Deciphering the Finance Act, 2020

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Preamble

The National Assembly published the Finance Bill, 2020 on 5th May 2020. This Bill, unlike in prior years, adhered to the strict timelines in which it had to be gazetted to be passed by the National Assembly and assented to by the President by 30th of June 2020. The change this year was occasioned by the changes in the Public Finance Management Act, 2012 mandating earlier presentation of the Finance Bill to avoid delays that have had adverse effects in the budgetary calendar of the Government. Recent court interpretations of constitutional issues that effectively barred the Government from collecting taxes before the relevant tax provisions are approved by the National Assembly have also played a key role in this change.

The Business Laws (Amendment) Act, 2020 which became law on 18th March 2020, requires the Treasury to table the Finance Bill in Parliament before 30th April and have it approved by the President as law by 30th June. This was a departure from the previous years' existing trend where the Finance Bill is tabled in the National Assembly after the reading of the national budget in June and takes months before it becomes law, case in point being the Finance Act 2019 which was assented into law on 7th November 2019.

The period between the tabling of the Finance Bill before the National Assembly for its consideration and the proposal becoming law is usually punctuated by back and forth discussions among the finance committee of the National Assembly and the National Treasury. The Bill is also required to be published in the Kenya Gazette for public participation in line with the provisions of article 118 of the constitution of the Republic of Kenya. Furthermore, the Statutory Instruments Act, 2013 requires regulation-making authorities to make appropriate consultations with persons who are likely to be affected by the proposed instrument, in particular where the proposed statutory instrument is likely have a direct, or a substantial indirect effect on business or restrict competition. Public participation, therefore is a key aspect in the process of making laws in Kenya. The move to publish the Finance Bill two months ahead of time before the budget statement has enabled most stakeholders to have ample time to submit their comments and inputs for consideration by parliament as well as being able to adjust their business practices in anticipation of the proposals stipulated by the Bill.

The Finance Act, 2020 ("the Finance Act") was signed into law by the President on 30th June 2020. Most of the provisions of the Act will take effect on the date of assent and just as the new financial year starts with a few exceptions which come into force on 1st January 2021 and others on 1st July 2021.

The Act has amended the following Tax Laws: Income Tax Act (ITA), Value Added Tax (VAT) Act, Excise Duty Act, Tax Procedures Act (TPA), Miscellaneous Fees and Levies Act, the Tax Appeals Tribunal Act, the Road Tolls Act, the Capital Markets Act, the Standards Act, the Kenya Revenue Authority Act, the Retirement Benefits Act and the Insolvency Act.

In this Tax Advisory Note, we provide an analysis of the changes introduced by the Act. We have specifically, for your ease of reference, included a segment highlighting the changes, if any, that have come up on enactment of the Finance Bill 2020.

Income Tax

Residential Rental Income Tax

Minimum tax

Digital service tax

Non-deductible expenses

Registered Home Ownership Savings Plan

Exempt income now subject to tax

Accrual and computation of gains from transfer of property

Residential Rental Income Tax

Effective 1st January, 2016, income earned from the use or occupation of residential property, where this income was in excess of KES 144,000 but not exceeding KES 10 million during any year of income would be subject to residential rental income tax. Residential rental income tax is charged at the rate of 10% on the gross rental income received by the resident person (both resident individuals and companies) from residential property. The tax is payable on or before the twentieth day of every month.

The Finance Act 2020 reinstates the prior amendment introduced in the Finance Bill 2020 extending the allowable threshold from KES 10 million to KES 15 million. The Finance Act 2020 further increases the lower limit of KES 144,000 to KES 288,000.

Effective Date

This measure will come into effect from 1 January 2021.

Our View

The overall objective of simplified taxation for Micro, Small and Medium Enterprises (MSMEs) in developing countries is generally to facilitate voluntary tax compliance and remove obstacles in moving toward business formalization and growth. The increased minimum threshold of KES 288,000 seeks to align the amounts to the revised tax brackets for Pay As You Earn (PAYE) purposes. The Tax Laws (Amendment) Act, 2020 introduced the expansion of tax bands and a reduction of the marginal rate of tax from 30% to 25%. The first tax bracket that was previously set at KES 147, 580 was subsequently increased to KES288,000.

What changed

The lower capping now aligned with the changes to the PAYE bands to increase the tax free amounts to KES 288,000 per annum.

Minimum tax

The Finance Act 2020 widens the tax net through the introduction of minimum tax to the Kenyan tax regime. This tax was first proposed through the Finance Bill 2020 and is chargeable at the rate of 1% of the gross turnover. The tax shall be paid through a quarterly instalment tax system by the twentieth day of each period ending on the fourth, sixth, ninth and twelfth months of the year of income.

Minimum tax will however not apply where the:

a. income is exempt under the Income Tax Act;

b. person is chargeable to tax under employment income;

c. tax has been charged under a simplified tax regime i.e. Turnover Tax or Residential Rental Income Tax;

d. capital gains have been computed in accordance with the Eighth Schedule of the Income Tax Act;

e. income is derived from the extractive industry, as prescribed under the Ninth Schedule; and

f. the minimum tax payable by that person is higher than the instalment tax. This however appears to be a drafting error that we expected to be amended in the Finance Act 2020. It contradicts another provision in the same Act that seeks to exempt persons from payment of instalment tax where minimum tax would be higher than instalment tax.

Effective Date

This measure will come into effect from 1 January 2021.

Our View

Previously, the Income Act would relieve a taxpayer off payment of advance instalment tax in the year where the taxpayer, to the best of his judgement and belief would have no income chargeable to tax for that year of income other than emoluments. This would mostly be in case where the entity is anticipating making losses in that year of income. Minimum tax now seeks to bring into the tax net, such entities that have not contributed to the exchequer as a result of being in perpetual tax losses. The National Assembly held that, in its consideration of the Finance Bill 2020 that there are 55 other countries that have such a tax and that it is a good tax. Tanzania, is the only partner state in the East African Community with this tax. The tax primarily focuses on companies making tax losses for 3 consecutive years and is chargeable at a rate of 0.5%. Exemption applies to agricultural companies engaged in provision of health or education.

The tax regime ought to be based on most efficient or prudent course of action as established from those 55 countries. Introducing the tax out rightly is not the solution and could significantly affect low margin industries that are thriving on cash flow/ liquidity cycles to keep them afloat. To illustrate this case, for instance, an entity engaged in the open tender system through the Ministry of Petroleum to supply downstream refined petroleum products to the entire industry barely marks up its products with more than 1%. A turnover tax of 1% therefore means that this entity must increase the cost of its product which will automatically be passed onto the consumer. We are looking at the cost of fueling our economy increasing by at least a shilling. There is therefore a dire need for consideration for further exemptions to be provided to critical sectors such as aviation, agriculture, hospitality, health and education that have also been hardest hit with the effects of COVID 19 pandemic.

It is also necessary that further guidelines are developed to regulate the administration of minimum tax. As it stands there is no clarity to issues like whether the minimum tax is an advance tax that can be applied against future tax liability or whether the turnover figures to be used to compute this tax will be based on actual amounts i.e. the turnover reported as at those dates or are to be based on forecast numbers.

What changed

No changes from what was initially introduced in the Finance Bill 2020.

Digital service tax

Taxation of income from the digital market place at the rate of 1.5% of the gross transaction value has been introduced as follows:

- Digital service tax (DST) shall be payable by a person whose income from services is derived from or accrues in Kenya through a digital market place.
- A resident person or non-resident person with a permanent establishment in Kenya shall offset the DST paid against the tax payable for that year of income.
- The tax shall be due at the time of the transfer of the payment for the service to the service provider.

Effective Date

This measure will come into effect from 1 January 2021.

Our View

Virtual operations must be taxed appropriately to ensure equality amongst all industry players as with the way the law is currently crafted, it mostly seeks to tax businesses with physical presence. The fundamental concept governing chargeability to taxation is that any income accrued or derived in Kenya must be taxed in Kenya. This of course also causes an issue where the tax nexus created by non-residents deriving their income in Kenya through the digital market translates into taxation in more than one state. Evidently there is need for prudently crafted tax policies to ensure that taxpayers are not a victim of double taxation and also to ensure that these tax policies do not lead to harmful tax and trade wars. 1st January 2021 therefore seems to be an ambitious timeframe within which to draft the relevant regulations to govern this tax.

What changed

No changes from what was initially introduced in the Finance Bill 2020.

Non-deductible expenses

The Finance Act 2020 amends Section 15 of the Income Tax Act by deleting the following expenditure items that were previously deductible for purposes of ascertaining the income chargeable to tax:

i. entrance fee or annual subscription paid to a trade association that has elected to be taxable.

ii. capital legal costs and other incidental expenses relating to the authorization and issue of shares, debentures or similar securities offered for purchase by the general public.

iii. capital legal costs and other incidental expenses, for the purposes of listing on any securities exchange operating in Kenya, without raising additional capital.

iv. capital expenditure incurred on rating for the purposes of listing on any securities exchange operating in Kenya.

v. club subscriptions paid by an employer on behalf of an employee.

Effective Date

This measure will come into effect from 1 January 2021.

Our View

- The taxation of entrance fees, annual subscriptions and club subscription may not be significant but could potentially discourage employers from extending these benefits to employees.
- Deletion of allowable capital costs linked to listing removes the incentives made earlier in encouraging investments in the stock market.

Aptly, the National Treasury agreed to drop recommendations for removal of tax breaks linked to CSR activities. The Finance Act 2020 therefore reinstates a previous proposed deletion of expenditure on the construction of public schools, hospitals and similar social infrastructure.

What changed

Expenditure of a capital nature incurred in that year of income, with the prior approval of the Minister, by a person on the construction of a public school, hospital, road or any similar kind of social infrastructure has now been reinstated as an allowable deduction.

Registered Home Ownership Savings Plan

The Finance Act 2020 removes the tax relief that was previously available to individuals depositing funds with a registered Home Ownership Savings Plan (HOSP).

Effective Date

This measure will come into effect from 1 January 2021.

Our View

The Income Tax Act would allow one to deduct HOSP contributions of up to KES 96,000 per year while ascertaining an individual's taxable income and exempt from taxation, interest income earned by a depositor on such deposits of up to KES 3,000,000.

These provisions were first introduced in 1996 with a view to incentivize Kenyans to save for their homes. This later also fell in line with President Uhuru Kenyatta's development blueprint, The Big 4 Agenda, comprising of Food Security; **Affordable Housing;** Manufacturing and Affordable Healthcare. This move goes against achievement of this objective.

What changed

No changes from what was initially introduced in the Finance Bill 2020.

Exempt income now subject to tax

Part I of the First Schedule to the Income Tax Act prescribes income accrued in, derived from or received in Kenya which is exempt from tax. The Finance Act amends this schedule to exclude the following sources of income. The following now cease to be exempt and will be taxed as appropriate.

i. The income of a registered Home Ownership Savings Plan (HOSP).
ii. Income from employment paid in the form of bonuses, overtime and retirement benefits to employees whose income is below the lowest tax bracket.

There has been a further amendment to include to this list of exempt income:

I. Monthly pension granted to a person who is sixty-five years of age or more.

Effective Date

The measure for HOSP will come into effect from 1st January 2021 while the other two measures will come into effect on the date of assent of the Finance Act 2020.

What changed

The Finance Act 2020 reinstates for exemption, income of the National Social Security Fund (NSSF) and monthly pension granted to a person who is sixty-five years of age or more that the Finance Bill 2020 had previously sought to delete.

Our View

The Finance Bill 2020 had previously proposed for deletion of the exemption relating to income of the National Social Security Fund (NSSF). This has now been reinstated in the Finance Act 2020. This reinstatement is a correct move as its deletion would otherwise contradict the principle of not taxing income of registered pensions schemes.

The same applies to the pension income of senior citizens above age of sixty-five years. The Finance Bill 2020 had sought to add to tax net through deletion of prior exemption of the same. This has now been reinstated and is fair to the senior members of our society whose disposable income would otherwise be affected.

We however still note with concern that the amendments regarding income from HOSP and from employment as set out above have continued to be passed as law. These proposals were included in the Tax Laws (Amendment) Bill, 2020 but were rejected by the National Assembly only to be reintroduced in the Finance Bill 2020 and now passed in the Finance Act 2020.

Accrual and computation of gains from transfer of property

The Finance Act 2020 amends the Eighth Schedule to the Income Tax Act which governs the manner in which gains arising from the transfer of machinery are to be treated for taxation purposes. The change seeks to amend the wording of the provision to exempt from tax, gains accruing to a company on **any** transfer of machinery.

Effective Date This measure will come into effect on the date of assent of the Finance Act 2020.

Our View

This amendment is a drafting clarification made in line with the amendments done to the Second Schedule to the Income Tax Act in April 2020 governing deductions in respect of capital expenditure, through the Tax Laws (Amendment) Act, 2020.

The revisions overhauled this Schedule and this provision now seeks to bring the treatments of the gains arising from transfer of machinery in tandem with the revised provision governing capital expenditure so as to avoid a case of double taxation that would otherwise arise.

What changed

This is a new provision that was not previously factored in the Finance Bill 2020.

Value Added Tax

Deduction of Input Tax

Special Operating Framework Arrangements

Other Notable changes under the First Schedule of the VAT Act

Other changes in VAT Classification

Deduction of Input Tax

The Finance Act 2020 adds onto the list of prerequisite conditions that one must meet in order to qualify for deduction of input tax. Now, in addition to possession of the necessary documentation, the supplier of the taxable supply must have declared the sales invoice in his return for the period for the purchaser to claim a deduction for the same on the other side.

Effective Date This measure will come into effect on the date of assent of the Finance Act 2020.

Our View

The Kenya Revenue Authority (KRA) has been verifying data reported by a taxpayer for its purchases against the corresponding sales entry made by the supplier for the same taxable supply. Any discrepancies then translate to Value Added Tax Auto Assessments (VAA) through the iTax Platform, with the onus lying on the taxpayer to reconcile and adjust any inconsistencies. Where the taxpayer fails to do so, then the purchaser is faced with an assessment disallowing the input VAT claim.

This proposal negates the principal of VAT in as far as input tax claim is permissible to the extent that the supply or importation was acquired to make taxable supplies. With the implementation of electronic invoicing, the requirement to have output tax declared by the supplier as a condition to allow the input tax deduction is not necessary as it is punitive to the person claiming the input tax as evident above. This is due to the fact that the purchaser does not have control over the suppliers who may choose whether or not to declare the output tax.

This proposed provision indicates an attempt by the KRA to shift their responsibility to the taxpayers. The law has empowered the KRA to enforce compliance in tax matters where it is for the KRA to ensure that taxpayers declare all their sales and purchases adequately. A case in point is the current iTax system that does not require for the supplier to declare all particulars for sales made while completing the VAT 3 return.

This therefore translates to an additional administrative burden for the tax payer who now has to follow up with his suppliers to ensure that they declare the sale, so as to position him in a place where he can claim the input VAT. It is key to note that the taxpayer does not have the backing of the law like the KRA does and hence enforcing this is not feasible. A taxpayer may also be engaging with several parties making following up with all of them an onerous task that takes away productive business time.

What changed

No changes from what was initially introduced in the Finance Bill 2020.

Special Operating Framework Arrangements

The Finance Act 2020 introduces a transitional provision in the VAT Act, 2013 exempting goods imported or purchased locally for direct and exclusive use in the implementation of projects under a special operating framework arrangement with the Government. This provision will allow the exemption to continue for existing projects for the remaining period of the agreement.

Effective Date This measure will come into effect on the date of assent of the Finance Act 2020.

Our View

The Tax Laws (Amendment) Act, 2020 had among other provisions, repealed this provision and was seeking to charge to tax these goods that were being imported or purchased locally. This is a welcome move but we are of the opinion that this extension should not be limited only to the special operating framework arrangements, but all projects undertaken with the Government of Kenya. This will ensure that all existing projects are supported and completed to conclusion. Some of these projects, for instance for Liquefied Petroleum Gas (LPG) storage would affect the common mwananchi if not supported to completion.

What changed This is a new provision that was not previously factored in the Finance Bill 2020.

Other Notable changes under the First Schedule of the VAT Act

a) Zero rated supplies to Standard rated supplies

Supplies	New Rate	Old Rate	Effective Date
The supply of liquefied petroleum gas (LPG) including propane.	14 %	0 %	1st July 2021
Inputs or raw materials for electric accumulators and separators including lead battery separator rolls whether or not rectangular or square supplied to manufacturers of automotive and solar batteries in Kenya.	14 %	0 %	Date of Assent
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.	0 %	Exempt – 0% will be in operation only for a period of 6 months from date of assent. From 1st January 2021 this will move back to exempt status.	Date of Assent

Effective Date This measure will come into effect on the date of assent of the Finance Act 2020.

Our View

We note that the effective date for the LPG has been extended to 1st July 2021. This and the temporary change in VAT status of the maize, cassava, wheat or meslin flour will work towards reducing cost of these essential items in the interim in light of the effects on the country of the locust invasion and COVID-19 pandemic.

b) Exempt supplies to Standard rated supplies

Supplies	New Rate	Old Rate	Effective Date
8802.11.00 Helicopters of an unladen weight not exceeding 2,000 kg.	14 %	Exempt	1st July 2021
8802.12.00 Helicopters of an unladen weight exceeding 2,000 kg.	14 %	Exempt	1st July 2021
8802.20.00 Aeroplanes and other aircraft, of unladen weight not exceeding 2,000 kg.	14 %	Exempt	1st July 2021
8803.30.00 Other parts of aeroplanes and helicopters.	14 %	Exempt	1st July 2021
8805.10.00 Aircraft launching gear and parts thereof; deck-arrestor or similar gear and parts thereof.	14 %	Exempt	1st July 2021
8805.21.00 Air combat simulators and parts thereof.	14 %	Exempt	1st July 2021
8805.29.00 Other ground flying trainers and parts thereof.	14 %	Exempt	1st July 2021
8309.90.90 Aluminum Pilfer Proof caps with EPE liner.	14 %	Exempt	Date of Assent
Specialized equipment for the development and generation of solar and wind energy, including deep cycle batteries which use or store solar power upon the recommendation of the Cabinet Secretary responsible for matters relating to energy.	14 %	Exempt	Date of Assent
Tractors other than road tractors for semi-trailers.	14 %	Exempt	1st July 2021
Goods of tariff No. 4011.30.00. (Pneumatic Tyres)	14 %	Exempt	Date of Assent
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.	0 %	Exempt	Exempt – 0% will be in operation only for a period of 6 months from date of assent. From 1st January 2021 this will move back to exempt status.

Supplies	New Rate	Old Rate	Effective Date
Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating) barbeques, braziers, gas-rings, plate warmers and similar non-electric domestic appliances, and parts thereof, or iron or steel of tariff numbers 7321.11.00, 7321.12.00, 7321.19.00, 7321.81.00, 7321.82.00, 7321.83.00 and 7321.90.00.	14 %	Exempt	Date of Assent
One personal motor vehicle, excluding buses and minibuses of seating capacity of more than eight seats, imported by a public officer returning from a posting in a Kenyan mission abroad and another motor vehicle by his spouse and which is not exempted from Value Added Tax under the First Schedule.	14 %	Exempt	Date of Assent
Taxable goods locally purchased or imported by manufacturers or importers of clean cooking stoves for direct and exclusive use in the assembly, manufacture or repair of clean cook stoves approved by the Cabinet Secretary upon recommendation by the Cabinet Secretary for the time being responsible for matters relating to energy.	14 %	Exempt	Date of Assent
Hiring, leasing and chartering of helicopters of tariff numbers 8802.11.00 and 8802.12.00.	14 %	Exempt	1st July 2021

Other changes in VAT Classification

1. The Act adds Maize (corn) seeds of tariff no. 1005.10.00. under the First Schedule as exempt goods.

2. The Act adds under part II of the First Schedule of the VAT Act, exempt services to include 'ambulance' as part of medical, veterinary, dental and nursing services.

Effective Date This measure will come into effect on the date of assent of the Finance Act 2020.

Our View

The amendments to the first schedule are geared towards expanding the tax base through deletion of exemptions provided in the past. This seems to be in continuance of an exercise that commenced through The Tax Laws (Amendment) Act, 2020 that saw a number of exemptions being scrapped and the list for standard rated items getting more exhaustive. What remains of importance is to ensure that while we achieve our objective of increasing tax revenue the same is not done at the detriment of the various industries affected by these amendments.

What changed

I. 8309.90.90 Aluminum Dilfer Proof caps with EPE liner that were previously exempt for VAT purposes are now chargeable at the standard rate of 14%.

II. The supply of lique fied petroleum gas including propane has been moved from the zero rated category to the standard rated category. With the Finance Bill 2020, this measure would come into force from the day of the assent of the Finance Act 2020, however, this date has now been pushed to 1st July 2021.

III. 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. Prior to the Finance Act 2020, the same was exempt but has now been moved to the zero rate category. However, to cushion the common mwananchi, the Act further provides for a 0% rate that will be in operation only for a period of 6 months from date of assent before reverting to the exempt category as from 1st January 2021.

Excise Duty

Definition of Licence

Adjustment for inflation

Alcoholic strength of Beer and Spirits

Abolition of Excise Duty on Betting

Definition of Licenses

The Finance Act, 2020 expands the definition of a license to include:

I. in the case of excisable services, the certificate of registration.

II. in the case of excisable goods, the licence issued under Section 17.

III. in the case of any activity under Section 15 (1) (e), the licence required thereunder.

Effective Date This measure will come into effect on the date of assent of the Finance Act 2020.

Our View

This will bring more clarity on excise license in respect of excisable goods and services and will also reduce the bureaucracy that would come with procuring additional licences from the Commissioner.

What changed No changes from what was initially introduced in the Finance Bill 2020.

Adjustment for inflation

The Finance Act, 2020 introduces provisions in the Excise Duty Act to administer inflationary adjustments on excisable goods and services. As per the revisions, the Commissioner, may, with the approval of the Cabinet Secretary and by notice in the Gazette, adjust the specific rate of excise duty once every year to take into account inflation in accordance with the formula specified in Part of the First Schedule to the Excise Duty Act.

The notice is to be laid before the National Assembly within seven days from the date of publication, and the National Assembly shall, within twenty-eight sitting days of the receipt of the notice consider the notice and make a resolution either to approve or reject the notice.

Effective Date This measure will come into effect on 1st January 2021.

Our View

Section 8 of the Excise Duty Act provides the Cabinet Secretary with the power for variation of rates of excise duty and provides for mechanisms through which pre-determined excise duty on excisable goods or services can be increased or decreased.

Prior to the Finance Act, 2020, Section 10 of the Excise Duty Act provided that despite Section 8, the Commissioner shall, by notice in the Gazette, adjust the specific rate of excise duty "once every year" to take into account inflation in accordance with the formula specified in Part I of the First Schedule.

The amendments align these pieces of legislation to the requirements of article 210 of the Constitution of the Republic of Kenya which requires that all variations to be made to any taxes levied must be sanctioned by the National Assembly. This amendment therefore takes away the constitutional bottlenecks that were previously arising from the way the law was previously drafted.

The amendment also addresses another key factor that the law was not considering previously. It removes the compulsion to adjust for inflation on a yearly basis as this needs to be discretionally, factoring in cases like COVID 19 that have completely distorted the economy. It would not make sense making an inflationary adjustment at this point as this would only increase the cost of living.

As mentioned in the preamble, Section 39A of the Public Finance Management Act, 2012 changed the process and timelines of submission, consideration and passing of the Finance Bill. This exercise sets out the revenue raising measures for the National Government. Given that inflation adjustment of excise rates is part of the revenue raising measures for the National Government, this inflationary adjustment should ideally be aligned to the Finance Bill enactment timelines and therefore the adjustment date should be amended from the current period of October to July.

What changed

This is a new provision that was not previously factored in the Finance Bill 2020.

Alcoholic strength of Beer and Spirits

The Finance Act, 2020 proposes to reduce the percentage of alcoholic strength from 10% to 6 % for Beers and spirits. As a result, the revised description will be as follows:

Particulars	Rate
Beer, Cider, Perry, Mead, Opaque beer and mixtures of fermented beverages with non-alcoholic beverages and spirituous beverages of alcoholic strength not exceeding 6%.	KES 110.62 per litre
Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 6%.	KES 253.00 per litre

Effective Date This measure will come into effect on the date of assent of the Finance Act 2020.

Our View

The alcoholic strength percentage at 6% is in conflict with the Kenya Bureau of Standards (KEBS) published Standards, which are developed under the guidance of Food Drugs and Chemical Substances Act, Cap. 254. The alcohol content in Ready to Drink (RTD) spirituous products is set at within 3% to 8%, with a tolerance limits of ±10% of declared strength under Kenya Standard 2150: 2008. Beer Standards i.e. EAS 63:2019 defines the lower limit alcoholic strength percentage and not the upper limit as provided in the First Schedule of the Excise Duty Act 2015.

This creates complexities, inefficiency and confusion in the implementation of the excise tax by taxpayers due to conflicting legal instruments. The current percentages introduce complexities and lack of uniformity with international principles of classification of alcoholic products for taxation purposes.

According to World Customs Organisation (WCO) principles of classification, goods are classified based on their essential character and therefore a beer, which is classified under Harmonized System (HS) 2203 is distinctively different from Spirits classified under HS 2207. Although this distinction has been made in the Part I of the First Excise Duty Act 2015, the alcoholic strength percentage at 6% distorts this differentiation and make Kenya uncompetitive in comparison to other East African Countries who have aligned they excise taxation system with the EAC Common External Tariff classification of products. Furthermore, the increased rates will be pushed through increased prices to the consumers. This will create a challenge in the market which will ultimately encourage the consumption of low-cost alternative such as illicit alcohol. It is therefore imperative that the National Treasury and the KRA to relook this amendment and urgently reverse the same.

What changed

The percentage of alcoholic strength has been further reduced from 8% to 6 % for beers and spirits when compared with the Finance Bill 2020. It is important to note that the rate was initially at 10% then reduced to 8% and now eventually set at 6%.

Abolition of Excise Duty on Betting

Excise duty on betting which was chargeable at twenty percent of the amount wagered has now been deleted by the Finance Act, 2020.

Effective Date This measure will come into effect on the date of assent of the Finance Act 2020.

Our View

The now repealed 20% excise duty was introduced through the Finance Act 2019 which was in addition to the previous 20% tax on winnings that customers were subjected to prior to changes in the law.

The repeal of the excise duty is a reviving move for the industry players as the multiple taxes and increased competition had seen the local sports gaming sector lose most of its customers to offshore online gaming companies which are not taxable locally, which was a loss to both the taxman and the local gaming industry.

What changed

This is a new provision that was not previously factored in the Finance Bill 2020.

Tax Procedures Act

Voluntary Tax Disclosure Program

Appointment of digital service tax agent

Voluntary Tax Disclosure Program

The Finance Act, 2020 introduces a Voluntary Tax Disclosure program which shall be for a period of three years with effect from the 1st January, 2021. Under this program, the taxpayer will disclose his tax liabilities to the Commissioner for the purpose of being granted a relief of penalties and interest on the tax disclosed.

A person with a tax liability may apply to the Commissioner for relief in the prescribed form with respect to tax liabilities that accrued within a period of five years prior to 1st July, 2020. The application shall be voluntary and disclose all material facts.

Where the Commissioner is satisfied with the facts disclosed in the application, the Commissioner shall grant the relief provided that the relief shall not result in the payment of a refund to the taxpayer. If a tax payer is granted relief under the program, they shall not be prosecuted with respect to the tax liability disclosed and shall be granted a remission of the interest and penalty due on the tax liability as follows:

- where the disclosure is made and the tax liability is paid in the first year of the program, a full remission of the interest and penalty.
- where the disclosure is made and the tax liability is paid in the second year of the program, remission of fifty per cent of the interest and penalty.
- where the disclosure is made and the tax liability paid final year of the program, remission of twenty-five per cent of the interest and penalty.

Where the Commissioner has granted the relief, the Commissioner shall enter into an agreement with the taxpayer setting out the terms of payment of the tax liability and the period within which the payment shall be made which shall not exceed one year from the date of the agreement.

Where a taxpayer fails to disclose all the material facts, they shall be liable to pay the full interest and penalty that had been remitted under the agreement. A taxpayer granted relief under the program shall not seek any other remedy including the right to appeal with respect to the taxes, penalties and interest remitted by the Commissioner.

Where, before the expiry of the agreement between the Commissioner and the taxpayer, the Commissioner establishes that the taxpayer failed to disclose a material fact in respect of the relief granted under this section, the Commissioner may:

- withdraw any relief granted.
- assess and collect any balance of the tax liability.
- commence prosecution.

A taxpayer may appeal against a decision of the Commissioner.

The Voluntary Tax Disclosure program shall not apply to a taxpayer if the taxpayer:

- is under audit, investigation or is a party to ongoing litigation in respect of the tax liability or any matter relating to the tax liability.
- has been notified of a pending audit or investigation by the Commissioner.

Effective Date

This measure will come into effect from 1 January 2021.

Our View

This tax amnesty opens a window for persons who may have erred in computing their tax liabilities in the past and now wish to set them the same right but were discouraged by the hefty penalties and interest.

It also offers a helping hand to the KRA who lack sufficient resources to carry out compliance checks on all taxpayers to establish any amounts not declared.

What changed

No changes from what was initially introduced in the Finance Bill 2020.

Appointment of digital service tax agent

The Finance Act, 2020 seeks to introduce a provision whereby the Commissioner may appoint an agent for the purpose of collection and remittance of digital service tax to the Commissioner. The provision also grants the Commissioner the power to revoke an appointment.

Effective Date This measure will come into effect from 1 January 2021.

Our View

This provision seems to be targeted at financial institutions who act as the link between a consumer and supplier in the digital market place. Among other regulations, the VAT Digital Marketplace Supply Regulations, 2020 require a person supplying taxable services through a digital marketplace to register for VAT in Kenya where the payment made to the supplier in the export country, for the supply of digital marketplace supplies, originates from a bank registered or authorized in Kenya, under the Banking Act, Cap 488.

What changed

No changes from what was initially introduced in the Finance Bill 2020.

Miscellaneous Fees & Levies Act

Import Declaration Fee (IDF)

Railway Development Levy (RDL)

Import Declaration Fee (IDF)

Description	Current Rate	Proposed Rate
Goods imported under the East African Community Duty Remission Scheme.	KES 10,000	1.5% of the customs value
Additional import duty payable in respect of goods entered for home use from an export processing zones enterprises.	N/A	2.5% of the customs value
Aircraft of unladen weight not exceeding 2,000 kg and Helicopters of Heading 8802.11.00 and 8802.12.00 .	Exempt	3.5%
Any other goods as the Cabinet Secretary may determine are in public interest, or to promote investments which value shall not be less than two hundred million shillings.	Exempt	3.5%
Goods imported for implementation of projects under special operating framework arrangement with the Government.	Exempt	3.5%
Goods including materials supplies, equipment, machinery and motor vehicles for the official use by the Kenya Defense Forces and National Police.	3.5%	Exempt

Effective Date

Aircraft of unladen weight not exceeding 2,000kg and Helicopters of Heading 8802.11.00 and 8802.12.00 - this measure will come into effect on 1st July 2021 while the rest of the measures come into effect on the date of assent of the Finance Act 2020.

Our View

The amendment on IDF for goods imported under the East African Community Duty Remission scheme creates consistency and equity amongst manufacturers.

The proposal to levy additional duty for home use goods from EPZ is to discourage EPZ goods from accessing the local market and ensuring that they exported as required.

The proposed changes in respect of aircrafts affects the aviation industry that is already ailing considering the COVID 19 pandemic. The change is counterproductive and will affect Kenya as an aviation hub in the region. Further, the changes create an ambiguity as aircrafts and helicopters have been classified together and will be subject to different interpretations and thus creating grounds for disputes.

What changed

No changes from what was initially introduced in the Finance Bill 2020.

Railway Development Levy (RDL)

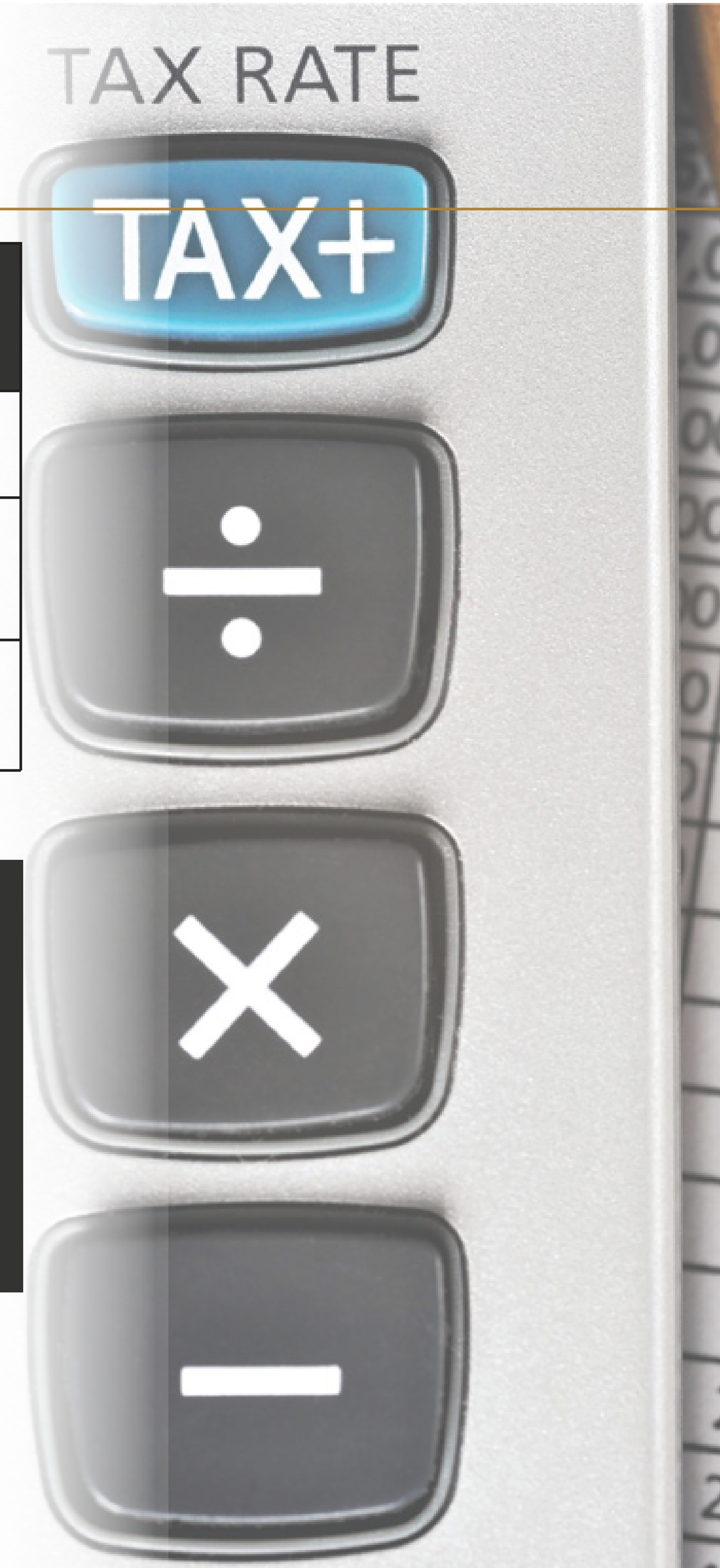
Description	Proposed Rate	Current Rate
Currency notes and coins imported by the Central Bank of Kenya.	3.5%	Exempt
Goods, including materials supplies, equipment, machinery and motor vehicles for the Kenya Defence Forces and National Police Services.	3.5%	Exempt
Goods as the Cabinet Secretary may determine are in public interest, or to promote investments whose value exceeds KES 200 million.	Exempt	3.5%

Effective Date This measure will come into effect on the date of assent of the Finance Act 2020.

Our View

The deletion of the powers of the minister to exempt RDL in public interest is not progressive considering that there are situations like COVID 19 and the Locust crisis that may require discretionary exemption powers of the minister.

What changed No changes from what was initially introduced in the Finance Bill 2020.



Tax Appeals Tribunal Act 2013

Procedure for an appeal

The Roads Tolls Act (Cap. 407)

The Capital Markets Act
(Cap. 485A)

The Standards Act (Cap. 496)

The Kenya Revenue Authority Act
(No. 2 of 1995)

The Retirement Benefits Act,
1997(No. 3 of 1997)

The Insolvency Act (No. 18 of 2015)

Insurance Act (Cap 487)

Procedure for an appeal

The Act has amended the Tax Appeals Tribunal Act to allow the appellant to rely on the grounds stated in the documents to which the decision relates. Previously it only allowed the appellant to be limited to the grounds stated in the appeal to which the decision relates.

Effective Date This measure will come into effect on the date of assent of the Finance Act, 2020.

Our View

This is for clarity and to avoid ambiguity. This may however prevent an appellant from introducing other grounds of appeal and documents after the appeal has been filed.

What changed

No changes from what was initially introduced in the Finance Bill, 2020.

The Roads Tolls Act (Cap. 407)

The Act has expanded the definition of a toll collector to include a public toll collector appointed under Section 4 and a private toll collector appointed under Section 4B of the Road Tolls Act.

The Act has further introduced a new requirement that a private toll collector shall only levy toll and collect monies payable on a public toll road constructed under an agreement entered into by the minister with a suitably qualified person to plan, design, construct and manage a public road.

It also includes transit toll stations under the First Schedule of this Act. It further removes the requirements for the approval by the National Assembly of agreements entered into by the Minister with qualified persons to plan, design or manage a public road.

The Act has introduced a National Roads Toll Fund to be established under the Public Finance Management Act, 2012. The purpose of the Fund shall be to provide funds for the proper functioning of toll roads and toll stations; and the development, repair and maintenance of roads.

The offences and penalty Section of the Road Tolls Act has been amended to impose more stringent penalties on motorists who drive a vehicle through a toll station except by the route designated, refuses to stop a vehicle at a toll station and to pay the toll or fraudulently or forcibly drives a vehicle through a toll station without paying the toll. The Act has imposed a penalty of KES 50,000 or imprisonment for a term not exceeding six months or to both. This penalty is up from the previous KES 5000.

Effective Date This measure will come into effect on the date of assent of the Finance Act, 2020.

Our View

The effect of this proposal is to allow privatisation of roads tolls.

The enhancement of the penalty is a move by the government to ensure compliance as it seeks to put in place legal mechanisms to guide the toll fees on major national roads and to establishment of the toll fund.

What changed

- The definition of a "toll collector" has been expanded a public toll collector appointed under section 4 and a private toll collector appointed under section 4B of the Road Tolls Act.
- Establishment of the National Roads Toll Fund under the Public Finance Management Act to provide funds for the proper functioning of toll roads and toll stations.
- Enhancement of the penalties from KES. 5000 to KES. 50000 for failure or fraudulently passing through a toll station without paying.

The Capital Markets Act (Cap. 485A)

The Act has amended Section 11 (3) of the Act to bring private equity and venture capital firms that access public funds (pensions scheme funds) under the regulatory oversight of the Capital Markets Authority. This is in line with the Cabinet Secretary's policy pronouncement and intention in the financial year 2015/16 budget speech. The Act has further amended Section 18 of the Act to remove the function of payment of beneficiaries from collected unclaimed dividends when they resurface since this is a function currently domiciled under the Unclaimed Financial Assets Authority.

It has also expanded the application of the Investor Compensation Fund (IFC) to activities such as whistle blowing, forensic audits and other related activities that are proactive in nature as far as protection is concerned.

Effective Date This measure will come into effect on the date of assent of the Finance Act, 2020.

Our View

This is a welcome move since the unclaimed dividends are paid out to the Unclaimed Financial Assets Authority which has the responsibility and resources of tracing the beneficiaries of the unclaimed assets.

What changed

No changes from what was initially introduced in the Finance Bill, 2020.

The Standards Act (Cap. 496)

The proposal to amend the definition of "consolidator" in Section 2 of the Standards Act to include "a firm that is licensed to consolidate goods belonging to different consignees at the country of export, which shall be under one Master Bill of Lading or Master Airway Bill, and breaks the consignment into smaller consignments at the port of destination for the different consignees for the purpose of individual customs declaration." has been deleted.

Effective Date	This measure will come into effect on the date of assent of the Finance Act, 2020.

Our View

The Bill had proposed to limit a consolidator to a licensed firm as an alternative to an individual consolidator. The proposal invalidated the introduction of the registration requirement of cargo-consolidators in the Finance Act of 2019 which was aimed at regulating the cargo consolidation business.

What changed	The previous definition of a Consolidator in the Act has been maintained.

The Kenya Revenue Authority Act (No. 2 of 1995)

The Act has amended the Kenya Revenue Authority Act to provide for a legal framework for the establishment of an institution to offer capacity building and training on tax, customs and revenue administration.

The Act has also amended the Kenya Revenue Authority Act to include commissions earned by the Kenya Revenue Authority on collections made on behalf of government agencies or county governments as a source of funding for the Authority capped at 2% of the revenue collected.

Further amendments include providing for specific timelines within which the Authority can be sued to enable the Authority to effectively manage its disputes.

Effective Date This measure will come into effect on the date of assent of the Finance Act, 2020.

Our View

This amendment is meant to give legal status to Kenya school of revenue Administration. (KESRA)
The limitations of actions against KRA is in line with the section 3 of the Public Authorities Limitations Act cap 389 laws of Kenya. However, tax disputes are catered for under specific tax statutes including Tax Procedures Act and Tax Appeal Tribunals Act.

What changed No changes from what was initially introduced in the Finance Bill, 2020.

The Retirement Benefits Act, 1997(No. 3 of 1997)

The Act has amended the Retirement Benefits Act, 1997 to enhance supervisory role of the Authority on pension schemes by providing powers to charge a penalty of KES 100,000 for failure to submit actuarial valuation reports within the period specified in the Regulations and a further penalty for KES 1,000 each day the report remains outstanding.

Effective Date This measure will come into effect on the date of assent of the Finance Act, 2020.

Our View

The effect of this amendment is to enhance supervisory role of the Retirements Benefit Authority.

What changed No changes from what was initially introduced in the Finance Bill, 2020

The Insolvency Act (No. 18 of 2015)

The Act has amended the Second Schedule to the Act to reduce the risk exposure on the tax revenues held by commercial banks before transfer to Central Bank by declaring them preferential claims in the order of priority in the event of insolvency.

Effective Date This measure will come into effect on the date of assent of the Finance Act, 2020.

Our View

The effect of this proposal is to place taxes to rank in the second priority claims with the first priority claims being those of secured creditors. This is aimed at reducing KRA's risk exposure.

What changed

No changes from what was initially introduced in the Finance Bill, 2020.

Insurance Act (Cap 487)

The Act has stipulated a 30-day timeline for an aggrieved party to file an appeal with the insurance tribunal on the decision of the commissioner of insurance in a dispute.

Effective Date This measure will come into effect on the date of assent of the Finance Act, 2020.

Our View

The introduction of the time limit within which to lodge disputes to the tribunal will ensure that the disputes are filed in time to enable commencement of the dispute resolution process without unnecessary delay. An appeal may be dismissed for being filed out of time.

What changed

No changes from what was initially introduced in the Finance Bill, 2020.

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