



ORARO & COMPANY
ADVOCATES

LEGAL ALERT

THE FINANCE ACT, 2021 – BREAKDOWN AND
ANALYSIS

INCOME TAX ACT, CAP 470

Provision Amended	Amendment	Our Comments
S.2(a)	<p>Amends Section 2 of the ITA Inclusion of the definition of “control” in scenarios where:</p> <ul style="list-style-type: none"> • a person holds at least 20% of the voting rights of a company whether directly or indirectly; • a person advances a loan facility constituting at least 70% of the total book value of the assets of a company or guarantees 70% of the total debt of the debtor (excluding loans from unrelated financial institutions); • a person appoints more than half of the board of directors of another entity or at least one director or executive member of the governing board of that entity; • a person owns intellectual property rights which a company wholly depends on in the manufacture or processing of goods or articles carried on by the person; • a person who supplies at least 90% of the sales of an entity and upon assessment by the Commissioner, the person influences the price or other conditions relating to the supply or purchases by the other person; • a person who purchases or designates a person to purchase at least 90% of the sales of another person and upon assessment, the Commissioner deems influence in the price or any other conditions of the sales of another person; • A person who has any other relationship, dealing or practice with another person that the Commissioner may deem to constitute control. 	<p>The term “control” was previously defined under the Second Schedule of the Income Tax Act to mean the holding of 25% or more of the shares or voting rights within a company. The provision was subsequently deleted by the Tax Laws (Amendment) Act, 2020. This amendment is geared towards reintroducing the definition of the word “control” and expanding its scope in light of the introduction of beneficial ownership disclosure under the Companies Act. It, therefore, expands the scope of those in control of a company from ordinary shareholders to include suppliers, financiers, guarantors and even consumers provided that they exercise control in companies.</p> <p>Additionally, a related company that supplies another company with at least 90% of its sales will have to comply with the transfer pricing rules under the Income Tax Act.</p> <p>Further, the last amendment gives the Commissioner a wide discretion to determine what constitutes control of another person. This creates a level of uncertainty for taxpayers on the criteria used for determination of control.</p> <p>These amendments will affect the application of the law on thin capitalisation and transfer pricing to include a wider range of transactions between related parties which were not clear or expressly provided for thus widening the taxable income base.</p>

	<p>Introduction of the definition of “infrastructure bond” to mean a bond issued by the government for the financing of a strategic public infrastructure facility including a road, hospital, port, sporting facility, water and sewerage system, communication network or energy project.</p>	<p>This will improve certainty for potential investors whose listed bonds are infrastructure bonds, hence exempt them from paying income tax on the accruing interest.</p> <p>For purposes of taxation, it is extremely useful and necessary to have express definitions for avoidance of doubt and to provide clarity.</p>
	<p>The amendment redefines a “permanent establishment” (PE) as follows:</p> <p>paragraph (a) has expanded the definition to include a warehouse (in relation to persons providing storage facilities to others), a farm, plantation or any other place where agricultural, forestry plantation or related activities are carried on as well as a sales outlet;</p> <p>paragraph (b) includes a building site, construction, assembly or installation project or any supervisory activity connected thereto, only if it continues for a period of more than one hundred and eighty-three days;</p> <p>paragraph (c) lists the provision of services (including consultancy), through employees or other persons only where such services are related to business in Kenya for an aggregate period of at least 91 days in any 12-month period or ending in the year of income concerned;</p> <p>paragraph (d) also classifies an installation/structure used in the exploration of natural resources for a period of not less than ninety-one days as a PE;</p> <p>paragraph (e) also includes a dependent agent of a principle for activities the principal undertakes in Kenya (including habitually concluding contracts, playing the principal role leading to the conclusion of contracts without material modification by the person).</p>	<p>Paragraph (a) expands the definition of a PE to include sales outlets, farms, plantations or any place where related activities are carried out irrespective of the duration of activity.</p> <p>Paragraph (b) seeks to quell the mischief of persons carrying out building & construction projects in Kenya:</p> <ol style="list-style-type: none"> a. using different related entities for short periods each to avoid being deemed to be operating in Kenya for more than one hundred and eighty-three days; or b. by carrying out projects intermittently using a single entity to avoid carrying out business for a continuous period of one hundred and eighty-three days. <p>By deeming such to be PEs for purposes of income tax.</p> <p>Paragraph (c): Service provision for an aggregate of 91 days in any 12-month period shall be regarded as a PE. This will affect the way non-resident service providers do business with resident entities.</p> <p>Paragraph (d): Installations/structures used in natural resource exploration are now PEs if they are up for a period exceeding ninety-one days.</p> <p>Paragraph (e): Non-residents acting through local agents to habitually conclude business in Kenya shall be deemed to have a PE in Kenya.</p> <p>However, the determination of a PE excludes certain activities of a preparatory or auxiliary character.</p>

	A fixed place of business through which business is wholly or partly carried on; and a building site, construction, assembly or installation project or any supervisory activity connected to the site or project, but only if it continues for a period of more than 183 days.	
S.3	The Act expands the scope of income to be subject to income tax by including income accrued from business carried out over the internet or electronic networks, including through a digital marketplace.	This amendment subjects income from business carried out online to income tax. Previously, only income from a digital marketplace was subject to income tax.
	The Act now defines a “digital marketplace” as an online or electronic platform which enables users to sell or provide services, goods or other property to other users.	The amendment brings certainty as to what constitutes a digital marketplace. However, the Digital Marketplace Regulations have not yet been enacted. Therefore, there is no clear mode of collecting taxes accruing from a digital marketplace.
S.11	<p>The Act introduces section 11(3A) to the Income Tax Act to require the application of section 11(3) to registered trusts in the following instances:</p> <ol style="list-style-type: none"> a) any amount paid out of the trust income on behalf of any beneficiary and is used exclusively for the purpose of education, medical treatment or early adulthood housing; b) income paid to any beneficiary which is collectively below Kshs. 10 million in the year of income; c) such other income as may be prescribed by the Commissioner from time to time and at such rate as prescribed in paragraph 5 of the 3rd Schedule. 	<p>This amendment exempts all amounts paid out by a registered trust (to or on behalf of a beneficiary) except for:</p> <ol style="list-style-type: none"> a. payments from the trust for the exclusive purpose of education, medical treatment or early adulthood housing; b. income paid to a beneficiary that amounts to less than KES ten million per year of income; c. any other amount prescribed by the Commissioner. <p>The amendment has restricted the applicability of income tax payments out of a registered trust that meet the above conditions. This will ultimately reduce tax collections on payments by trusts to beneficiaries. This amendment may be erroneous.</p>
S. 12D	The Act introduces subsection (1A) to exempt the following persons from paying minimum tax:	<p>This amendment is a welcome move seeking to exempt the following persons from payment of minimum tax:</p> <ol style="list-style-type: none"> a. businesses whose retail price is regulated by the government e.g. petrol stations;

	<ul style="list-style-type: none"> a) persons engaged in business whose retail price is controlled by the Government; b) persons engaged in insurance business; c) persons engaged in manufacturing and their cumulative investment in the preceding 4 years from assent is at least KES. 10 billion shillings; d) persons licensed under the Special Economic Zones Act, 2015; and e) persons engaged in distribution business with income based solely on a commission. 	<ul style="list-style-type: none"> b. those in insurance business e.g. agents & brokers; c. manufacturers who have invested a sum of at least KES ten billion within the preceding four years; d. Special Economic Zone (SEZ) operators; and e. distributors who earn only commissions.
S.12E	<p>The Act states that non-resident persons whose income is derived or accrues in Kenya through a business carried out over the internet or an electronic network including a digital marketplace shall be subjected to Digital Service Tax (DST). Such non-resident persons shall be required to remit the DST on or before the twentieth day of the following month. Additionally, income subject to Withholding Tax shall not be further subjected to DST.</p>	<p>This amendment restricts the applicability of Digital Service Tax (DST) to non-residents. The amendment further provides that DST returns are to be filed and DST paid before the twentieth day after the end of the month when the service was offered (similar to the filing deadline for VAT, WHT and excise duty). However, DST shall not apply to income subject to WHT or income from provision of radio, television or internet services.</p>
S. 15	<p>The phrase assigning the meaning of “control” as per the Second Schedule of the Act is deleted.</p> <p>The Act also removes the cap of 10 years for offsetting taxable losses to an indefinite period.</p>	<p>For purposes of Section 15, “control” shall take up the definitions listed in Section 2 above. This expands the definition of control and creates consistency in its definition.</p> <p>This amendment removes the 10-year restriction on carrying forward tax losses, thus enabling businesses to infinitely carry forward business losses.</p>
S. 16	<p>The Act prohibits payment of gross interest to related persons and third parties exceeding 30% of earnings before interest, taxes, depreciation and amortization (EBITDA) of the borrower in any financial year. Further, any income exempt from tax is proposed to be excluded from the calculation of EBITDA.</p>	<p>Thin capitalization will now be determined by the total value of loans as a percentage of EBITDA, a change from the previous position where loans were compared to the total equity in the balance sheet.</p> <p>This will change the thin capitalisation rule of debt-to-equity ratio of 3 to 1 to a restriction of payment of gross interest at not more than 30% of EBITDA. Related companies that are thinly capitalised will</p>

	<p>The above provision shall apply to interest on all loans; payments that are economically equivalent to interest; and expenses incurred in connection with raising the finance.</p>	<p>have to make necessary adjustments based on EBITDA. This amendment also encompasses any payments equivalent to interest, thereby sealing the loopholes resulting from persons declaring interest in other forms/classifications.</p> <p>However, banks and financial institutions licensed under the Banking Act and Micro and Small Enterprises registered under the Micro and Small Enterprises Act, 2012 shall be exempt from this provision.</p>
	<p>The Act introduces a new paragraph (ja) to Section 16 (2) to prohibit deductions on deemed interest where the person is controlled by a non-resident person alone or with not more than four other persons where the company is not a bank or financial institution licensed under the Banking Act.</p>	<p>This provision already existed in Section 16(2)(j) and the amendment is for clarity purposes only.</p>
<p>S.18B</p>	<p>The Act requires an ultimate parent entity of a multinational enterprise group to submit a return to the Commissioner describing the group's financial activities in Kenya, where its gross turnover exceeds the prescribed threshold, and in all other jurisdictions where the group has a taxable presence.</p> <p>The information to be provided in the returns include the amount of revenue, profit or loss before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees and tangible assets other than cash or cash equivalents regarding each jurisdiction in which the group operates.</p>	<p>Ultimate parent companies (that exceed a turnover threshold set by the Commissioner) must now file annual returns that include all the group's financial activities in all other jurisdictions where the group has a taxable presence.</p> <p>This will give the Revenue Authority first hand access to information on related parties.</p>
<p>S. 25</p>	<p>The Act refines the definition of the term "settlement" to include the phrase "through a registered family trust".</p>	<p>This amendment clarifies that registered family trusts are subject to income tax similar to other trusts.</p>

S. 26	The definition of the term “settlement” is amended to include the words “other than a registered family trust” immediately after the word “covenant”.	This excludes registered family trusts from the provisions of Section 26. As a result, income earned by a trust shall not be deemed as the taxable income of the creator of the trust.
S.31	Provision of insurance relief for contributions made to the National Hospital Insurance Fund (NHIF).	NHIF contributions shall now be allowable as insurance relief for resident individuals in their income tax returns, thus equalizing all tax payers when claiming relief on insurance.
S.39B	Employers who engage at least 10 graduates from technical and vocational education and training as apprentices for a period of 6 to 12 months shall now also be eligible for a tax rebate the following year after such engagement.	The amendment is meant to widen the scope of apprenticeship tax rebates to include employers offering 6–12-month apprenticeships to graduates from Technical and Vocational Education and Training (TVET) institutions, thus encouraging them to not only engage university graduates as apprentices but also graduates from TVETs.
S.41	<p>The Act deletes the current section 41 of the Act and replaces it with a new section 41 that provides that any special arrangement for relief from double taxation between Kenya and another country shall have effect in relation to income tax and the said agreement shall be subject to the provisions of the Treaty Making and Ratification Act, 2012.</p> <p>Additionally, where the agreement provides that the income derived from Kenya is exempt or excluded from tax, or the application of the arrangement results in the reduction of the rate of tax in Kenya, the arrangement shall not apply unless 50% or more of the underlying ownership of the entity is held by a person in the contracting state for the purposes of the agreement. However, this provision shall not apply if the resident of the other contracting state is a company listed in the stock exchange of the contracting state.</p>	DTAs shall now come into effect upon compliance with the requirements of the Treaty Making and Ratification Act (parliamentary approval). This is a change from the previous position where DTAs came into effect upon issuance of a Notice by the Minister in charge of finance.
S. 41A	The Act amends the provision by deleting the words “specified in the notice being arrangements”.	This is an administrative amendment following the removal of the requirement of a Notice by the CS for a DTA to come into force.

S. 133	Subsection (6) of the section has been amended to extend the duration of application of paragraph 24E of the Second Schedule to 31 st December 2022.	The extension is as a result of the ongoing construction of the Standard Gauge Railways which entitles the making of deductions due to the ongoing works.
	The Act amends section 133 by including subsection (7) which stipulates that subject to the provisions of section 12 of the Act, any investment allowance shall be claimed on a straight-line basis.	The mode of calculating written down values for purposes of investment allowance shall be straight-line only. This allows persons investing to claim investment allowance within a shorter period.
Paragraphs 36, 57 and 58 of the 1 st Schedule	Paragraph 36 is amended by inserting sub-paragraph (g) to include property, including investment shares, which is transferred or sold for the purpose of transferring the title or the proceeds into a registered family trust.	<p>The following income tax exemptions have been added under the 1st Schedule to the ITA:</p> <ul style="list-style-type: none"> a. property transferred or sold by an individual for the purpose of transferring them to a registered family trust; b. income of a registered family trust; c. capital gains resulting from transfer of immovable property to a family trust. <p>The amendment expands the scope of income exempt from income tax to dealings relating to registered family trusts.</p>
	Inclusion of paragraph 57 to exclude the income or principal sum of a registered family trust.	
	The Act has included paragraph 58 to exclude capital gains relating to the transfer of title of immovable property to a family trust.	
Paragraph 1 of the 2 nd Schedule	The Act amends the Investment Allowance rates. The words “on a reducing balance” have been deleted and replaced with the words “in equal instalments” under sub-paragraphs (a), (b), (c) and (d) of Paragraph 1 to the 2 nd Schedule.	<p>Investment deduction (ID) on commercial buildings, machinery & purchase/acquisition of indefeasible rights to a fibre-optic cable by a telecommunications operator shall be on a straight-line basis; a change from reducing balance. However, the allowance rates on the same will not change.</p> <p>In addition, ID will now be allowable on exploration machinery whether or not such operations are being carried out under a mining right.</p> <p>The amendment also includes machinery used for electricity production whether or not the electricity is supplied to the national grid.</p> <p>The amendment has also defined:</p>

		<p>a. civil works for purposes of ID. This definition is inclusionary and thus to the benefit of taxpayers.</p> <p>b. Farm works for the purposes of ID are now defined in the Act.</p>
Paragraph 1A of the 2 nd Schedule	<p>The Act introduces paragraph 1A to the 2nd Schedule to stipulate that the investment deduction shall be at 100% in the following circumstances:</p> <p>a) where the cumulative investment value in the preceding 3 years outside Nairobi County and Mombasa County is at least 2 billion shillings;</p> <p>Provided that where the cumulative value of investment for the preceding 3 years of income was 2 billion shillings on or before the 25th April 2020 and the applicable rate of investment deduction was 150%, that rate shall continue to apply for the investment made on or before 25th April, 2020.</p> <p>b) where the investment value outside Nairobi County and Mombasa County in that year of income is at least 250 million shillings; or</p> <p>c) where the person has incurred investment in a special economic zone</p>	<p>ID shall be allowed at 100% on investments outside Nairobi & Mombasa counties if such investment is cumulatively at least KES Two Billion for the preceding three years.</p> <p>However, where such investment cumulated to at least KES Two Billion for the three preceding years before 26th April 2020, an ID rate of 150% shall continue to apply on investments made before 26th April 2020.</p> <p>ID shall be allowed at 100% for investments outside Nairobi & Mombasa counties if they amount to at least KES Two Hundred and Fifty Million in that year of income.</p> <p>ID shall be allowed at 100% on investments in an SEZ.</p>
S. 133	<p>a) subsection (6) is amended by deleting the expression “31st December, 2021” and substituting therefor the expression “31st December, 2022”;</p> <p>b) the following new subsection has been inserted immediately after subsection (6) “(7) Subject to the provisions of section 12 of this Act, any investment allowance on any written down values as at the</p>	<p>This extends the applicability of ID on construction of bulk storage & handling facilities for SGR support to 31st December 2022 from the previous cut-off date of 31st December 2021. The above-mentioned ID is at 150%.</p> <p>Subject to S. 12 of the ITA, any ID is to be claimed on a straight-line basis.</p>

	date of commencement of this Act, shall be claimed on a straight-line basis.”	
Paragraph 5 of the 3 rd Schedule	The Act introduces sub-paragraph (jb) to apply a rate of 25% income tax in respect to the disbursement of deemed income under section 11(3)(c) of the Act.	Income tax rate on payments from a trust to a beneficiary in the form of annuities or other such payments designated to be paid free/net of tax shall be 25%.
9 th Schedule	<p>The provisions on the taxation of the extractive industries have been amended as follows:</p> <ul style="list-style-type: none"> a) reduction in the rate of depreciation for machinery first used to undertake operations from 100% to 50% in the first year of use and 25% per year, in equal instalments; b) reduction in the rate of depreciation for machinery first used to undertake exploration activities from 100% to 50% in the first year of use and 25% per year, in equal instalments; c) increase in withholding tax for non-resident subcontractor for the provision of services to either a licensee or a contractor from 5.625% to 10%; d) reduction of the deductible withholding tax by a contractor in cases of management, training or professional fees from 12% to 10% of the gross amount of the management or professional fees payable. 	<p>This amendment is to ensure conformity of ID rates by reducing ID on prospecting & exploration equipment from 100% to 50% in the first year and 25% per year on a straight-line basis (as per the 2nd Schedule).</p> <p>WHT on service fees due to non-resident contractors by licensees and contractors in mining/petroleum operations has been increased from 5.625% to 10%.</p> <p>WHT on payments to non-resident contractors with a PE in Kenya for management & professional services has been reduced from 12.5% to 10%.</p>
Para 18 of the 9 th Schedule	The amendment deletes it and replaces it with the following new paragraph: “The provisions of section 16(2)(j) shall apply to a contractor or a licensee.”	Thin cap provisions on deductibility of interest shall apply to contractors and licensees.

VALUE ADDED TAX (NO.35 OF 2013)

Provision Amended	Amendment	Our Comments
S.2	Section 2(c) of the VAT Act in the definition of “Supply of imported services” has been amended by deleting the provisions that hitherto provided that registered person would not be entitled to “credit on the full amount of input tax ...” and substituting thereof with “.the full amount of input tax” with the exclusion of “credit” on such input tax.	The amendment seeks to clarify that part (c) of the definition of supply of imported services relates to a registered person.
S.5	<p>The Act imposes VAT on supplies transacted over the internet and an electronic network.</p> <p>Amendment of sub-section (9) of section 5 to re-define a digital marketplace as an online platform which enables users to sell or provide services, goods or other property to other users.</p>	<p>The Amendment to subsection 7 is meant to clarify that VAT is payable in relation to supplies not just made at the digital marketplace but over the internet or on an electronic network. This is meant to expand the tax base.</p> <p>The re-definition of digital marketplace is meant to expand its definition to include not just the seller and the buyer but also the users of the said platform. This will bring the advertisers and online marketing (shopping) platform entities into the tax bracket of paying VAT.</p>
S.10	The Act deletes the word “registered” in subsections (1) & (3) and under subsection (2), clarifying that it only applies to registered person.	<p>The amendments to subsections (1) & (3) of the said Section cements on the issue of treatment of imported services whether made to registered or unregistered persons.</p> <p>Subsection 2 on its part, emphasises that the conditions set out therein under relates to treatment of imported services in relation to registered person.</p>
S.19	The Act deletes the word “registered” in subsection (2).	By deleting the word “registered”, it is now evident that both registered and non-registered persons must remit their VAT not later than the 20 th day of the month succeeding that which the tax became due.
S.17	The Act extends the scope of applicability of deduction of input tax beyond Section 17 of the VAT Act to the whole of the VAT Act and the Regulations.	This amendment is meant to clarify the current market practice where input VAT is claimed provided that the purchaser of the taxable supply has used the said purchases in the production of another taxable supply.

	<p>The Act also expands the scope of restriction on deductibility of input tax for registered persons to include taxes relating to leasing or hiring of passenger cars, mini-buses (including any repair and maintenance thereof) as well as entertainment, restaurant and accommodation services, subject to the exceptions listed therein.</p>	<p>Registered persons will now not be allowed to deduct input tax for the acquisition, leasing or hiring of passenger cars, mini-buses, entertainment, restaurant and accommodation services.</p>
First Schedule	<p>Deletion of the following supplies under Paragraphs 33, 34 and certain descriptions appearing after paragraph 39 of the First Schedule.</p>	<p>The supplies (including Heparin and its salts; Antisera and other blood fractions, modified immunological products; other milk in powder, granules or other solid forms) have been modified to have their tariff numbers conform to the East Africa Community Common External Tariff.</p>
	<p>Amendment of the table after paragraph 39 to exempt certain supplies from VAT. Notable examples of the proposed exempted supplies include: Vitamin C and its derivatives; Malaria diagnostic test kits; Insulin; Food supplements; Orthopaedic or fracture appliances and Blood giving set and infusion sets.</p>	<p>The supplies that were originally subject to VAT at the rate of 16% shall now be exempt.</p>
	<p>The Act exempts taxable goods imported or purchased for direct use in the extractive industries except for motor vehicles upon such recommendation by the relevant Cabinet Secretary</p>	<p>Such exemption will attract investors in the extractive industries, and this will in turn have a positive impact on the country's economy.</p>
	<p>The Act exempts from payment of VAT on procuring specialized equipment used for the development and generation of solar and wind energy, including photovoltaic modules, direct current inverters and deep cycle batteries that use or store solar power. Such exemption shall only be granted with the recommendation by the Cabinet Secretary responsible for matters relating to energy.</p>	

	<p>The Act stipulates that taxable goods supplied to persons that had an agreement/contract with the government prior to 25th April 2020 and the agreement provided for exemption from VAT shall continue to enjoy such exemption. The qualifier for this is that the said exemption only applies to the unexpired period of the agreement and upon recommendation by the Cabinet Secretary responsible for matters relating to energy.</p>	
	<p>The Act also grants VAT exemptions to (among others) the following medical supplies upon approval by the Cabinet Secretary responsible for health matters:</p> <ul style="list-style-type: none"> a) Medical ventilators and the inputs for the medical ventilators; b) Physiotherapy accessories, treadmills for cardiology therapy and treatment for use by licensed hospitals; c) Dexpanthenol of tariff number 3304.99.00 used for medical nappy rash treatment by licensed hospitals; d) Other instruments and appliances, of tariff number 9018.41.00, used in dental sciences, dental drill engines, whether or not combined on a single base with other dental equipment; e) Other breathing appliances and gas masks, excluding protective masks having neither mechanical parts nor replaceable filters; f) Discs, tapes, solid-state non-volatile storage devices, “smart cards” and other media for the recording of sound or of other phenomena; g) Ozone therapy, oxygen therapy, aerosol therapy, artificial respiration or other therapeutic respiration apparatus; h) Apparatus based on the use of x-rays, whether or not for medical, surgical or dental. 	<p>Exemption from VAT for medical supplies such as medical ventilators and respiratory apparatus for oxygen therapy is a welcome amendment especially in the ongoing fight against the COVID-19 pandemic.</p>

Part A of the 2 nd Schedule	<p>The Act includes the following supplies as zero-rated:</p> <ul style="list-style-type: none"> a) the transportation of goods originating from Kenya to a place outside Kenya; b) transportation of sugarcane from farms to milling factories; c) the supply of maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour by more than ten per-cent in weight. 	<p>The zero-rating of the listed supplies will encourage growth of the milling industries by allowing the manufacturers/processors of these commodities to claim input VAT thus making goods and services affordable to the consumers.</p>
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TAX PROCEDURES ACT (NO.29 OF 2015)

Provision Amended	Amendment	Our Comments
S.3	<p>The definition of the term “tax law” is amended to include the Miscellaneous Fees and Levies Act, 2016.</p>	<p>This officially includes the Miscellaneous Fees and Levies Act, 2016 in Kenya’s tax regime. Even though miscellaneous fees and levies are charged and paid largely by importers alongside the import duties, they have been hitherto excluded from the purview of tax statutes.</p>
Addition of S.6A	<p>The Act includes section 6A stating that any multilateral agreements and treaties entered into by or on behalf of the Kenyan Government in relation to international tax compliance and prevention of tax evasion or exchange of information on tax matters is to have effect in the manner stipulated in the treaties. Any information obtained pursuant to such agreements is not to be disclosed except as specified in the agreements.</p>	<p>This is an express recognition of tax treaties and multilateral agreements. The purpose is to make tax administration effective by ensuring interstate cooperation when it comes to effective tax administration.</p>
Addition of S.6B	<p>This section introduces common standards for financial reporting which financial institutions would have to comply with. Financial institutions in this case are custodial or depository institutions or investment entities or specified insurance companies. A Kenyan financial institution is one that is resident in Kenya or one that is not resident in Kenya but whose branch is in Kenya.</p>	<p>This addition is meant to set out the obligations of financial institutions to comply with financial reporting standards and also oblige them to file the same with the Commissioner.</p>

	<p>A reporting financial institution is to identify reportable accounts as specified by the common reporting standard regulations and file with the Commissioner either information return or “nil” returns. Where it can be reasonably considered that the arrangement or obligation is entered into or engaged in, the arrangement or practice will be taken as if it had not been entered into or engaged in. The Cabinet Secretary is to prescribe the common reporting standards, by regulations.</p>	
<p>S.23 Addition of subsection 2A and 2B</p>	<p>For non-resident persons doing business within a digital marketplace, the books of account are to be in a convertible foreign currency as may be approved by the Commissioner. A non-resident person filing returns and making payments through a resident tax representative or non-resident person with a permanent establishment is not required to file returns in Kenya shillings.</p>	<p>These amendments are in recognition of the diverse digital marketplace transactions including those done by non-residents that are more than likely to be providing services and receiving payment in a foreign currency thus providing mechanism of dealing with the same.</p>
<p>S.37(1) Addition of paragraph (d) and subsection 4</p>	<p>The addition by the Act includes a ground for the Commissioner refraining from assessing or recovering an unpaid tax; the ground being any other reason occasioning inability to recover the unpaid tax.</p> <p>The Commissioner shall be required to submit a report to the Cabinet Secretary by 30th June and 31st December each year outlining details and amounts of taxes abandoned under this section.</p>	<p>The other grounds for refraining from attempts of recovering unpaid tax are highly specified leaving no room for unprecedented situations that the section has not outlined.</p> <p>The report to be sent to the Cabinet Secretary provides a measure of accountability to ensure tax assessment and recovery is abandoned in situations where no other course of action is reasonable.</p>
<p>Repeal of S.37A</p>	<p>The Act repeals section 37A of the Act which provides for the instances in which the Commissioner is to refrain from assessing tax in some cases including taxes, penalties or interest in respect of any period before and during the 2013 year of income.</p>	<p>This section had set time limitations for when the Commissioner could no longer take action to recover taxes. This will no longer apply and will result in more audits being undertaken noting the requirement of maintaining records as provided under Section 23 of the Act.</p>

<p>S.42A Deletion of subsection 4A</p>	<p>The subsection provides for the Commissioner's power to exempt any supplier from having to comply with the requirement to appoint a tax withholding agent. This would only apply if the supplier sufficiently demonstrated to the Commissioner that the nature of its business or due to the application of S.42, they would be in a continuous credit position for at least 24 months.</p>	<p>This amendment has in effect removed the exemption of certain suppliers, who meet the conditions that were hitherto outlined therein, from withholding VAT.</p>
<p>S.47 Addition of subsections 4A, 4B and 4C</p>	<p>Section 47 has been amended to provide that where the Commissioner notifies a taxpayer that they are entitled to a refund, and the taxpayer has an outstanding tax, the refund will be applied to the payment of the outstanding tax. In effect, no penalties or interest shall accrue on this amount from the date of the notification until the said refund has been applied accordingly, by the Commissioner.</p> <p>Provided that despite applying the refund towards the outstanding taxes, more tax still accrue, the outstanding tax shall accrue interest and penalties per the Act. Further, where the Commissioner is satisfied that there is an overpayment of tax, the overpaid tax shall be deemed to have been offset against the taxpayer's future tax liabilities.</p>	<p>This amendment is proposed to avoid unfair prejudice occasioned to taxpayers who have outstanding taxes while still having a refund due to them. If the amount to be refunded is applied in settling the outstanding tax timeously, then no interest or penalties would accrue in relation to those outstanding taxes, especially where interest arises from a delay by the Commissioner to process the refund and apply it as an offset to the outstanding taxes. However, if the outstanding taxes exceed the refund amount, then the remaining unpaid taxes will accrue penalties provided that they remain unsettled.</p> <p>With respect to overpaid taxes, the amendment provides that such overpaid taxes shall be used to offset against a taxpayer's future tax liabilities.</p>
<p>S.57</p>	<p>Inclusion of admissibility of Information or documentation obtained from the exercise of power to inspect goods under Section 58 of the Act.</p>	<p>This is to increase the scope of admissible documentation or information in tax matters to include information under Section 58 that was previously not covered.</p>
<p>S.77</p>	<p>The Act includes filing of Notices of Objection and returns that have been filed electronically on a weekend and on a public holiday retaining the specified date as that prescribed in the relevant law.</p>	<p>The amendment clarifies that Notices of Objection filed electronically whether on weekends or on public holidays shall be deemed to have been filed within the prescribed timelines.</p> <p>This is a welcome move as it appreciates the electronic service of documents upon the Authority in light of COVID-19 pandemic.</p>

Addition of S.88A	The Act imposes penalties for filing inaccurate information in a tax return to the tune of KES. 100,000 for every false statement made in the return or imprisonment for a term not exceeding three years or both. Where the false information submitted was obtained from another person, the taxpayer will not be liable if they show that they made a reasonable effort to obtain the information. For financial institutions, they shall be liable to pay a penalty of KES 1 million for failing to file an information return or a “nil” return.	This is an attempt to encourage compliance with disclosure requirements on tax law especially for financial institutions in line with the common reporting standard obligations under the newly introduced Section 6B to the Act.
Addition of S.96A	The Commissioner has the discretion to engage the intervention of a relevant authority in collecting tax from a person who provides services over the internet or electronic network, which includes a digital marketplace.	This amendment now bestows the Commissioner with power to enforce tax laws and to seek intervention of any other authority in the collection and enforcement of VAT on a digital marketplace.
S.98	The Act includes additional actions that would warrant distress proceedings under Section 41 or seizure of goods under Section 44 by providing that the goods or property be secured or where there is proof of commission of an offence.	This gives the Commissioner additional mandate in such circumstances.
S.111	This amendment will have the effect of only protecting officers (the Commissioner or officers appointed under the Kenya Revenue Authority Act) from personal liability arising from their actions in performing their functions, only if they acted in good faith.	This amendment will mean that officers no longer have wide protection from prosecution for acts done in the course of their work save for that which is done in good faith. This will on the one hand ensure prudence on the part of tax officers while on the other hand giving them the much needed immunity.
First Schedule	The Act includes the action of carrying out business over the internet or an electronic network including through a digital marketplace to the list of transactions for which a PIN is required.	The amendment is meant to ensure that there is compliance in the remittance of VAT by players in the digital market industry.

MISCELLANEOUS FEES AND LEVIES ACT, 2016

Provision Amended	Amendment	Our Comments
S.9B	Application of S.47 of the Tax Procedures Act, 2015 to an application for refunds, ascertainment and repayment of fees and levies overpaid in error under this Act or the determination by the Commissioner of penalties and interests on fees that remain unpaid.	This amendment seeks to provide for refunds and overpayments under the purview of the Commissioner as this is not provided for in the Act currently, thereby ensuring efficiency in tax administration.
Second Schedule Part A and B	The Act amends the Second Schedule by providing that the Cabinet Secretary may exempt certain goods which he is satisfied are for public interest or for promotion of investment provided that the value of such goods exceeds KES 5 billion.	This amendment is progressive as it will authorise the CS to consider exempting certain consignments from remitting the levies and other fees, thus promoting investments.

STAMP DUTY ACT (CAP 480)

Provision Amended	Amendment	Our Comments
S. 52	The Act exempts a registered family trust from payment of stamp duty.	This amendment seeks to exempt disposition in property for a registered family trust from payment of stamp duty.
S. 117	The Act exempts disposition under a registered family trust from the payment of stamp duty.	Disposition of property under a registered family trust shall now be exempt from payment of stamp duty.

CAPITAL MARKETS ACT (CAP 485A)

Provision Amended	Amendment	Our Comments
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S.35A(17)	The Capital Markets Tribunal is to hear appeals within 90 days from the date of filing the appeal.	This amendment is geared towards improving efficiency in the administration of justice at the Capital Markets Tribunal.
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INSURANCE ACT (CAP 485A)

Provision Amended	Amendment	Our Comments
S.2	The Act redefines the term “broker” as an intermediary involved with the placing of insurance business with an insurer or reinsurer for or in expectation of payment by way of brokerage commission for or on behalf of an insurer, policyholder or proposer for insurance or reinsurance and includes a medical insurance provider.	This is a simplified definition of the word and excludes persons who canvass reinsurance products.
S.20 Deletion of sub-section 3	This sub-section required a reinsurance treaty or contract in force on the appointed date or the date of the renewal of the treaty or contract, whichever is earlier, be certified by the Kenya Reinsurance Corporation Limited as having been approved by that company.	Approval of treaties related to insurance matters will no longer be in the purview of the Kenya Reinsurance Corporation Limited. Once a treaty is ratified, the step of having the Corporation certify it is superfluous as the treaty is already binding on the country by the time the Corporation gets to review it.
Addition of S.21A	This section introduces the term “closed fund business”, defined as the continuance of insurance business for the purpose of maintaining, without renewal, any policy or contract of insurance issued before the appointed date. An insurer may carry out closed fund business without registration under the Act. If the policy or contract remains unpaid or undischarged, the provisions of the Act will continue applying to the insurer. There are pecuniary penalties imposed if this section is not adhered to, which is to be paid to the Policyholders Compensation Fund. A person shall not dispose of any assets from	Closed fund businesses are closed to new policyholders, meaning that no new policyholders can be admitted to it. operate this way to ensure that they see to existing policies and only do so until they mature. This is a strategy adopted for insurers that have taken on too many policyholders and may be overwhelmed. In the meantime, their obligations are paused under the Act.

	a closed fund without the prior approval of the Commissioner.	
S.31 Addition of sub-section (3)	An insurer issued with a licence under the Act is to pay the prescribed annual fee.	The payment of annual licence fees is a new requirement under the Act which insurers will have to comply with to obtain their insurance licences.

THE KENYA REVENUE AUTHORITY ACT (NO. 2 OF 1995)

Provision Amended	Amendment	Our Comments
S.5A	<p>The Act increases the reward payable to persons who provides information leading to the identification of unassessed duties or taxes from one hundred thousand shillings (Kshs. 100,000) to five hundred thousand shillings (Kshs. 500,000).</p> <p>Additionally, the Act increases the reward for persons who divulge information leading to the recovery of unassessed duties or taxes from two million shillings (Kshs. 2,000,000) to five million shillings (Kshs. 5,000,000).</p>	The amendment is meant to incentivize individuals to report to the Kenya Revenue Authority any suspected malpractice and assist in curbing the rampant tax related malpractices.

EXCISE DUTY ACT (NO. 23 OF 2015)

Provision Amended	Amendment	Our Comments
S.2	The definition of the word compound is added to the list of definitions and shall have the meaning assigned to it under Section 2 of the Compounding of Potable Spirits Act.	This is to clear any ambiguity in relation to the definitions in relation to compound in potable spirits.

	<p>The word “possession” has been defined as having, owning or controlling any excisable goods including knowingly having any excisable goods in the actual possession or custody of any other person; having any excisable goods in any place for the benefit of oneself or having any excisable goods for the use or benefit of another person. This definition comes with a proviso that where two or more persons are in possession of excisable goods and any of them knows or consents to the other having excisable goods in their custody or possession, such goods shall be deemed to be in the custody and possession of all of them.</p>	<p>There was previously no definition of the word “possession” resulting in reference to the ordinary meaning of the word. The inclusion removes any previous ambiguity.</p>
S. 7	<p>The Act amends section 7 by introducing a new sub-section 3A that shall require that the <i>Gazette</i> Notice issued with respect to granting remission for excise duty be tabled before the National Assembly and a resolution passed within 21 days to either approve or annul the Notice.</p>	<p>This is to ensure accountability by subjecting any Gazette Notices granting excise duty remission for approval before the National Assembly and is in tandem with the provisions of the Statutory Instruments Act.</p>
S.14	<p>The Act offsets between excise duty paid in respect of internet data services by a licensed person who purchases the data in bulk for resale against the excise duty payable by that person on internet data services supplied to the final consumer.</p>	<p>This amendment is for the purposes of preventing double taxation in relation to internet service provisions.</p>
First Schedule Para. 1 Part 1	<p>In the description of rates to be applied on goods, the Act now seeks to apply excise duty to sugar confectionary and white chocolate, chocolate in blocs, slabs or bars.</p>	<p>Previously, excise duty only applied to those goods that were imported. It did not apply to locally manufactured products in this regard. This amendment will result in excise duty for these goods being levied whether imported or otherwise.</p>
First Schedule Para. 4 Part 2	<p>The Act introduces Excise Duty on betting, gaming, prize competition and lottery at a rate of 7.5% of the amount wagered, staked, charged or paid</p>	<p>The intention is to collect tax from gamblers, gamers and persons involved in prize competitions and lotteries as this is presently a vibrant enterprise. Excise duty has traditionally been referred to as “sin” tax and the imposition of tax on this industry can only be seen as a deterrence.</p>

First Schedule Para. 1 Part 3	The Act amends the definition of other fees by deleting the words “fees” or “commissions” earned in respect of a loan.	The fees or commission earned from loans will be brought to tax as an excisable service at a rate of 20%
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RETIREMENT BENEFITS ACT (NO. 3 OF 1997)

Provision Amended	Amendment	Our Comments
S.2	The definition of “retirement benefits scheme” has been amended to include post-retirement medical cover as a benefit alongside payments. This section is amended by including the definitions of corporate trustee and post-retirement medical fund.	The amendments made to this Act are for the purpose of accommodating corporate trustees who provide services to pension schemes. They also provide for their regulation under the Act.
S.22, 23, 27, 28, 29, 30, 31 41, and 42	These sections are amended by adding the words “corporate trustees” after the word “manager” wherever it occurs.	
Addition of S.25C	This section provides for the registration requirements for corporate trustees including the minimum share capital threshold, which is to be prescribed by the Authority. Further, the trustees must include qualified persons experienced in matters including the administration of schemes, insurance, and law.	
Addition of subsection 4F to S.34	The amendment seeks to give the Retirement Benefits Authority the mandate to extend the period within which a Scheme must file its audited accounts with the Chief Executive Officer. This extension shall be granted if it appears justified on application by the Trustees and is not to exceed 3 months. If an extension of time is granted, the penalty prescribed for late submission will not be applied for the extended period.	

S. 53B	<p>Section 53B of the Act is amended to empower the Trustee to appoint the Kenya Revenue Authority (KRA) as an agent, subject to approval by the Retirement Benefits Authority (the Authority), for the collection of unremitted contributions, interests and penalties from a defaulting employer.</p> <p>The Trustees shall make a request for such approval to the Authority demonstrating that they have made reasonable efforts to recover unremitted contributions from a defaulting employer. Where the KRA is appointed by the Authority, they shall issue a 21 day notice to the defaulting employer requiring it to remit the unremitted contributions, interests, penalties and recovery costs. If the employer fails to comply notwithstanding the issuance of the notice, KRA shall serve the employer or the employer's bank with an agency notice; attach the bank accounts of the defaulting employer; and remit the attached funds to the Scheme, within 30 days. The costs of the unremitted contributions shall be borne by the defaulting employer.</p>	The amendment offers clarity on the procedure to be followed by Trustees for the recovery of unremitted contributions, interests and penalties from a defaulting employer which was previous not stipulated under the Act.
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CENTRAL DEPOSITORIES ACT (NO. 4 OF 2000)

Provision Amended	Amendment	Our Comments
S.2(1)	The Act includes the definition of the following terms under its definition section - "authorized nominee", "beneficial owner", "legal owner" and "omnibus account".	These inclusions are in line with the requirement for beneficial owners of assets and corporations to be disclosed to increase transparency and accountability where corporations are concerned.
Addition of S.30A	Beneficial owners may appoint authorized nominees to deposit securities in the securities account or omnibus account on behalf of the beneficial or legal owners. The authorized nominee is obliged to declare the beneficial or legal owners of these securities in the CDS rules. It is an offence to contravene this provision.	

<p>Addition of S.30B</p>	<p>Authorized nominees shall maintain records on beneficial owners, legal owners, securities accounts or omnibus accounts in respect of the securities deposited in the securities or omnibus account in the manner prescribed in the CDS rules.</p> <p>Authorized owners shall, on request, furnish the central depository with such information as may be required on the beneficial owners, legal owners, securities accounts or omnibus accounts in respect of the securities deposited in the securities or omnibus account.</p> <p>A person who contravenes the provisions of this section commits an offence and shall, on conviction, be liable to a fine not exceeding KES Ten Million shillings or to an imprisonment for a term of ten years, or to both.</p>	
<p>S.32 Addition of subsection (e)</p>	<p>This addition increases the obligations of central depositories in keeping records and accounts requiring them to disclose the purchases and sales or other dealings concerning deposited securities, the identities of the buyers and sellers of each of the deposited securities and the persons in whose favour the dealings are executed.</p>	

Disclaimer

The content of this alert is for general information purposes and should not be relied upon without seeking specific legal advice on the matter. If you have any queries or need clarifications, please do not hesitate to contact Pamella Ager (pamella@oraro.co.ke), and Anna Kandu (anna@oraro.co.ke) or your usual contact at our firm for legal advice relating to the EPR Regulations and how the same might affect you.



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