect that with these incentives, more investments will be seen in SEZs.

u) Introduction of new income taxes for individuals

Effective Date: 1 July 2023

The Act, in yet another move to widen the tax base, introduces two (2) new tax brackets to the graduated income tax bands. All income earned between KES 6,000,000 – KES 9,600,000 per annum (KES 500,000 – KES 800,000 per month) will be subject to 32.5% while all income above KES 9,600,000 per annum (KES 800,000 per month) will be subject to 35% . As has been the case in the past, the graduated income tax bands apply to employment income, income from services rendered as well as business income earned by individuals.

v) Reduction in the tax rate for residential rental income tax

Effective Date: 1 January 2024

The Act reduces the residential rental income tax rate from 10% to 7.5% on the gross amount payable which is a win for landlords but is also aimed at enhancing compliance and encouraging landlords to pay tax under the residential rental income tax regime.

w) Clarification on entities that qualify for tax exemptions

Effective Date: 1 July 2023

The Act introduces a substantive definition of entities that would qualify for tax exemptions under paragraph 10 of the First Schedule to the ITA, to mean entities established to benefit the public in a transparent and accountable manner without restriction or discrimination, and which use their assets/income exclusively for the purposes for which they were established without conferring a private benefit to individuals. This amendment will restrict availability of tax exemptions for entities that are established for the benefit of a certain class of individuals.

x) Deletion of diminution allowance

Effective Date: 1 July 2023

The Bill proposed to increase the diminution allowance provided under Section 15(2)(g) of the ITA from 33% to 100% of the value of loose tools and small implements such as utensils or similar article employed in the production of income. The Act has deleted the provision which provided for diminution allowances but has failed to provide the new provision, which appears to be a drafting error which will negatively impact taxpayers because the outcome is that diminution allowance will no longer be applicable.

y) Thin capitalisation / interest deductibility

Effective Date: 1 January 2024

The Act amends the interest restriction rule which capped deductible interest at 30% of earnings before interest, tax, depreciation, and amortization (EBITDA) regardless of the source of the loan. Under the new provisions, interest restriction (limited to 30% of EBITDA) will only apply on loans from non-resident lenders and will not apply on loans borrowed from local lenders, which is a welcome move. The Act also repeals an exemption which had been granted to manufacturers who had met certain conditions.

The Act further grants a deduction for any disallowed interest paid to a non-resident to be carried forward in the three subsequent years of income for deduction, to the extent that the 30% EBITDA rule is met in the respective years when the deduction is claimed, which may mitigate the overall impact of disallowed interest for entities with loans from non-resident lenders.

z) Various changes in the investment allowances regime

Effective date: 1 July 2023

The Act introduces the following changes to the Second Schedule to the ITA in respect of investment allowances:

i. industrial building allowance at the rate of 10%. An "industrial building" is defined to mean a building in use for purpose of transport, bridge, tunnel, inland navigation and electricity or hydraulic power undertaking;

ii. docks at the rate of 10%. A "dock" is defined to mean a container terminal, berth harbour, wharf, pier, jetty, storage yard and other works used to load and unload a vessel; and

iii. the Act extends accelerated investment allowances of 100% to persons who invest in hotel buildings, buildings used for manufacture, and machinery used for manufacture where the investment value outside of Nairobi and Mombasa is KES 2 Billion or the investment is within a special economic zone. Notably, the definition of manufacture has been amended to include refining.

aa) Scope of Capital Gains Tax Expanded

Effective Date: 1 July 2023

A drastic change in the law on capital gains tax means that any capital gains arising from the sale of shares in foreign entities which derive more than 20% of their value directly or indirectly from immovable property situated in Kenya will be subject to capital gains tax (CGT) in Kenya. Similarly, CGT will also apply where a non-resident person who holds more than 20% of the share capital of a Kenyan company directly or indirectly disposes off their interest.

We were expecting clarity on various aspects relating to these new provisions, such as who has the obligation to pay the CGT circumstances where a disposal is undertaken outside Kenya, as the liability could be imposed on the Kenyan entity in which the shares have been transferred or on the non-resident person who disposes off the shares in the offshore entity. Unfortunately, the provisions of the Act are the same as the Bill and there is no clarity on the application and implementation of these provisions.

bb) Criteria for re-basing for CGT purposes

In certain instances, such as internal group reorganisations and transfers between family members, transfer of property would qualify for CGT and other tax exemptions. Upon transfer, the value at which property is transferred would be the base cost which would be relied on for a future transfer or sale of the property.

The Act has introduced a restriction and now provides that where a CGT exemption is relied on in a restructuring transaction involving a transfer of property, any subsequent transfer of the property in a taxable transaction within a period of five (5) years will not rely on the re-basing in value of the property. This means that for the re-basing in value to be relied on for a future transaction with a third party, such a sale would need to be undertaken after the expiry of 5 years from the date the tax-exempt restructuring transaction is undertaken.

While it would be expected that these new provisions would apply to transactions going forward, there is a likelihood that the Kenya Revenue Authority will seek to apply the provisions to transactions that took place before the effective date, such that any exempt transaction before the effective date will need to be meet the 5-year period in order to benefit from any re-basing in value.

cc) Due date for payment of CGT

The existing provisions relating to the CGT payment due date were declared unconstitutional by the High Court in March 2017. The Act amends the due date for CGT payment to be the earlier of receipt of the full purchase price by the vendor or registration of the transfer.

dd) CGT Exemption on Group Restructuring

The transfer of property within a Group, which did not involve a transfer to a third party, was exempt from CGT. The Act has amended these CGT exemption provisions to only apply to Groups which have been in existence for at least twenty-four (24) months. Therefore, in order to qualify for a CGT internal group restructuring exemption, one will need to prove that both the transferor and transferee have been part of the same group, i.e., at least 50% of the shareholding in one company is held by the other company or at least 50% of both companies has been held by a 3rd company, for at least 24 months.

2. AMENDMENTS TO THE TAX PROCEDURES ACT

a) A refund decision to be an appealable decision directly to the Tax Appeals Tribunal

Effective Date: 1 July 2023

The Act deletes a ''refund decision'' from the definition of a ''tax decision'' under the TPA. This provision brings clarity in the tax dispute regime in that refund decisions will no longer be deemed to be tax decisions that ought to be objected against before moving to the Tax Appeals Tribunal. With this amendment, refund decisions now automatically qualify as "appealable decisions" that are to be appealed directly to the Tax Appeals Tribunal. There had been confusion in the provisions of the TPA where Section 3 of the TPA provided that a refund decision was a tax decision which should be objected to prior to appealing the same at the Tax Appeals Tribunal, while Section 47 of the TPA provided that a refund decision was an appealable decision that automatically could be challenged at the Tax Appeals Tribunal.

b) Introduction of the electronic tax invoice system

Effective Date: 1 September 2023

The Act introduces an electronic system through which electronic tax invoices will be issued and records of stocks maintained. The amendment, which is aimed to legitimise the Tax Invoice Management System (TIMS) that the KRA is already implementing, provides that any person who carries on business will be required to issue an electronic tax invoice through the system and maintain a record of their stock in the electronic system. The Act further seeks to enhance compliance with TIMS by providing that deductions for corporate tax purposes will not be allowed for expenses which are not supported by an invoice issued through the electronic tax invoice system.

The Act also provides that the Commissioner may, by notice in the Gazette, exempt a person from the requirement to maintain an electronic tax invoice. It is not clear on what basis a person would be eligible for exemption and we may therefore have to wait and see if the Commissioner will issue guidelines to this effect.

This appears to be in line with KRA's agenda to leverage technology to automate taxpayers' transactions and records in a bid to enhance tax compliance and ensure an electronic trace of all payment records for taxpayers.

c) Repeal of tax abandonment powers

Effective Date: 1 July 2023

The Act has repealed the powers granted to the Commissioner and Cabinet Secretary in respect of abandonment of tax. The provisions previously allowed the Commissioner to abandon, subject to prior approval by the Cabinet Secretary the payment of tax where the Commissioner determines that it may be impossible to recover an unpaid tax or there is undue difficulty or expense in the recovery of an unpaid tax or there is hardship or inequity in relation to the recovery of an unpaid tax. The amendment in effect seems to echo and crystalize the sentiment of the KRA in its notice earlier this year in which it announced the suspension of all tax abandonment measures.

d) ***Repeal of waiver provisions and introduction of a limited tax amnesty on penalties, interest and fines***

Effective Date: 1 September 2023

The Act has repealed the provisions relating to the remission of penalties and interest and therefore neither the Commissioner nor the Cabinet Secretary for the National Treasury have powers to grant waiver of penalties and interest. Previously, taxpayers could apply to the Commissioner for the remission of the penalties or interest payable provided reasons are provided to justify the request for waiver, and in certain cases, the waiver applications are escalated to the Cabinet Secretary for the National Treasury.

In the same breath, the Act introduces an amnesty on penalties or interest where a person had paid all the principal tax due before 31 December 2022. In instances where all the principal tax due had not been paid prior to 31 December 2022, a taxpayer shall apply to the Commissioner for an amnesty of interest or penalties on the unpaid tax and propose a payment plan for the outstanding amount. In addition to the above, the Section 37E of the TPA has further been amended at the Committee Stage to the effect that any principal tax that crystallized as at December 2022 and which remains unpaid by 30 June 2024 shall attract interest and penalties for which no amnesty shall be granted.

This comes against the backdrop of Voluntary Tax Disclosure Programme (VTDP) introduced by Finance Act, 2020 which is due to expire on 31 December 2023. This new measure, although seemingly limited as it only relates to unpaid taxes as at the end of 2022 and not unpaid taxes beyond this period, in our view is aimed at enhancing collection of revenue for the Government and reduce the growing tax debt by taxpayers by according an opportunity for tax debtors to regularise their compliance by paying unpaid principal taxes.

e) ***Issuance of agency notices to enforce compliance***

Effective Date: 1 July 2023

The Act introduces specific grounds upon which the Commissioner can issue an agency notice. These include, where a taxpayer has defaulted in paying an instalment tax, where the Commissioner has raised an assessment and the taxpayer has not objected to or challenged the validity of the assessment within the prescribed period, where the taxpayer has not appealed against an assessment specified in an objection decision within the prescribed timelines, where the taxpayer has made a self-assessment and submitted a return but has not paid the taxes due before the due date lapsed or where the tax payer has not appealed against an assessment specified in a decision of the Tribunal or Court.

These new measures are aimed at expanding the circumstances under which the KRA can issue an agency notice unlike previously whereby KRA could only issue an agency notice where a taxpayer had not appealed an objection decision to the Tribunal within the prescribed timelines.

f) Mandatory remittance of withholding VAT within five (5) working days

Effective Date: 1 July 2023

The Act reduces the timeline within which a withholding VAT agent should remit withheld VAT to the KRA to five (5) working days after the deduction was made unlike in the previous regime where the withholding VAT agent would be required to remit the tax withheld before the 20th day of the month following the month in which the deduction is made.

In our view, this new measure will likely create an administrative burden for taxpayers especially for taxpayers with multiple transactions, and there may be requirements to reconfigure their systems to meet the compliance obligations.

g) Overpaid tax to be refunded within six months

Effective Date: 1 July 2023

The Act provides that an application for the refund an overpaid tax that has been ascertained by the Commissioner shall be refunded within a period of six (6) months from the date of ascertainment and if the Commissioner fails to refund the tax, the overpaid tax shall be applied to offset the taxpayers outstanding tax debt or future tax liabilities. Further, where a refund application is being subjected to an audit, the Act requires the Commissioner to ascertain and determine the refund application within one hundred and twenty (120) days failure to which the application will be deemed to have been approved.

This change in our view is a welcome move for taxpayers who have over the years faced delays in having their verified applications for refunds processed in time. The amendment also acknowledges the cash flow challenges that may be experienced by the Government in refunding overpaid taxes and therefore taxpayers shall be allowed to offset their existing or future tax obligations against such overpayments.

h) Extension of time for settlement of disputes out of court

Effective Date: 1 July 2023

The Act extends the time allowable for the settlement of a tax dispute outside of court from ninety (90) days to one-hundred and twenty days (120). This extension of time is in our view a welcome move and is aimed at promoting resolution of disputes outside the Court under the alternative dispute resolution mechanisms by according to disputing parties, more time to settle their dispute outside the Court system.

i) Domesticating international agreements on mutual administrative assistance in collection of taxes

Effective Date: 1 July 2023

The Act introduces an amendment to allow Kenya to give effect to any multilateral agreement that Kenya has entered into for mutual administrative assistance in collection of taxes. The Act has also provided a detailed procedure to be followed when a competent authority of a foreign tax jurisdiction is seeking assistance from the Commissioner for the recovery of a foreign tax debt. Currently, Kenya is a signatory to the Multilateral Convention on Mutual Assistance in Tax Matters which allows countries to assist each other in collecting tax debts.

3. AMENDMENTS TO THE VALUE ADDED TAX ACT

a) Zero rating VAT on the supply of exported services

Effective Date: 1 July 2023

VAT on the supply of exported taxable services shall be zero rated, making exported services from Kenya once again competitive in the region. The underlying impact of this is that a taxpayer who makes zero rated supplies will be entitled to claim input VAT incurred in making the taxable supplies.

This is a welcome move as it aligns our VAT legislation with international best practice unlike the position that has existed over the last twelve (12) months where exported services have been subjected to VAT at the standard rate of 16% with the exception of business processing outsourcing services.

b) VAT on liquified petroleum gases (LPG) and other Petroleum Products

Effective Date: 1 July 2023

The Act has deleted the VAT charging sections providing for reduced VAT rate of 8% on Petroleum Products and Liquified Petroleum Gas (including Propane).

Notably, the supply of Liquified Petroleum Gas (LPG) is now listed under the Second Schedule of the VATA as a zero-rated supply. While on the other hand, petroleum products which were subject to VAT at the reduced rate of 8% will be subject to VAT at the rate of 16%.

The move to zero rate LPG is a welcome move as it is aimed at promoting adoption of clean energy in line with the green agenda of the government to discourage the use of fossil fuels.

On the other hand, increase of VAT to 16% on the Petroleum Products which were previously subject to VAT at the rate of 8% is expected to increase the fuel prices and thus cost of transportation. This will also have a ripple effect on the cost of other goods and services and thus adversely impacting on cost of living taking into account Kenya's dependence on fossil fuels. In the long-term, the increase in fuel prices will make it more expensive to do business in Kenya which could lead to a decrease in economic growth.

c) VAT on Compensation for loss of taxable supplies

Effective Date: 1 July 2023

A bona fide owner of taxable supplies who having claimed the input VAT on the taxable supplies is later compensated upon the loss of the taxable supplies/goods will be required to account for VAT on the compensation where the compensation includes VAT. Where the compensation does not include VAT, the compensation shall be declared and subjected to VAT.

This amendment in our view impacts on the general insurance sector as compensations pay outs where input VAT had been claimed will be now considered as a taxable supply.

d) VAT Registration by digital service providers

Effective Date: 1 July 2023

The Act provides that digital service providers shall register for VAT whether or not they meet the turnover threshold of KES 5 million Shillings. This will provide clarity to digital service providers as there has always been some confusion on whether digital service providers who did not meet the VAT registration threshold of KES 5 million per annum in sales ought to register for VAT.

e) Recording keeping outside Kenya

Effective Date: 1 July 2023

Section 43 of the VATA is amended to allow for keeping of VAT records outside of Kenya. This is a welcome move which will provide flexibility particularly for digital service providers majority of whom do not have a presence in Kenya.

f) Zero rating of e-Mobility supplies

Effective Date: 1 July 2023

The Act has introduced zero rating on the following e-mobility supplies in a move to incentivise the e-Mobility sector:

- the supply of electric bicycles;
- the supply of electric motorcycles of tariff heading 8711.60.00;
- the supply of electric buses of tariff heading 87.02; and
- the supply of solar and lithium-ion batteries.

These new measures under the Act are a welcome move as they are aimed at creating mass adoption of electric vehicles. These incentives come amidst fast paced global conversations around the transition to clean energy and averting the negative and potentially disastrous impacts of climate change. For Kenya, these measures would be even more critical as incentivising the adoption of e-mobility will create demand for locally generated clean electricity where over 90% of Kenya's energy mix comes from renewable sources of energy such as geothermal, solar, wind and hydropower. Additionally, these measures will reduce the dwindling forex reserves that Kenya pays each year to import hydrocarbon fuel. Further, these measures will contribute significantly towards local assembling of the electric vehicles which will also create more employment opportunities for the Kenyan population.

g) Enhanced VAT exemptions on supplies in the medical sector

Effective Date: 1 July 2023

The Act has exempted from VAT the supply of various goods used in the manufacture of pharmaceutical products such as medicaments, packaging materials for pharmaceutical products and artificial body parts amongst others. We have listed these changes below under the detailed amendments to the First Schedule of the VAT Act.

Additionally, taxable goods used in the construction and equipping of specialised hospitals with a minimum bed capacity of 50 beds upon approval by the Cabinet Secretary will effective 1 July 2023 be VAT exempt. The Cabinet Secretary responsible for Health may issue guidelines for determining eligibility for the exemption. Notably the proposal in the Bill was to exempt taxable goods used in the construction of specialised hospitals with a 100-bed capacity.

h) Zero rating of inbound International Sea freight

Effective Date: 1 July 2023

The Act has zero rated (0%) inbound sea freight services offered by a registered person. This is in our view is to provide clarity on the VAT position of inbound sea freight services that have occasionally been treated as out of scope for Kenyan VAT purposes. Pursuant to these amendments, these services will be subject to VAT at the rate of 0%.

i) VAT on transfer of business as a going concern

The Bill had proposed to exempt from VAT the transfer of a business as a going concern. However, this proposal was not passed into law, and therefore the current position will be retained where the transfer of a business as a going concern will be subject to VAT at the rate of 16%.

j) Time of supply for the national carrier

Effective Date: 1 July 2023

The Act has provided clarity on the time of supply in the case of the national carrier, which shall be the date on which the goods are delivered, or services performed. Neither the Act nor the VAT Act has defined who the national carrier is, however, generally the national carrier refers to any aircraft or ship operated by or on behalf of the Government.

k) Amendments of provisions relating to refund of VAT on bad debts

Effective Date: 1 July 2023

The Act has deleted the provisions of the VAT Act which provided for refunds of bad debts and substituted it with a new provision. Under the new provisions, where a registered person has made a supply and paid VAT on that supply but has not received any payment from the purchaser within a period of three (3) years from the date of the supply or the person to whom the supply was made has been placed under statutory management through the appointment of an administrator, receiver, or liquidator, he may apply to the Commissioner for refund of the tax involved.

An application for refund shall be made before the expiry of ten (10) years from the date of supply which is an increase of time period from the current period of four years. The Act has also provided that the refund application shall be made in compliance with provisions of the Tax Procedures Act which provides that the Commissioner shall apply the overpayment in the following order; payment of any other tax owing by the taxpayer under specific tax law, any other tax owing by the taxpayer under anu other tax law and ant remainder refunded to the taxpayer.

Additionally, the Act provides that the refunds may be credited to the taxpayer's record for use against future VAT liabilities. Further, the taxpayers are now required to pay back any tax refunds received from the Commissioner within sixty (60) days where the tax refunded is subsequently recovered from the recipient of the services. Previously the payback period was thirty (30) days. Notably, there is a drafting error in the new provisions as the thirty (30) days payback period under Section 31 (2) VAT Act has not been repealed.

VAT Amendments to the First Schedule – the Exemption Schedule

Previous Provision	Amendment in the Act	Sector	Implication
Fish and crustaceans, muluscs and other quaticinveterbrates of chapter 3 excluding those of tariff heading 0305, 0306 and 0307.	Fish and crustaceans, molluscs and other aquatic invertebrates of Chapter 3 excluding those of tariff headings 0305, 0306 and 0307;	Agriculture	This is a clean-up of the wording in the provision by removing the word "quaticinvetebrates" and replacing the same with "aquatic invertebrates".
N.A	Inserting the following to the table appearing immediately after Paragraph 39: Tariff Number 3003.41.00, 3003.42.00, 3003.43.00, and 3003.49.00 Other medicaments, containing alkaloids or derivatives thereof, put up in measured doses or in forms or packings for retail sale.	Medical	Medicaments of Tariff Numbers 3003.41.00, 3003.42.00, 3003.43.00 and 3003.49.00 are exempted from VAT.
N/A	Inserting the following to the table appearing immediately after Paragraph 39: Tariff Number 3003.90.00 which provides for infusion solutions for ingestion other than by mouth not put up in measured doses or in forms or packings for retail sale and other medicaments consisting of two or more constituents which have been mixed together	Medical	Medicaments of Tariff Number 3003.90.00 are exempted from VAT

	for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale		
-	3005.90.11, 3005.90.12, 3005.90.19 White absorbent cotton wadding, impregnated or coated with pharmaceutical substances, or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes		
0402.29.10 Milk, specially prepared for infants.	Deleted	Medical and general households	Milk specially prepared for infants will now be subject to VAT at the rate of 16%
3002.19.00 Other - Antisera, other blood fractions and immunological products, whether or not modified or obtained by means of biotechnological processes	Deleted	Medical	This will now be subject to VAT at the rate of 16%.
3002.11.00 Malaria diagnostic test kits.	Deleted and substituted with tariff number 3822.11.00- for malaria.	Medical	This is a clean-up.
Paragraph 49 – Aircraft parts of heading 8803, excluding parts of goods of heading 8801.	All goods and parts thereof of chapter 88	Aircraft	All goods of aircraft, spacecraft and parts thereof shall be exempted from VAT.
Paragraph 63 Provided that notwithstanding this subparagraph, any approval granted by the Cabinet Secretary before the commencement thereof in respect of the supply of taxable goods and which is in force at such commencement shall continue to apply until the supply of the	Deleting Paragraph 63 and substituting it with the following: *"Taxable goods for the direct and exclusive use in the construction and equipping of specialized hospitals with a minimum bed capacity of50 bed capacity, approved by the Cabinet Secretary upon recommendation by the*	Medical and health	This is a welcome move aimed at increasing investments in specialised hospitals in alignment with the Government's agenda to promote universal health coverage.

exempted taxable goods is made in full.	*Cabinet Secretary responsible for health who may issue guidelines for determining eligibility for the exemption."*		
Paragraph 66A. Bioethanol vapour (BEV) Stoves classified under HS Code 7321.11.00 (cooking appliances and plate warmers for liquid fuel)	Deleted	Energy	In a bid to promote adoption of clean energy, this provision has now been moved to the zero-rated schedule. Further, there is an amendment of the tariff heading under the new zero-rating provision from HS Code 7321.11.00 to read HS Code 7321.12.00.
Paragraph 71. Perforated PE film 15-22 gsm of tariff number 3921.90.00	**Deleted and substituted with:** Printed and unprinted Perforated PE film of other plastics 15-22 gsm of tariff numbers 3921.90.10, and 3921.90.90.	Manufacturing industry	The supply of the Perforated PE film 15-22 gsm of tariff number 3921.90.00 will be subject to VAT at the rate of 16%. On the other hand, supply of Printed and unprinted Perforated PE film of other plastics 15-22 gsm of tariff numbers 3921.90.10, and 3921.90.90 shall be exempt from VAT. se items will now be
Paragraph 108: The supply of maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour by more than ten percent in weight: Provided that this paragraph shall, subject to paragraph 20 of the Second Schedule, be suspended for six months from the date of assent.	Deleted	Agriculture	This is a clean-up exercise on the supply of these items which were appearing in the exemption schedule and twice in the zero-rating schedule. The Act has deleted Paragraph 108 of the First Schedule and Paragraph 20 of Part A of the Second Schedule leaving Paragraph 22 of Part A of the Second Schedule. What this essentially means is

			that the supply of *"supply of maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour by more than ten percent in weight shall be zero rated."*
Paragraph 119 Diagnostic or laboratory reagents, of tariff number 3822.00.00 on a backing, prepared diagnostic or laboratory reagent whether or not on a backing, other than those of heading 30.02 or 30.06, certified reference materials upon approval by the Cabinet Secretary responsible for matters relating to health.	**Deleted and substituted with:** Diagnostic kits or laboratory reagents and their certified reference materials of heading 3822 upon approval by the Cabinet Secretary responsible for matters relating to health	Health	This is a clean up of the Act and also seeks to remove exclusion from the exemption of diagnostic kits and laboratory reagents of tariff headings 30.02 and 30.06.
Paragraph 120 Electro-diagnostic apparatus, of tariff numbers 9018.11.00, 9018.12.00, 9018.13.00, 9018.14.00, 9018.19.00, 9018.20.00, 9018.90.00 upon approval by the Cabinet Secretary responsible for matters relating to health.	**Deleted and substituted with:** Electro-diagnostic apparatus, of tariff numbers 9018.11.00, 9018.12.00, 9018.13.00, 9018.14.00, 9018.19.00, and other apparatus, Instruments and appliances of tariff numbers 9018.20.00, 9018.90.00 upon approval by the Cabinet Secretary responsible for matters relating to health.	Medical	This is a clean-up on the wordings of this provision. Pursuant to the clean-up, Electro-diagnostic apparatus, and other apparatus, instruments and Appliances of the listed tariff headings shall continue being exempt from VAT.
Paragraph 122 Other instruments and appliances, including surgical blades, of tariff number 9018.49.00, 9018.50.00, 9018.90.00 used in dental sciences upon approval by the	**Deleted and substituted with:** Other instruments and appliances, used in dental sciences of tariff 9018.49.00, Other ophthalmic instruments and	Medical	This is a clean-up of the wordings of the provisions of the VAT Act.

Cabinet Secretary responsible for matters relating to health.	appliances of tariff 9018.50.00 and other instruments and appliances of tariff number 9018.90.00 upon approval by the Cabinet Secretary responsible for matters relating to health.		
Paragraph 125 Artificial teeth and dental fittings of tariff numbers 9021.21.00, 9021.29.00 and artificial parts of the body of tariff numbers 9021.31.00, 9021.39.00, 9021.50.00 and 9021.90.00 upon approval by the Cabinet Secretary responsible for matters relating to health.	**Deleted and substituted with:** Artificial teeth of tariff number 9021.21.00, other dental fittings of tariff number 9021.29.00 and other artificial parts of the body of tariff numbers 9021.31.00 and 9021.39.00 and other appliances of tariff number 9021.90.00 upon approval by the Cabinet Secretary responsible for matters relating to health.	Medical	This is a clean-up of the Act. However, we note that other artificial parts of the body of tariff 9021.50.00 have now been removed from the exemption provision and therefore these will attract VAT at the rate of 16%.
Paragraph 128 Discs, tapes, solid -state non -volatile storage devices, "smart cards" and other media for the recording of sound or of other phenomena, whether or not recorded, of tariff number 8523.80.10, including matrices and masters for the production of discs, but excluding products of Chapter 37; software upon approval by the Cabinet Secretary responsible for matters relating to health.	**Deleted and substituted by:** Discs, tapes, solid-state non-volatile storage devices, "smartcards" and other media for the recording of sound or of other phenomena, whether or not recorded of tariff heading 85.23, including matrices and masters for the production of discs, but excluding products of Chapter 37 upon approval by the Cabinet Secretary responsible for matters relating to health.	Media	This in our view is a clean- up exercise aimed at widening the scope of the exemption to include all items listed under tariff heading 85.23 as opposed to previous provision which only exempted items of tariff number 8523.80.10
Paragraph 129 Weighing machinery (excluding balances of a sensitivity of 5 cg or	**Deleted and substituted with:** Weighing machinery (excluding balances of a	Medical (Hospitals)	The impact of this amendment is that it deletes the term "weighing machine

better), of tariff number 8423.31.00, including weight operated counting or checking machines; weighing machine weights of all kinds upon approval by the Cabinet Secretary responsible for matters relating to health.	sensitivity of 5 cg or better), of tariff number 8423.10.00 purchased or imported by registered hospitals upon approval by the Cabinet Secretary responsible for matters relating to health.		weights of all kinds" from the exemption provision and therefore what this means is that only weighing machinery (excluding balances of a sensitivity of 5 cg or better), of tariff number 8423.10.00 purchased by registered hospitals will be VAT exempt.
Paragraph 140 Plant and machinery of chapter 84 and 85 imported by manufacturers of pharmaceutical products or investors in the manufacture of pharmaceutical products upon the recommendation of the Cabinet Secretary responsible for matters relating health.	inserting the words *"or locally purchased" immediately after the word "imported" appearing in paragraph 140;*	Medical (Vaccines)	This amendment widens the scope of the exemption to also include the supply of locally purchased plant and machinery used by manufactures of pharmaceutical products. Previously only imported plant and machinery of Chapter 84 and 85 by manufacturers of pharmaceutical products or investors were VAT exempt.
Paragraph 145 Taxable goods, inputs and raw materials imported or locally purchased by a company which is- (a) engaged in business under a special operating framework arrangement with the Government; and (b) incorporated for purposes of undertaking the manufacture of human vaccines; and whose capital investment is at least ten billion shillings, subject to approval of the Cabinet Secretary for the National Treasury, on recommendation of the Cabinet Secretary for health.	Amending paragraph 145 in paragraph (b) by inserting the words *"or other manufacturing activities including refining"* immediately after the words *"human vaccines"*.	Manufacturing	This widens the scope of exemption to include taxable goods, inputs and raw materials or locally purchased by companies undertaking other manufacturing activities including refining upon approval by the Cabinet Secretary.

Part II			
Paragraph 34 Taxable goods, inputs and raw materials imported or locally purchased by a company which- (a) is engaged in business under a special operating framework arrangement with the Government; and (b) is incorporated for purposes of undertaking the manufacture of human vaccines; and whose capital investment is at least ten billion shillings, subject to approval of the Cabinet Secretary for the National Treasury, on recommendation of the Cabinet Secretary for health.	by deleting the words "goods, inputs and raw materials" and substituting therefor the word "services"; and by inserting the words "or other manufacturing activities including refining" immediately after the words "human vaccines" in paragraph (b);	Manufacture	This is a clean-up of the Act as Part II relates to exemption of services and not goods. This amendment also extends the exemption to other manufacturing activities including refining whose capital investment is at least ten billion shillings upon approval by the Commissioner.

Other Amendments to the Second Schedule – the Zero-Rating Schedule

Previous Provision	Amendment	Sector	Implication
The supply of maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour by more than ten percent in weight: Provided this paragraph shall be in operation for a period of six months from the date of assent.	This provision has been deleted.	Agriculture	As set out above under the exemption section, this is a clean up exercise of the VAT Act. Paragraph 22 of Part A of the Second Schedule has been retained which essentially means that the supply of maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour by more than ten percent in weight.
N/A	**New Paragraph 28**: All tea and coffee locally purchased for the purpose of value addition before exportation subject to approval by the Commissioner-General.	Agriculture.	The supply of tea and coffee locally purchased for purpose of value addition before export will now be zero rated. The removal of 16% VAT on tea and coffee will in our view incentivise and promote more local players in the sector venturing in value addition activities in Kenya.
N/A	**New Paragraph 29**: The supply of locally assembled and manufactured mobile phones.	Communication.	The is will encourage investments into the manufacture and assembly of locally made mobile phones, making them more competitive than imported phones.

4. AMENDMENTS TO THE EXCISE DUTY ACT

a) *Repeal of inflationary adjustments*

Effective Date: 1 July 2023

The Act has removed the discretion of the Commissioner to adjust excise duty rates yearly on account of inflationary changes.

The impact of this Proposal is to enhance certainty and predictability of excise duty rates.

b) *Clarity on provisions relating to suspension of excise duty licenses*

Effective Date: 1 July 2023

The Act has amended the provisions of the Excise Duty Act by providing clarity that where a licensed person lodges a notice of appeal for suspension of their license, the Commissioner shall be required to provide the licensed person with written notice of the action required to be taken to remedy the deficiencies that led to the suspension of the license before the date specified in the notice of appeal but not later than within fourteen (14) days.

This is a welcome change as it brings clarity and harmonisation of timelines on legislation relating to suspension of excise duty licences.

c) *Excise Duty Changes in the betting, lottery, and gaming industry*

Effective Date: 1 July 2023

The Act has increased the excise duty rate on betting, gaming, lottery, and price competition from seven-point five percent (7.5%) to twenty percent (20%). In our view, this is aimed at increasing revenue collected in this industry.

The Act has also inserted the words "or gaming" immediately after the word "betting" in the definition of "amount wagered or staked". The effect of this is to include gaming activities to the ambit of excisable activities.

d) *Mandatory remittance of excise duty in the betting, lottery and gaming industry within twenty-four (24) hours*

Effective Date: 1 July 2023

The Act provides that excise duty on betting and gaming, offered through a platform or other medium, to be remitted to the Commissioner by a bookmaker within twenty-four hours from the closure of transactions of the day. The Act has defined "closure of transactions of the day" to mean midnight of that day. As has been observed above, in our view, this amendment is likely to create an administrative burden for bookmakers especially due to multiple transactions carried out by book markers.

The Act also proposes that in the case of licensed manufacturers of alcoholic beverages, excise duty shall be payable to the Commissioner within twenty-four hours upon removal of the goods from the stockroom.

Further to this, the Act has granted the Commissioner powers, by notice in the Gazette, to require taxpayers in any sector to remit excise duty collected on certain excisable services within twenty-four hours from the closure of transactions of the day.

e) Excise on alcohol, betting, gaming, lottery, and price competition advertising

Effective Date: 1 July 2023

The Act has introduced excise duty at the rate of fifteen (15%) of fees charged, for advertisement relating to the alcohol, betting, gaming, lottery, and price competition industries carried on both print media and broadcast media.

The Act has also increased the excise duty rates for betting (not including horse racing), gaming, price competition and lottery (not including charitable lotteries) from seven-point five percent (7.5%) to twelve-point five percent (12.5%).

f) Reduced Rates on Telephone and Internet Data Services

Effective Date: 1 July 2023

The Act has reduced excise duty on telephone and internet data services from twenty percent (20%) to fifteen percent (15%) of the excisable value.

g) Increase of Excise Duty on fees charged by cellular phone providers and addition of licensed service providers under the National Payment Systems Act,2011 to Excise Duty bracket

Effective Date: 1 July 2023

The Act has increased the excise duty on fees charged by cellular phone providers from 12% to 15%. Additionally, in a bid to increase the tax base, the Act has brought, within the tax bracket, fees charged by payment service providers licensed under the National Payment Systems Act,2011 at the rate of fifteen percent (15%).

h) Excise Duty chargeable on all amounts charged in respect of digital lending

Effective Date: 1 July 2023

The Act has amended the provision providing for Excise Duty on digital lending to provide that all amounts charged in respect of lending shall be subject to excise duty.

i) Proposed Introduction of new offences relating to counterfeit excise stamps

Effective Date: 1 July 2023

The Act, in a bid to improve compliance with requirements to affix excise duty stamps on excisable goods and increase revenue to the fiscus, has introduced additional offences relating to excise duty stamps over and above those already provided under the Excise Duty Act including defacing or printing over an excise stamp affixed on any excisable goods. Secondly, it has provided that being in possession of excisable goods on which excise stamps have not been affixed and which have not been exempted from the requirements of the Excise Duty Act or attendant Regulations will also be an offence. Further, any printing or making of counterfeit excise stamps or stamps not authorised by the Commissioner is to be an offence under the Excise Duty Act. Finally, the Act has also made it an offence to be found in possession or trading in excisable goods without affixing excise stamps.

The Act has added that any person convicted of the commission of these offences to be liable to pay a fine of up to five million shillings (KES. 5,000,000) or imprisonment for a term of up to three years, or to both.

j) Excise duty on money transfer services

Effective Date: 1 July 2023

The Act has reduced the Excise duty in fees charged for money transfer services by banks, money transfer agencies and other financial service providers from twenty percent (20%) to fifteen percent (15%).

This is a welcome change to providers of money transfer services as it reduces their tax liability.

k) Exemption from excise duty of disassembled or unassembled kits for local assembly or manufacture of mobile phones

Effective date: 1 July 2023

The Act has added "Disassembled or unassembled kits for local assembly or manufacture mobile phones" to the Second Schedule which provides for goods that are exempt from excise duty when purchased before clearance through Customs or removal from excise control.

l) Changes to various current excisable goods

Effective date: 1 July 2023

The Act has made several changes to some of the excisable goods currently found in Part I of the First Schedule of the Excise Duty Act. The changes are as below:

Description of item	Amendment introduced by the Act
Condensates per 1000l @ 20degC of tariff 2709.00.10	**Now deleted** which means that going forward condensates of tariff 2709.00.10 shall not be subject to excise duty.
Motor vehicles of tariff 87.11 other than motorcycle ambulances and locally assembled motor cycles	**Deleted and replaced with**: *"Motorcycles of tariff 87.11 other than motorcycle ambulances, locally assembled motorcycles and electric motorcycles".* This is aimed at excluding electric motorcycles from excise duty provisions.

Imported White chocolate including chocolate in blocks, slabs, or bars of tariffs numbers 1806.31.00, 1806.32.00, and 1806.90.00	**Deleted and replaced with :** *"Imported white chocolate of heading 1704; Imported chocolate and other foodpreparations containing cocoa of tariff numbers 1806.31.00, 1806.32.00 and 1806.90.00"*
Imported Glass bottles (excluding imported glass bottles for packaging of pharmaceutical products)	Excise duty rate increased from 25% to 35%
4821.10.00 and 4821.90.00	Excise duty rate increased from 10% to 20%
3907.91.00 Imported Unsaturated polyester	Excise duty rate increased from 10% to 20%
3907.91.00 Imported Unsaturated polyester	Excise duty rate increased from 10% to 20%
3907.91.00 Imported Unsaturated polyester	Excise duty rate increased from 10% to 20%
3907.91.00 Imported Unsaturated polyester	Excise duty rate increased from 10% to 20%
3907.91.00 Imported Unsaturated polyester	Excise duty rate increased from 10% to 20%

m) Newly Excisable Goods

Effective Date: 1 July 2023

Some of the newly excisable goods in the Act include the following:

Description of Item	New Excise Duty Rate
Imported fish	10%
Imported Sugar excluding imported sugar purchased by a registered pharmaceutical manufacturer	KES. 5 per kg
Powdered Juice	KES. 25 per kg
Imported cement	10% of the value or KES. 1.50 per kg, whichever is higher

Imported cellular phones	10%
Imported furniture of tariff heading 9403 excluding furniture originating from East African Community Partner States that meet the East African Community Rules of Origin	30%
Imported paints, varnishes and Lacquers of heading 3208, 3209 and 3210	15%
Imported non- virgin test liner of heading 4805.24.00	25%
Imported non-virgin fluting Medium of heading 4805.19.00	25%
Imported cartons, boxes and cases of corrugated paper or paper board and imported folding cartons, boxes and case of non-corrugated paper or paper board and imported skillets, free-hinge lid packets of tariff heading 4819.10.00, 4819.20.10 and 4819.20.90	25%
Imported plates of plastic of tariff heading 3919.90.90, 3920.10.90, 3920.43.90, 3920.62.90 and 3921.19.90	25%
Imported paper or paper board, labels of all kinds whether or not printed of tariff heading 4821.10.00 and 4821.90.00	25%

5. AMENDMENTS TO THE TAX APPEALS TRIBUNAL ACT

Deletion of the proposed 20% security deposit of tax disputed as a condition to appealing to the High Court

The Act has deleted the proposal in the Bill that sought to introduce a significant amendment to the tax dispute mechanism on appeals to the High Court. The Bill intended to amend the Tax Appeals Tribunal Act, 2013 by introducing a requirement for taxpayers dissatisfied with the decision of the Tribunal to either deposit an amount or provide security equivalent to 20% of the disputed tax as a requirement for filing an appeal at the High Court. Where a taxpayer wins their appeal at the High Court, the Bill provided for the KRA to credit the amount/security to the taxpayer within thirty (30) days.

Notably, this proposal has been deleted in the Act thus retaining the status, meaning that there would be no contingent fee for filing an appeal to the High Court. The deletion of the security for costs requirement is a reprieve for taxpayers as it protects their right of access of justice and by extension protects judicial independence as the High Court will retain is discretion of determination the question of security on a case-by-case basis.

6. AMENDMENTS TO THE MISCELLANEOUS FEES AND LEVIES ACT

a) Reduction in the rate of Import Declaration Fee

Effective Date: 1 July 2023

The Act reduces the rate payable as import declaration fee (IDF) from the previous three-point five percent (3.5%) of the customs value of goods to two point five per cent (2.5%) of the customs value of the goods. Additionally, the Act deletes the reduced IDF rate of one point five per cent (1.5%) that was previously chargeable on raw materials and intermediate products imported by manufacturers and input for the construction of houses under an affordable housing scheme and goods imported under the East African Community Duty Remission Scheme.

This new measure will in our view go a long way in reducing costs of importation.

b) Reduction in the rate of Railway Development Levy

Effective Date: 1 July 2023

The Act reduces the rate payable as railway development levy (RDL) to one point five per cent (1.5%) of the customs value of the goods from the previous rate of two percent (2%). Additionally, the Act deletes the reduced RDL of one point five per cent (1.5%) that was previously chargeable on raw materials and intermediate products imported by manufacturers and input for the construction of houses under an affordable housing scheme. These changes relating to the RDL regime are expected to reduce import costs.

c) Repeal of inflationary adjustment on export levy

Effective Date: 1 July 2023

The Act deleted Section 5 (4) of the Miscellaneous Fees and Levies Act which empowers the Commissioner, to adjust the specific rate of export levy annually to take into account inflation. This is a welcome change as it will reduce the impact of inflation on the exported goods and therefore reduce the overall cost of the exported goods.

d) Introduction of Export and Investment Promotion Levy

Effective Date: 1 July 2023

The Act introduces an Export and Investment Promotion Levy on all goods imported into the country for home use that are set out under the newly introduced Third Schedule to the Miscellaneous Fees and Levies Act. The levy shall be paid by the importer of such goods at the time of entering the goods into the country for home use and the funds collected shall be paid into a fund established and managed in accordance with the Public Finance Management Act, 2012.

The introduction of Export and Investment Promotion Levy is aimed at providing funds to boost local manufacturing, increase exports, create jobs, and promote investments. However, the Act grants an exemption from the export and promotion levy on goods originating from the EAC Partner States that meet the EAC Rules of Origin.

Some of the salient goods set out in the Third Schedule which is effective on 1 September 2023 which will be subject to a levy rate of 17.5% on their customs value include:

- 2523.10.00 - Cement Clinkers;
- 7207.11.00 - Semi-finished products of iron or non-alloy steel containing, by weight <0.25% of carbon; and
- 7213.91.10 and 7213.9190 - Bars and rods of iron or non-alloy steel, hot-rolled, in irregularly wound coils of circular cross-section measuring less than 14mm in diameter.

Further, other goods set out in the Third Schedule that will be subject to a levy rate of 10% on their customs value are:

- 4804.11.00 - Uncoated kraft paper and paperboard, in rolls or sheets; Kraft liner; Unbleached;
- 4804.21.00- Sack kraft paper; unbleached;
- 4804.31.00- Other craft paper and paperboard weighing 150g/m2 or less; Unbleached
- 4819.30.00 - Sacks and bags, having a base of a width of 40 cm or more; and
- 4819.40.00 Other sacks and bags, including cones.

e) Amendments in respect to products subject to export levy and products exempt from IDF and RDL

The Act introduces a raft of changes to those products subject to export levy under the First Schedule and products that are exempt from IDF and RDL under the Second Schedule.

Some of the salient changes to those products subject to export levy under the First Schedule include reduction of the rate from "80% or USD 0.55 per Kg whichever is higher" to "50% or USD 0.32 per kg whichever is higher". These items include but are not limited to the following;

Tariff No	Tariff Description
4102.21.00	Whole hides and skins, of a weight per skin not exceeding 8 kg. when simply dried, 10 kg. when drysalted, or 16 kg. when fresh, wetsalted or otherwise preserved.
4102.29.00	Other raw skins of sheep or lamb (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), without wool on, whether or not split, other than those excluded by Note (c) to Chapter 41
4103.20.00	Other raw hides and skins (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), whether or not debarred or split, other than those excluded by Note 1 (b) or (c) to this Chapter, of reptiles
4103.30.00	Other raw hides and skins (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), but not debarred or split, other than those excluded by Note 1 (b) or 1 (c) to this Chapter, of swine
4103.90.00	Other raw hides and skins other than of reptiles, swine, goats or kids.
4104.19.00	Other tanned or crust hides and skins of bovine (including buffalo) or equine animals, without hair on, whether or not split, but not further prepared, in the wet state (including wet - blue).
4101.50.00	Whole hides and skins, of weight exceeding 16 kg.
4301.60.00	Raw furskins of fox, whole, with or without head, tail or paws.
4301.30.00	Raw furskins of lamb, the following: Astrkhan, broadtail, Caracul, Persian and similar lamb, Indian, Chinese, Mongolian or Tibetan lamb, whole, with or without head, tail or paws.
4302.30.00	Whole skins and pieces or cuttings thereof, assembled.
4101.90.00	Other, including butts, bends and bellies.

4102.10.00	Raw skins of sheep or lamb (fresh or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), with wool on, whether or not split, other than those excluded by Note 1(c) to Chapter 41.
4301.10.00	Raw furskins of mink, whole, with or without head, tail or paws.
4301.80.00	Other raw furskins, whole, with or without head, tail or paws.
4301.90.00	Heads, tail, paws,and other pieces or cuttings, suitable for furriers' use
4302.11.00	Whole skins, with or without head, tail or paws, not assembled, of mink.
4302.19.00	Other whole skins, with or without head, tail or paws, not assembled
4302.20.00	Heads, tails, paws and other pieces or cuttings, not assembled

Further, the Act introduces additional items that will be subject to an export levy rate of 20% of the customs value. This will increase the cost of exporting this category of items and is a signal that the Government intends to disincentivise their exportation. We set out these items in the table below.

Tariff No.	Tariff Description
8106.10.00	Bismuth and articles thereof including waste and scrap containing more than 99.99% of bismuth, by weight
8106.90.00	Other bismuth and articles thereof including waste and scrap
8105	Cobalt mattes and other intermediate products of cobalt metallurgy; cobalt and articles thereof, including waste and scrap
8109.31.00	Waste and scrap of zirconium containing less than 1 part hafnium to 500 parts zirconium by weight
1703	Molasses resulting from the extraction or refining of sugar

Some of the key changes introduced under the Act to those products that are exempt from IDF and RDL under the Second Schedule include but are not limited to the following;

The deletion of the exemption for gifts and supplies for diplomatic and consular missions and to the United Nations Missions and replacement with those goods for official use by diplomatic and consular missions, the United Nations and its agencies, and institutions or organizations exempted under the Privileges and Immunities Act. This change narrows the exemption to be applicable to those goods that are used for official use only and not personal use.

The expansion of the exemption to all goods and parts thereof of Chapter 88 which deals with aircraft, spacecraft and parts thereof. Previously, the exemption was only applicable to a narrow classification of goods, that is, aircraft, excluding aircraft of unladen weight not exceeding 2,000kg and helicopters of heading 8802.11.00 and 8802.12.00.

The exemption will also be applicable to any other aircraft spare parts including aircraft engines imported by aircraft operators or persons engaged in the business of aircraft maintenance upon recommendation by the competent authority responsible for civil aviation;

Inclusion of "all goods and material supplies" for official use by the Kenya Defence Forces and National Police Service as exempt. This will widen the scope of the exemption for goods for use by Kenya Defence Forces and National Police Service which was only applicable to equipment, machinery and motor vehicles.

Expansion of the scope of the exemption of goods, inputs and raw materials imported by the Company which is engaged in business under a special operating framework arrangement with the Government and incorporated for the purpose of other manufacturing activities including refining.

The supplies of liquefied petroleum gas, the supply of denatured ethanol of tariff number 2207.20.00 and bioethanol vapour (BEV) stoved classified under HS Code 7321.12.00 (cooking appliances and plate warmers for liquid fuel) will also be exempt from IDF and RDL.

7. AMENDMENTS TO THE STATUTORY INSTRUMENTS ACT

a) Automatic revocation of statutory instruments repealed

Effective Date: 1 July 2023

Section 21 of the Statutory Instruments Act, 2013 provides for the automatic revocation of statutory instruments after a period of 10 years from the date the statutory instrument comes into force unless the instrument is repealed sooner or expires, or there is a regulation that exempts it from expiry. More specifically to tax matters, the provision states that the automatic revocation period for statutory instruments issued under the Income Tax Act, Stamp Duty Act, Value Added Tax Act, Tax Appeals Tribunal Act, Excise Duty Act and Tax Procedures Act shall be twenty-four (24) months from 25 January 2023 i.e., these instruments will stand revoked as at 25 January 2025.

The Act has now repealed this provision, the effect of which is that all statutory instruments will continue to be in force unless the specific statutory instruments are repealed. We note that there are various statutory instruments issued under the Income Tax Act particularly granting tax exemptions in the energy sector and infrastructure sectors, which will continue to be in force and will not expire on 25 January 2025 as previously envisaged. This is a welcome move and provides the much-needed certainty to investors who have been relying on the tax exemptions but were facing uncertainty as to the position after the anticipated expiry in 2025.

8. AMENDMENTS TO THE SPECIAL ECONOMIC ZONES ACT

a) Expansion of a special economic zone to include non-customs-controlled area

Effective Date: 1 July 2023

The Act expands the definition of an SEZ to include both a customs-controlled area and a non-customs-controlled area. A non-customs-controlled area is in essence a designated zone within an SEZ where customs control measures are not as stringent as in a customs-controlled area within the same SEZ.

In our view, this expansion will provide for the recognition in law of a non-customs-controlled area as an SEZ whose purpose is to provide additional flexibility, less stringent customs regulations including inspections, documentation requirements and enforcement of customs procedures to business operating within the SEZ.

b) Introduction of a proviso regarding the goods to be considered as exported or imported into the customs territory

Effective Date: 1 July 2023

The Act replaces the term "Kenya" and replaces it with the term "the customs territory" under Section 6(b) of the SEZ Act . Section 6 (b) currently provides that goods which are brought out of an SEZ and taken into any part of the customs territory for use therein or services provided from a special economic zone to any part of the customs territory shall be deemed to be imported into Kenya. This in our view is a clean-up exercise to align the definitions under Section 2 of the SEZ Act and provisions of the Customs legislation.

Additionally, the Act also introduces a proviso which provides that goods whose content originates from the customs territory shall be exempt from payment of import duties and goods whose content partially originates from the customs territory shall pay import duties on the non-originating component subject to the customs procedures. This introduction provides further clarity regarding the import duty treatment in respect of those goods that partially originate from outside the customs territory which will be required to account for import duty and aligns with the provisions of the EAC Rules of Origin.

9. AMENDMENTS TO THE EXPORT PROCESSING ZONES ACT

a) Clarification on payment of import duties on goods originating from customs territory

The Export Processing Zone Act (EPZ Act) is amended by introducing a proviso at the end of Paragraph 24(b) stating that goods whose content originates from customs territory shall be exempt from payment of import duties while goods whose content partially originates from the customs territory shall pay import duties on the non-originating component subject to customs procedures.

Similar to the amendment under the SEZ Act, provision provides clarity regarding the import duty treatment in respect of those goods that partially originate from outside the customs territory in line with provisions of Customs Procedures and EAC Rules of Origin.

10. LOCAL OWNERSHIP OF PENSION SCHEMES

Effective 1st July 2023

The Finance Act, 2023 has amended Section 25B (eb) of the Retirement Benefits Act by reducing the requirement for local ownership of Pension Scheme Administrators from 60% to 33%. This will be of benefit to the industry as it allows for more flexibility and will encourage more foreign investment in the pensions sector. The capping on foreign ownership to 40% was introduced in 2014 through the Statute Law (Miscellaneous Amendment) Act, 2014 but it had the effect of restricting investment into this industry. It should be noted that banks and insurance companies are exempt from the local ownership requirement.

11. INVESTMENT OF SHARIA COMPLIANT PENSION FUNDS

Effective:1st July 2023

The Finance Act, 2023 exempts Sharia Compliant Funds from the restriction placed by the Retirement Benefits Act (RBA) on the investment of scheme funds. Section 38 of the RBA restricts the investment of scheme funds to the guideline prescribed under the Retirement Benefits (Forms and Fees) Regulations, 2000. The exemption is intended to accommodate Sharia compliant funds which meet the ethical and religious requirements under Sharia Law.

12. AFFORDABLE HOUSING LEVY

Effective Date: 1 July 2023

i. Following a lot of debate surrounding contributions towards the National Housing Fund as initially proposed in the Finance Bill, 2023, the Finance Act, 2023 introduces a new levy, termed the Affordable Housing Levy whose purpose shall be to provide funds for the development of affordable housing and associated social and physical infrastructure and provision of affordable home financing to Kenyans.
ii. Both the employer and the employee shall each be required to contribute 1.5% of the employee's gross salary towards the levy. It should be noted that there is no cap in relation to this levy as had been initially proposed in the Finance Bill, 2023.

iii. In addition, under the Finance Bill, 2023 it had been proposed that employees eligible for affordable housing would use their contributions to finance the purchase of a home under the affordable housing scheme, and non-eligible employees would access their contributions after seven years. These provisions have been left out of the Finance Act, 2023. Reference to the amounts deducted as a contribution was also changed to a levy.

iv. The employer is expected to remit the employer's and employee's contribution by the 9th day following the month of deduction failing which the employer shall be liable to pay a penalty of 2% of the unpaid funds for every month the same remains unpaid.

v. The Affordable Housing Levy introduces a substantial change for both employers and employees and the question in everybody's mind is how the levy will be administered.

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