

Tax changes 2021 and other Tax Developments

28/ 10/2021



Alpha Tax And
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Services

KRA Performance 2020/2021.....

In spite of the challenging operating economic environment brought about by the COVID-19 pandemic, Kenya Revenue Authority (KRA) has defied all odds to surpass its revenue target after eight (8) years, since the FY 2013/14. This is after revenue collection in the FY 2020/21 (July 2020 - June 2021) reached a new record of Kshs. 1.669 Trillion compared to Kshs. 1.607 Trillion collected in FY 2019/20.

In the FY 2020/2021 revenue target as reflected in the *2021 Budget Policy Statement* was Kshs. 1.652 Trillion which KRA surpassed with a surplus of Kshs. 16.808 Billion. This represents a performance rate of 101% and revenue growth of 3.9% compared to last Financial Year. This performance is consistent with the prevailing economic indicators, especially the projected GDP growth of 0.6% in 2020.

**KShs 1.669
Trillion**

actual

**KShs 1.652
Trillion(Target)**



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- Resurgence of the economy
- Relaxation of the stringent Covid-19 containment measures
- The Alternative dispute resolution process
- Post Covid Recovery plan
- Enhanced compliance enforcement
- Reversal of the Covid 19 Tax Incentives.

- The implementation of the new taxes.
 - Digital Service Tax
 - Minimum Tax
- The Voluntary disclosure programme.
- Comprehensive Audits of exemptions
- Profiling and targeting.

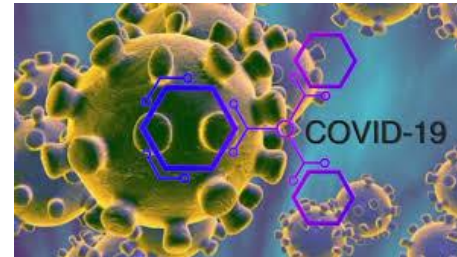


Setting the scene 2021/2022.....

**PROJECTED
EXPENDITURE 3.6
TRILLION**

**FISCAL
DEFICIT**

**PROJECTED INCOME
OF 1.77 TRILLION
THROUGH TAXATION**



VS



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	FY 2018/2019	FY 2019/2020	FY 2020/2021	FY 2021/2022
Interest Payments				
Interest - Internal Debt	285,607	301,812	308,424	421,897
Interest - External Debt	114,374	131,868	154,684	138,365
Sub - Total	399,981	433,680	463,108	560,262
Redemptions Payments				
Redemption- Internal Debt	220,352	213,691	261,955	346,810
Redemption- External Debt	250,283	121,477	179,640	262,093
Sub - Total	470,635	335,168	441,595	608,903
Public Debt Service Expenses	870,616	768,848	904,704	1,169,165

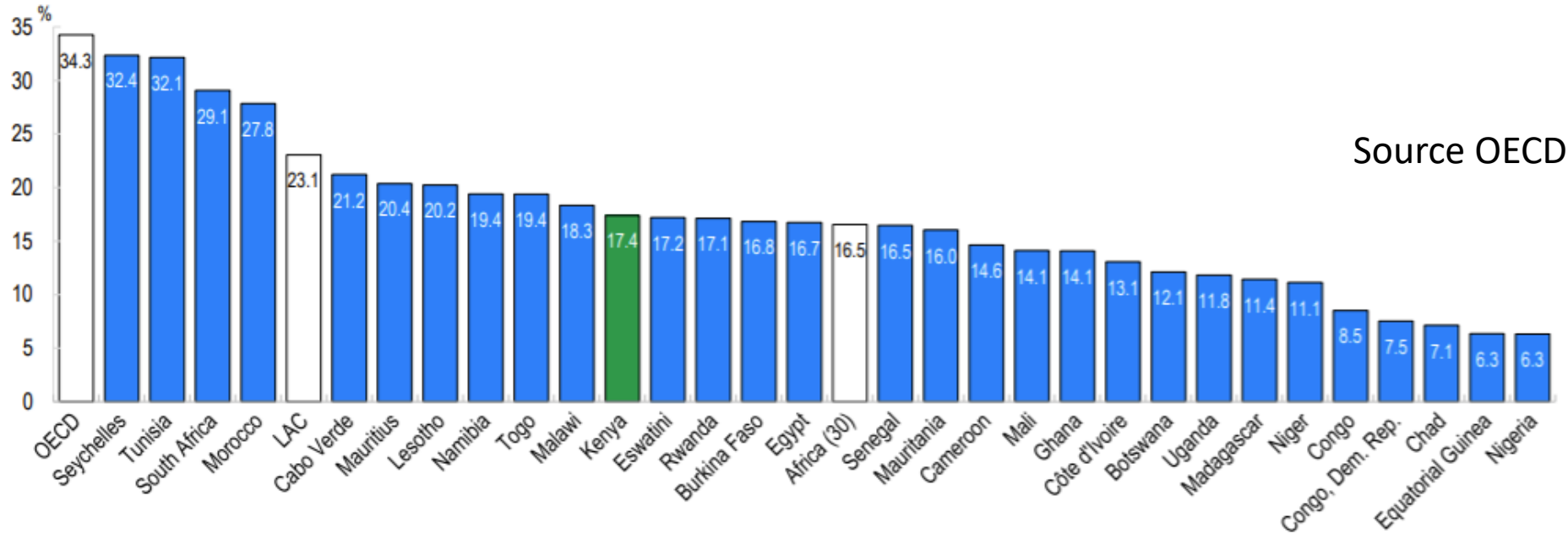


**Our 2021/2022
Debt obligation
is 1,169,165**

Setting the scene....

Tax-to-GDP ratio, 2018

Kenya's tax-to-GDP ratio in 2018 (17.4%) was higher than the average of the 30 African countries in Revenue Statistics in Africa 2020 (16.5%) by 0.8 percentage points but lower than the Latin America and the Caribbean (23.1%).



How much tax do you derive from the size of the Economy?

How do you increase the tax base?

July - September 2021



ISO 9001:2015 CERTIFIED

The Kenya Revenue Authority (KRA) has collected **KShs. 476.646 Billion**, surpassing the Financial Year 2021-2022, Quarter One (July – September 2021) revenue target of **KShs. 461.653 Billion** by **KShs. 14.992 Billion**. The performance reflects a sustained revenue growth in the first three months of the year, with a performance rate of **103.2 per cent** and growth of **30 per cent**.

Tax-Payer!



PUBLIC

Press Statement

20th September 2021

High Court judgement on Minimum Tax

The High Court in Machakos has today morning declared Section 12D of the Income Tax Act, the section that introduced Minimum Tax, unconstitutional for violating Article 201(b)(i) of the Constitution. The court noted that minimum tax was unconstitutional for subjecting taxpayers to double taxation and was punitive in nature. The Court was of the opinion that taxation cannot be fair when a system of tax is introduced to diminish the capital of a business.

The Kenya Revenue Authority respectfully disagrees with the findings of the Court and will prefer an appeal to the Court of Appeal to challenge this finding. This is to ensure that KRA continues to review and improve on tax policies in order to reduce the tax burden while ensuring that every citizen contributes their fair share of tax.

Commissioner for Legal Services & Board Coordination



Lobby sues KRA over excise duty on petroleum products

Petitioners seek court order to quash plans by taxman which will see another hike in fuel prices on October 1

by Nancy Gitonga
@PeopleDailyKe

A lobby group has petitioned the High court seeking orders to quash the decision by Kenya Revenue Authority (KRA) to adjust excise duty rate for all petroleum products.

In a petition filed in court by UFANISI Centre, the youths from Korogocho want to suspend the move to have prices of fuel in Kenya go up yet again starting from October 1. This follows a move by the taxman that would see excise duty on the petroleum products rise by 4.97 per cent from October 1, in line with average annual inflation.

Through lawyer Kenneth Amond, the youths say the decision by KRA Commissioner General Githii Mburu to adjust excise duty for petroleum products though discretionary is bound to burden the already overtaxed Kenyans.

"This court be pleased to issue temporary conservatory orders quashing the decision by the Commissioner General of the KRA to adjust excise duty rates for petroleum products effective October 1, 2021 subject to approval by the Cabinet Secretary Treasury and National Planning pending the hearing and determination of this application *inter-partes*," states the youths under the banner name UFANISI Centre.

The petition follows another landmark court ruling which saw minimum tax being quashed in a Machakos court yesterday. The base income tax is payable by all persons regardless of whether or not they make a profit. Energy and Petroleum Regulatory Authority (Epra), which sets fuel prices, announced a surge

Price review

Effects

Documents filed in court by Isaiiah Odando and Wilson Yata say an increase in fuel prices will definitely have ripple effects in other sectors of the economy in terms of higher transport costs, general increase in prices of basic goods and services and costs of agricultural inputs

Parliament

They also want the High court to declare that parliament has failed to exercise its mandate to cushion Kenyans against the spiralling effects of fuel tax by deliberately sanctioning taxes on petroleum products which now constitute more than half the price

Guidelines

Also sought is an order directing KRA, Epra, Treasury and Petroleum CSs, and Speaker of National Assembly to come up with clear guidelines on the management and application of monies received by the Petroleum subsidy fund from the Petroleum development levy

Summon

According to court documents, the Senate committee on Energy has issued summons to the two cabinet secretaries (Treasury and Petroleum) and the Energy and Petroleum Regulatory Authority to appear before it today to explain why the State halted subsidies thereby causing the spiraling high prices



in fuel prices which saw the cost of petrol soar above Sh130, the highest so far. Epra announcement last week was met with anger and criticism after the government decided to cut compensation to fuel marketers that had kept the prices unchanged for two months. Fuel is one of the biggest contributors to a high cost of living - as manufacturers and producers pass on the higher transport and energy costs by increasing prices of consumer goods.

Documents filed in court by Isaiiah Odando and Wilson Yata, officials of UFANISI claims KRA and Epra have ignored proper public participation of Kenyans before adjusting the rates of excise duty using the average inflation rate for the financial year 2020 to 2021 of 4.97 per cent as

determined by the Kenya National Bureau of statistics contrary to the Constitution.

"The respondents have subjected Kenyans to heavy fuel tax notwithstanding that Kenyans are overburdened contrary to the basic principles of social justice and the economic interest of Kenyans under Article 10(2)(b), 2(2) and 46(1)(c) of the constitution," the petitioners argue.

Opaque petroleum subsidy

Further, the lobby group says that the government has been operating an opaque petroleum subsidy fund which has been receiving funds in billions from the Petroleum Development Levy without disclosing the regulations guiding it and circum-

stances under which it may be used to cushion Kenyans against fuel price hikes. "The same was devoid of proper public participation at a time when Kenyans are reeling from the economic consequences of the Covid-19 pandemic thereby compromising the peoples entitlement to social justice," says the petitioners.

"That I can confirm that we have a keen interest in public affairs and that the cost of living is too hard to bear for the common citizen and that an increase in fuel prices will definitely have ripple effects in other sectors of the economy in terms of higher transport costs, general increase in prices of basic goods and services and costs of agricultural inputs," says Odando in his supporting affidavit.

Tax-Payer!



Round Table Conversations to address various concerns



The Voice of Private Sector in Kenya



The National Treasury



Finance Act Updates (Major changes)



Definition of Control

- (a) that the person, **directly or indirectly**, holds at least **20%** of the voting rights in a company;
- (b) a loan advanced by the person to another person constitutes at least **70% of the total assets** of the other person excluding loans from financial institutions not associated with the person advancing the loan;
- (c) a guarantee by the person for any form of indebtedness which constitutes at least **70% of the total indebtedness** of the other person;
- (d) the person appoints more than **50% of the board of directors** of another person or at least one director or executive member of the governing board of that person.

Definition is extremely wide and may capture entities that are independent and have no form of relationship.

Has an impact on **Transfer Pricing** and **deemed interest** provisions

Definition of Permanent establishment expanded

- a fixed place of business through which business is wholly or partly carried on;
- a building site, construction, assembly or installation project or any supervisory activity connected provided that the same continues for more than 183 days.
- the **provision of services**, including consultancy services, by a person through employees or other personnel where the services continue for an aggregate of more than 91 days in the 12th months;
- an installation or structure used in the exploration for natural resources provided such activities exceed 91 days;
- a dependent agent of a person who acts on behalf of the principals in respect of any activities which that person undertakes in Kenya; (This includes conclusion of contracts)

.... excludes activities which are of a preparatory or auxiliary character.

- The provision increases the risk of creating a PE.
- Principle- Agent relation will trigger PE

Effective date 1st
July 2021

Digital Service Tax – Charging section

Previous Law	Finance Act 2021
<p>(ca) income accruing through a digital marketplace;</p> <p>“digital marketplace” means a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means;</p>	<p>(ca) income accruing from a business carried out over the internet or an electronic network including through a digital marketplace;</p> <p>“digital marketplace” means an online platform which enables users to sell or provide services, goods or other property to other users.</p>

- This has expanded the services to include almost all online business transactions.
- The expanded scope without the definition of what online business will result into complexities

Effective date 1st
July 2021

Minimum Tax shall be payable by a person.....



Who is a person?

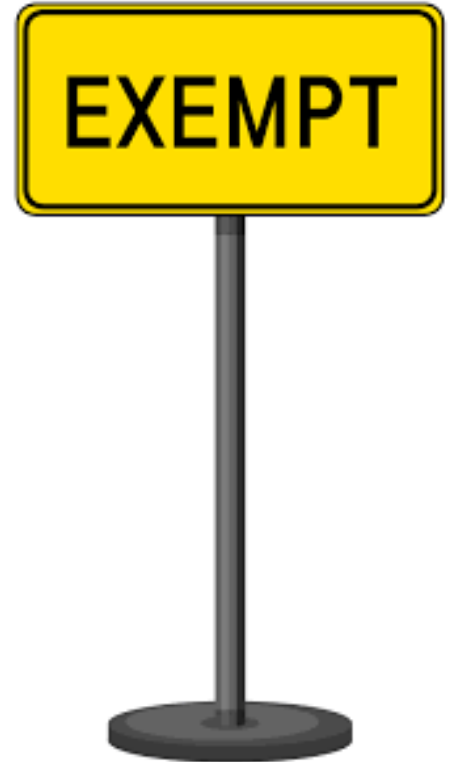
Does minimum tax apply to

- A sole trader?
- Partners in a partnership?
- A company?



Currently Suspended

- Income **exempted** under the ITA;
- Income from employment, residential rent, capital gains, mining or oil exploration, capital gains or subject to turnover tax; or
- Persons engaged in business **whose retail price** is controlled by the Government. *(e.g Oil marketing companies)*
- persons engaged in **insurance business**
- Persons engaged in manufacturing and that person's **cumulative investment** in the preceding 4 years from assent is at least 10 billion shillings.
- Is licensed under the **Special Economic Zones Act 2015**.
- Is engaged in **distribution business** whose income is wholly based on a commission.



Effective date
1st July 2021
but currently
suspended

Carry forward of losses

- This was previously capped at 10 years.
- Restriction removed and losses can now be carried forward indefinitely.
- This may be as a result of the impact Minimum Tax has on tax losses.
- This is also cushions tax-payer who have significantly been impacted by Covid and is accumulating losses



Effective date 1st
July 2021

NO
RESTRICTIONS

Thin Capitalization provisions – Interest Restriction

Current Law	Provision in the Finance Bill
<ul style="list-style-type: none">Section 16 (j) deleted <p>Interest deducted restricted to the extent that the ratio of interest to capital does not exceed a ratio of 3:1 and 2:1 for companies in the extractive sector.</p>	<ul style="list-style-type: none">Gross interest paid or payable to related persons and 3rd parties capped at 30% of earnings before depreciation, amortisation, interest and tax.Exempt income excluded from the computation of EBIDTAProvision applies to:<ul style="list-style-type: none"><i>interest on all loans</i><i>Payments equivalent to interest</i><i>Expenses incurred in connection with raising the finance</i>

IMPORTANT

This provision does not apply to:

- Banks or financial institutions licensed under the Banking Act
- Micro and small enterprises registered under the Micro and Small Enterprises Act of 2012

Effective date 1st

January 2022

Group Return for Multinational Enterprises

Provision in the Finance Act

The Act introduces the requirement for the Ultimate Parent company of a Multinational Enterprise Groups to submit returns that will provide information on their activities in other Jurisdictions.

Country by country reporting

“multinational enterprise group” means a group that includes two or more enterprises which are resident in different jurisdictions including an enterprise that carries on business through a permanent establishment or through any other entity in another jurisdiction

“ultimate parent entity” means an entity that—
(a) is resident in Kenya for tax purposes;
(b) is not controlled by another entity; and
(c) owns or controls a multinational enterprise group.

Effective date 1st
January 2022

Generation of electricity

Previous Law

manufacture" means the making (including packaging) of goods or materials from raw or partly manufactured materials or other goods, or the generation of electrical energy for supply to the national grid or the transformation and distribution of electricity through the national grid,

Finance Act

The requirement that the electricity must be supplied to the National Grid for it to fall under manufacturing is now removed

Effective date 1st January 2022



Private investors who generate electricity for personal use or for sale will also enjoy the capital allowances.

**Capital Allowances:
2nd Schedule
to the ITA**

Previous Law	Finance Act 2021
Some allowances are on a reducing balance	The Act has amended this to straight line basis
Civil works not currently define. - The Tax Laws Amendment Act overhauled the 2 nd Schedule	Civil works has been defined to include - (i) roads and parking areas; (ii) railway lines and related structures; (iii) water, industrial effluent and sewerage works; (iv) communications and electrical posts and pylons and other electrical supply works; and (v) security walls and fencing.

Capital Allowances: 2nd Schedule to the ITA

Qualifying costs
Salon cars

Investment Allowances (ID at 100%)

Qualifying costs for salon cars was previously capped at **KShs 2 million**. This has been increased to **KShs 3million**

The investment deduction shall be one hundred per cent where—

- the cumulative investment value in the preceding three years outside Nairobi City County and Mombasa County is at least two billion 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 the 25th April, 2020;
- the investment value outside Nairobi City County and Mombasa County in that year of income is at least two hundred and fifty million shillings;
- or the person has incurred the investment in a special economic zone.

Finance Act 2021 changes



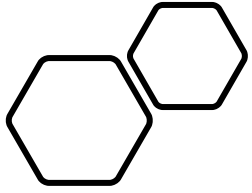
Effects and Influences of the Withholding Tax

9th Schedule to the ITA

Current Law	Finance Act 2021
<p>Withholding tax rate for fees derived by a non-resident subcontractor for provision of services to a person undertaking mining or petroleum activities at 5.625%</p>	<p>Withholding tax rate for fees derived by a non-resident subcontractor for provision of services to a person undertaking mining/petroleum activities at 10 %</p>



Effective date 1st
July 2021



- Insurance relief now extended to contributions to NHIF.
- Beneficial to contributors to NHIF.
- Rate is 15% of premiums to a maximum of KShs 5,000

Effective date 1st
January 2022



Tax Rebates for Apprenticeships

(a) An employer who engages at least 10 university graduate as apprentices for a period of 6-12 months shall be eligible for tax rebate in the year subsequent to the year of such engagement

...Rebate now extended to ***technical, vocational education and training.***

Effective date 1st
January 2021





Finance Act 2021



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Exported Services

- Exported Services were previously **zero rated**.
- The Act has now changed the VAT status **from VATable to Exempt**.
- Exporters of services can no longer claim input VAT

Effective date 1st
July 2021

Output VAT

- Input VAT

VAT Payable

- Was this done as a shortcut to resolve the issue of what an **Export of Service** is?
- Does VAT on Imported Services check in?
- Will this impact Kenya's suitability of a service hub?



GOODS

SERVICES



VAT on Imported Services – Reverse charge VAT

supply of imported services” means a supply of services that satisfies the following conditions –

- the supply is made by a person who is not a registered person to any person;
- the supply would have been a taxable supply if it had been made in Kenya; and
- *In the case of a registered person, the person would not have been entitled to a full amount of input tax payable if the services had been acquired by the person in a taxable supply.*



VAT - Digital Service Tax

Previous Law	Finance Act 2021
<ul style="list-style-type: none">• 5 (9) of the Act and the VAT (Digital Marketplace Supply) Regulations, 2020 brought to VAT charge supplies made through a digital marketplace.• VAT Act defines a “digital marketplace” to mean a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means.	<p>Expansion of the services that are subject to DST</p> <ul style="list-style-type: none">• VAT shall be applicable to supplies made over the internet or an electronic network or through a digital marketplace• “digital marketplace” define to include an online platform which enables users to sell or provide services, goods or other items electronically.



VAT - Input VAT Restriction

Previous Law

Section 17 of the VAT Act restricts deductibility of input tax if it relates to -

- acquisition of passenger cars or mini-buses
- the repair and maintenance

unless they are acquired by the registered person exclusively for the purpose of making a taxable supply in the ordinary course of a continuous and regular business of selling or dealing or hiring of passenger

Effective date 1st
July 2021

Finance Act 2021

- Restriction of claiming input VAT now extended to **leasing of passenger cars** and mini-buses
- The VAT on the lease cost becomes a cost of doing business.



2nd Schedule to the VAT Act – Zero rated supplies

	Old Rate	New Rate
The transportation of goods originating from Kenya to a place outside Kenya	Exempt	0%
Transportation of sugarcane from farms to milling factories.	16%	0%
The supply of maize (corn) flour, cassava flour, wheat or mesline flour and maize flour containing cassava flour by more than 10% in weight.	Exempt	0%



Effective date 1st
July 2021

Finance Act changes



Farahat & Co

Excise Duty on Imported Glass Bottles



Previous Law	Finance Act
<ul style="list-style-type: none">Currently, imported glass bottles are subject to excise duty at the rate of 25%.	<ul style="list-style-type: none">The provision does not apply to glass bottles imported from any of the countries within the East Africa Community

KIOO CASE

The East African Court of Justice ruled that the imposition of excise duty at 25% on importation of glass bottles contravened provisions of the Customs Union Protocol and Common Market Protocol.

Can the Excise Tax paid on importation be offset against excise tax payable on the final product?

What about COMESA



Excise Duty Changes

Previous Law

The Excise Act only allows licensed excise businesses to offset excise duty paid on:

- raw materials (both imported into Kenya and locally manufactured)

... from excise duty payable on the corresponding finished goods.

Finance Act

The Act now allows for offsetting excise duty incurred by a licensed person on purchase of bulk internet data services for resale against excise duty payable by the person on supplying the internet data services to the final consumer

Input- Output from an Excise duty perspective on purchasers of bulk internet data



Effective date 1st
July 2021

Excise Duty Changes

Item	Old rate	New Rate
Jewelry tariff heading 7113 and 7117	Nil	10%
Articles of plastic tariff heading 3923.30.00	Nil	10%
Imported pasta tariff heading 1902 whether cooked or not cooked.	Nil	20%
Imported Eggs tariff heading 04.07	Nil	25%
Imported Onions tariff heading 07.03	Nil	25%
Imported Furniture tariff heading 9403	Nil	25%

Excise Duty Changes

Current Law	Old rate	New Rate
Potato chips, and crips of tariff heading 07.01	Nil	25%
Imported sugar confectionary of tariff heading 17.04 not containing cocoa	20.99/kg	35/kg
Telephone and internet data services	15%	20%
Nicotine products <ul style="list-style-type: none">• Products containing nicotine or nicotine substitutes intended for inhalation without combustion or oral application• The provision excludes medicinal products approved by the Cabinet Secretary responsible for matters relating to health .	Nil	KShs 1,200 per kg

Sale of ring back tunes now exempt from excise duty

Excise Duty Exemptions

Illuminating kerosene products supplied to registered manufacturers of pain, shoe polish etc now exempt



Excise Duty reintroduced on betting activities

Previous Law	Finance Act 2021
<p>The Finance Act 2020 had removed excise duty on betting activities with effect from June 2020.</p>	<p>The Finance Act reintroduce excise duty on</p> <ul style="list-style-type: none">- Betting and gaming activities at the rate of 7.5% of the amount wagered or staked.- Price competition shall be 7.5% of the amount paid or charged to participate in a prize competition- Lottery (excluding charitable lottery) at a rate of 7.5% of the amount paid or charged to buy the lottery ticket



Excise Duty on Fees and Commissions on Loans

Previous Law

Excisable Services

- Excise duty on fees charged for money transfer services by cellular phone service providers, banks, money transfers agencies and other financial service providers shall be 20% of their excisable value.
- Excise duty on **other fees** charged by financial institutions shall be 20% percent of their excisable value

other fees includes any fees, charges or commissions charged by financial institutions relating to their licensed financial institutions, but does not include interest on loan or return on loan or **fees or commissions earned (now deleted)** in respect of a loan or any share of profit or an insurance premium or premium based or related commissions specified in the Insurance Act or regulations made thereunder.

Fees and commissions earned in respect of a loan are now subject to excise duty.

Excise Duty Remissions

Finance Act 2021

The Excise Act has been amended to the effect that any excise duty remissions by the Cabinet secretary need to be laid before the National Assembly for approval or annulment





The Tax Procedures Act

Finance Act
changes

Tax Procedures Act

Previous Law	Finance Act
<p>Section 23(2) of the TPA provides that the unit of currency in books of account, records, paper registers, tax returns or tax invoices shall be in Kenya shillings.</p>	<p>Unit of currency: Non- Resident with DST Obligations The Act allows non-resident persons to use foreign currency as may be approved by the commissioner as the unit of currency in books of accounts, records, paper registers, tax returns or tax invoices.</p>
<p>Section 42A(4A) of the Tax Procedures Act allows the Commissioner to grant an exemption from Withholding VAT (“WH VAT”)</p>	<p>Removal of Withholding VAT exemption provisions The Act proposes to delete section 42A(4A),</p>

Tax Procedures Act

Previous Law	Finance Act
Section 77 of the TPA Due date for submission and payment	Provided that where a person who submits a notice of objection in electronic form or a tax return in electronic form, or pays the tax electronically, the due date shall remain the date specified in the relevant tax law.



Abandonment of Tax



Effective date 1st
July 2021

Finance Act 2021

- Commissioner now has powers not to recover taxes where he has assessed and determined that the taxpayer is unable to pay the unpaid tax liability.
- The Commissioner is required to submit a report to the Cabinet Secretary on or before the 30th June and on or before the 31st December of each year containing the details and amounts of taxes abandoned under this section.

Q&A



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