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NEWSFLASH KENYA

FINANCE ACT 2021 & ETR REGULATIONS UPDATE

Issue:
26 July 2021

Latest news on law, tax and business in Kenya

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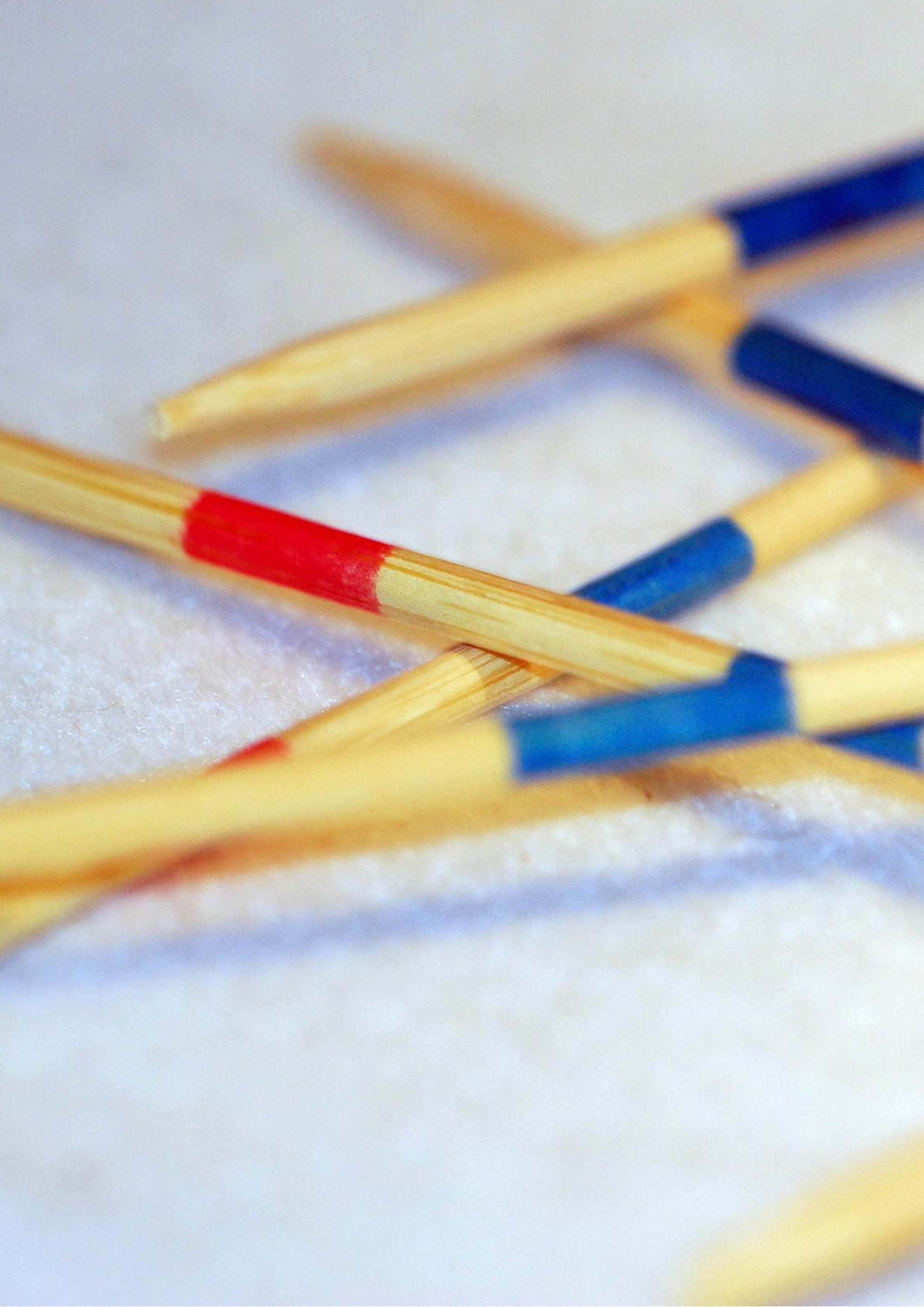


→ Background

The Finance Act 2021 was finally assented by the President on 29th June 2021. We have reviewed the passed laws relating to tax laws against the earlier proposals under Finance Bill 2021 and noted that all proposals were substantially passed including other additional changes.

Separately, the Kenya Revenue Authority (KRA) issued a Public Notice on 13th July 2021 reminding taxpayers of the commencement date for roll out of the Electronic Tax Invoice Regulations, 2020.

In this issue we have discussed only the new laws under Finance Act 2021 (the Act) not previously covered in our NewsFlash dated 11th June 2021. We have also outlined the new requirements under the Electronic Tax Invoice Regulations, 2020 that take effect from 1st August 2021.

→ Income tax changes

Taxation of registered family trusts

The Act has specified the taxation of the following incomes of a trust:

a. Any payment made out on behalf of any beneficiary exclusively for the purpose of education, medical treatment or early adulthood housing.
b. Payment to any beneficiary which is below Kes. 10 million in a year of income.
c. Disbursement of deemed income to beneficiaries at a tax rate of 25 per cent.

It further exempts taxation of the following:

- property, including investment shares, which is transferred or sold for the purpose of transferring the title or the proceeds into a registered family trust.
- income or principal sum of a registered family trust.
- capital gains relating to the transfer of title of immovable property to a family trust.

Comment: This is a clarification that seeks to ensure payments made out of trust income to cater for the basic needs of beneficiaries are brought to tax. However, the exemption from capital gains tax on transfers to a registered family trust; and their incomes will encourage the use of such vehicles.

Exemptions from minimum tax

Minimum tax will now be exempted in the following instances:

a. Businesses whose retail price is controlled by the Government;
b. Persons engaged in insurance business;
c. Businesses engaged in manufacturing whose cumulative investment in the last 4 years from year 2020 is at least Kes. 10 billion;
d. Holders of licenses under the Special Economic Zones Act, 2015; and
e. Persons engaged in distribution business whose income is wholly based on a commission.

Comment: Minimum tax was halted by a court order in a case fronted by umbrella bodies representing manufacturers and retailers. The amendments in the Act seem to target the concerns of the two classes of taxpayers in the filed case.

Scope and incidence of Digital Service Tax

Digital service tax (DST) will now be accounted for exclusively by non-residents. The focus on this tax will also shift from platforms where buyers and sellers interact to income that is derived or accruing from the provision of services through a business performed over the internet or an electronic network. In addition the Act also reaffirms the tax exemptions on incomes subject to withholding tax as earlier provided for in the Commissioner's guidelines; and business of transmission of messages through specified apparatus.

Comment: These amendments are consistent with the guidelines under Action 1 of the BEPS Action Plans that require set up of a new nexus focusing on non-resident enterprises with significant economic presence delivered via technology and other automated tools.

Thereafter the Act has opted for an equalization levy on the non-residents as opposed to a withholding tax in order to ensure equal treatment of foreign and domestic suppliers. It is noteworthy that all resident digital service players are now exempted from DST but automatically be subjected to minimum tax.

Recognition of multilateral agreements and treaties

The Act has further realigned the proposal under the Bill to recognize reliefs granted by anti-double taxation treaties with the Treaty making and Ratification Act, 2012. It also excludes the application of such reliefs on persons in a contracting state who are controlled by over 50 per cent owners from the other contracting state.

Comment: The Treaty making and Ratification Act, 2012 sets a framework for negotiation and approval of the agreements by both the Cabinet and Parliament. This is set to harmonize the process of developing and review of multilateral agreements in order to prevent Court actions like in the case of the Kenya-Mauritius DTA. The amendment has achieved the guidance under Action 6 of the BEPS Action Plan that seeks to adopt model treaty provisions that prevent the granting of treaty benefits in inappropriate circumstances. Kenya will also embrace the Inclusive Framework which is a forum (under Action 15) that will also enable it to be part of jurisdictions that will be able to provide an innovative approach to international tax matters reflecting the rapidly evolving nature of the global economy.

Enhanced investment allowances

Investment deductions have been reintroduces on the following investment categories:

Category I: A cumulative investment value in the last 3 years outside Nairobi City County and Mombasa County is atleast Kes. 2 billion; Provided that where the cumulative value of investment for the last 3 years of income was Kes. 2 billion on or before the 25th April, 2020, and the applicable rate of investment deduction was 150 per cent, that rate shall continue to apply for the investment made on or before the 25th April, 2020.

Category II: An investment value outside Nairobi City County and Mombasa County in a year of income is at least Kes. 250 million shillings.

Category III: An investment in a special economic zone.

Comment: The repeal of the Second schedule to the Income Tax Act last year did not provide any guidance on treatment of investments made prior to 25th April 2020. Investors who were previously attracted to Kenya by tax incentives focusing on developments outside Nairobi and Mombasa, and inside special economic zones were indeed shortchanged upon the repeal. The reintroduction of similar tax incentives and laws for transitioning investments prior to 25th April, 2020 is indeed a welcome move.

→ VAT Act changes

Changes in VAT status

Refer to table in appendix »

→ Excise duty Act changes

The main changes here are procedural:

- In respect to remission of excise duty in respect of beer or wine made from sorghum, millet or cassava or any other agricultural products, (excluding barley), grown in Kenya, the Cabinet Secretary is now required to make a notice in the Gazette and also lay it before the National Assembly for approval.
- Where excise duty has been paid in respect of internet data services by a licensed reseller of data, the duty payable shall be reduced by any duty charged on their inputs.

→ Other changes in tax laws

Tax Procedures Act: Waiver of Penalties and interest

The Act has opened up the permissible grounds for waiver applications by allowing any other reason occasioning inability to recover the unpaid tax. Furthermore the Commissioner will now be required to submit a report to the Cabinet Secretary on or before the 30th June and 31st December of each year containing the details and amounts of taxes abandoned in approved waivers.

Comment: These amendments provide the enabling legislation that will set pace for processing of long outstanding applications for waiver of taxpayers' penalties and interest.

Tax Procedures Act: Utilization of refunds against future tax liabilities

It is now permissible for the Commissioner to offset a taxpayer's future tax liabilities against any tax overpayments whose refund decision notices have been released.

Tax Procedures Act: PIN Registrations

The Act requires any person who carries out business over the internet or an electronic network including through a digital marketplace to obtain a tax registration number (PIN) beforehand.

Comment: This requirement will empower the regulator (Communications Authority of Kenya) to ensure compliance by non-resident providers of digital services in Kenya.

Proposed amendments under Finance Bill 2021 which were not passed in the Act

a. Repeal of the law enabling group registrations under the VAT Act.
b. Repeal of the law requiring the Cabinet Secretary to table any Regulations to the National Assembly before they take effect.
c. The extension of time limit for maintaining tax records from 5 years to 7 years.
d. The removal of powers to issue a stay or prohibition order in a criminal case whose issue is directly or substantially an issue in any ongoing civil case.

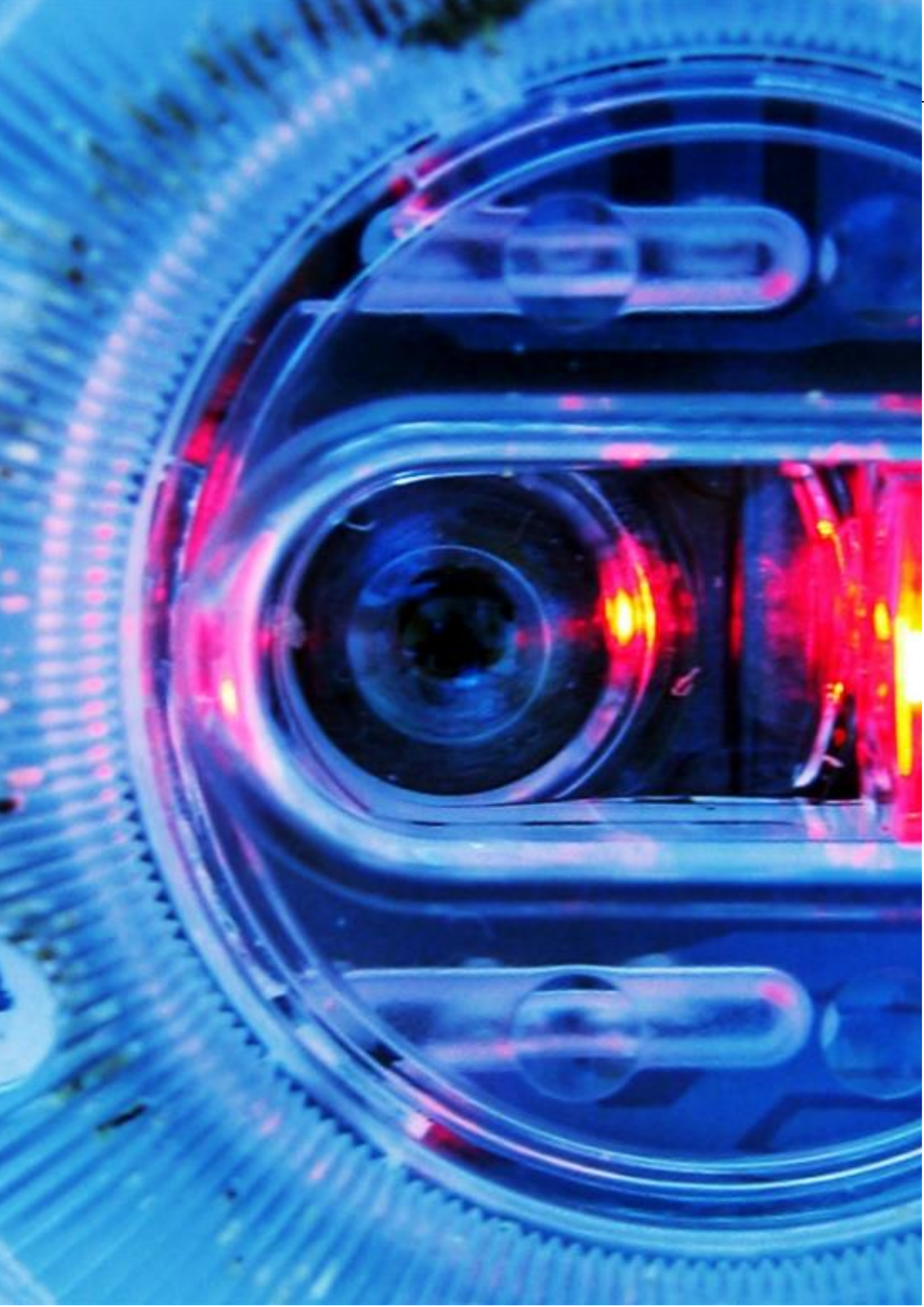
→ Electronic Tax invoice Regulations

The Value Added Tax (Electronic Tax Invoice) Regulations, 2020 were issued by the Cabinet Secretary for the National Treasury and Planning on 10th September, 2020 in line with Section 67 of VAT Act. According to the Regulations, registered taxpayers are required to maintain tax registers with the following capabilities:

a. be capable of interconnectivity with information technology networks;
b. have sufficient storage to maintain records;
c. display clear messages in the official languages;
d. be secure and tamperproof; and
e. be capable of—
   1. integrating with the Authority's systems - transmitting to the Authority's system the tax invoice data and the end of day summary of the respective day's data in the manner specified by the Commissioner;
   2. transmitting or connecting to a device that will transmit the recorded data to the systems;
   3. c) storing data in an unintelligible manner to persons not authorized to access it;
   4. maintaining the integrity of the data;
   5. securing authentication for authorized users;
   6. capturing the log of all activities; and
   7. assigning a unique identifier to each invoice.
   8. allowing updates for any changes in the tax laws; and
   9. capturing the information required under these Regulations.

The commencement date for operation of the Regulations is within a period of 12 months from the 10th of September 2020.

However, any person who is unable to comply with these Regulations within the 12 months shall apply to the Commissioner for an extension of time which shall not exceed 6 months; and the application shall be made at least 30 days before the expiry of the period specified.



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This is a general guideline tax and legal alert and should not be a substitute for proper advice. For queries and clarification, kindly get in touch with Rödl & Partner.

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→ Appendix

Additional VAT changes under the Finance Act 2021

Tariff Number	Description	New rate	Old rate
Par. 134	Taxable supplies including fish feeding and handling, water operations, cold storage, fish cages, pond construction and maintenance, and fish processing and handling, imported or purchased for direct and exclusive use on the recommendation of the relevant state department.	Exempt	16 %
Par. 135	Pre -fabricated biogas digesters.	Exempt	16 %
Par. 136	Biogas	Exempt	16 %
Par. 137	Sustainable fuel briquettes for household and commercial use.	Exempt	16 %
Par. 138	The supply of denatured ethanol of tariff number 2207.20.00.	Exempt	16 %
Par. 139	Tractors other than road tractors for semitrailers.	Exempt	16 %
Sec. Sched. Par. 20	The transportation of goods originating from Kenya to a place outside Kenya.	0 %	Exempt
Sec. Sched. Par. 21	Transportation of sugarcane from farms to milling factories.	0 %	16 %
Sec. Sched. Par. 22	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.	0 %	Exempt/ 16 %

Excise duty changes under the Finance Act 2021

Description	Old rate	New rate
Imported sugar confectionary of tariff heading 17.04	Shs. 20 per kg	Shs 35 per kg
White chocolate, chocolate in blocs, slabs or bars of tariff Nos. 1806.31.00, 1806.32.00 and 1806.90.00 (other than imported)	0	Shs. 200 per kg
Imported glass bottles (excluding glass bottles for packaging of pharmaceutical products) from any of the countries within the East African Community.	25 %	0
Jewellery of tariff heading 7113 and imported jewellery of tariff heading 7117	0	10 %
Products containing nicotine substitutes intended for inhalation without combustion or oral application but excluding medicinal products approved by the Cabinet Secretary responsible for matters relating to health and	0	Shs. 1,200 per kg

other manufactured tobacco and manufactured tobacco substitutes that have been homogenized and reconstituted tobacco, tobacco extracts and essences.		
Articles of plastic of tariff heading 3923.30.00.	0	10 %
Imported pasta of tariff 1902 whether cooked or not cooked or stuffed (with meat or other substances) or otherwise prepared, such as spaghetti, macaroni, noodles, lasagne, gnocchi, ravioli, cannelloni, couscous, whether or not prepared.	0	20 %
Imported furniture of any kind used in offices, kitchen, bedroom and other furniture of tariff number 9403.	0	25 %
Imported eggs of tariff heading 04.07.	0	25 %
Imported onions of tariff heading 07.03.	0	25 %
Imported potatoes, potato crisps and potato chips of tariff heading 07.01.	0	25 %
3907.91.00 unsaturated polyester.	0	10 %
3907.50.00 Alkyd.	0	10 %
3905.91.00 Emulsion VAM.	0	10 %
3903.20.00 Emulsion-styrene Acrylic.	0	10 %
3905.19.00 Homopolymers.	0	10 %
3906.90.00 Emulsion B.A.M.	0	10 %
Telephone and internet data services	15 %	20 %
Excise duty on betting	0	7.5 % of the amount wagered or staked
Excise duty on gaming	0	7.5 % of the amount wagered or staked
Excise duty on price competition	0	7.5 % of the amount paid or charged to participate in a prize competition.
Excise duty on lottery (excluding charitable lotteries)	0	7.5 % of the amount paid or charged to buy the lottery ticket.
Excise duty on fees or commissions earned in respect of a loan	0	20 %

Illuminating kerosene supplies to licenced or registered manufacturers of paint, resin or shoe polish in such quantities as the Commissioner may approve.	Shs 10,305 @ 20degC	Exempt
Excisable services supplied in Kenya by a mobile telecommunication service provider on the sale of a ring back tune to a subscriber.	15 %	Exempt