Tax Alert
Finance Bill 2023

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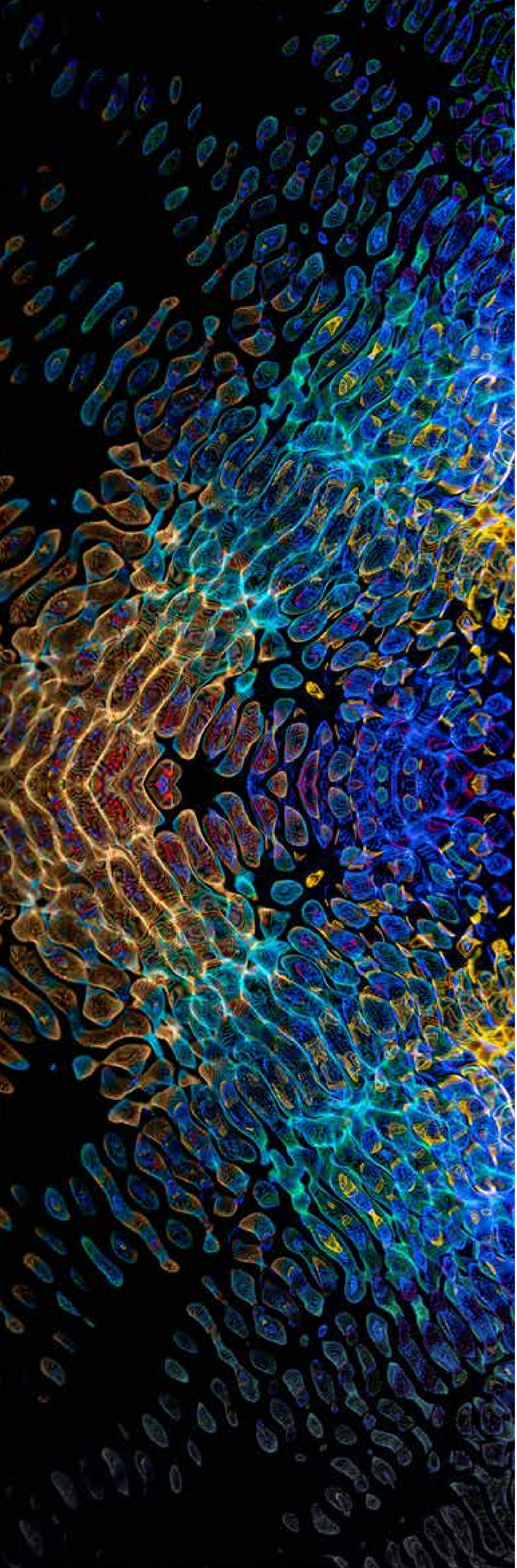
May 15, 2023



The financial landscape is ever-evolving and governments constantly adapt their tax policies to meet changing economic realities and fiscal priorities. The Kenyan government is no different and it is in this context that the Finance Bill 2023 (the Bill) was tabled before parliament. The Bill proposes to introduce several changes to tax legislation that will significantly impact businesses and individuals.

In this alert, we explore the key provisions of the Bill, examining the potential implications and offering insights into the rationale behind these proposed tax changes.

A. Income Tax Act

1. Introduction of 35% PAYE rate

The Bill proposes to subject earnings above KES 6 million annually (KES 500,000 monthly) to PAYE at the rate of 35%.

Current graduated PAYE scale	
On the first KES 288,000	10%
On the next KES 100,000	25%
Above KES 388,000	30%

Proposed graduated PAYE scale	
On the first KES 288,000	10%
On the next KES 100,000	25%
On the next KES 5,612,000	30%
On all income above KES 6,000,000	35%

This proposal only impacts individuals who earn above KES 500,000. Those earning above this threshold will see a reduction in their disposable income, which is likely to lead to reduced consumer spending.

2. Changes to the taxation of branches of companies

The Bill proposes to reduce the rate of Corporate Income Tax for Kenyan branches of foreign companies to 30% from the current 37.5%. However, it also proposes to introduce a tax on income repatriated by the branches. In an apparent error, no tax rate has been indicated. At the moment, it is not possible to tell whether such a rate, once determined, will dissuade or encourage the use of branches as an investment vehicle in Kenya. The ideal outcome would be a tax rate that puts branch taxation at par with the rate of taxation of Kenyan resident companies.

3. Withholding tax (WHT) to be paid and accounted for within 24 hours

Currently, WHT must be remitted on or before the 20th day of the month following the month in which it was deducted. The Bill introduces amendments that will require taxpayers to remit WHT to the Kenya Revenue Authority (KRA) within 24 hours of making the deduction from a payment. The proposed compliance timelines will pose a challenge to taxpayers who have a large volume of transactions that are subject to WHT. This amendment is likely to increase administrative and compliance costs to business of customising systems and processes to factor in the strict compliance timelines.

4. Introduction of WHT on marketing services and digital content monetisation

The Bill proposes to introduce a 5% WHT on payments made to resident persons on account of sales promotion, marketing and advertising services of at least KES 24,000 or more in a month. It also proposes to introduce WHT on payments relating to digital content monetisation. Those making these payments will be required to deduct withholding tax at a rate of 15% of the gross amount.

The proposals are intended to widen the tax base.

5. Introduction of Digital Assets Tax

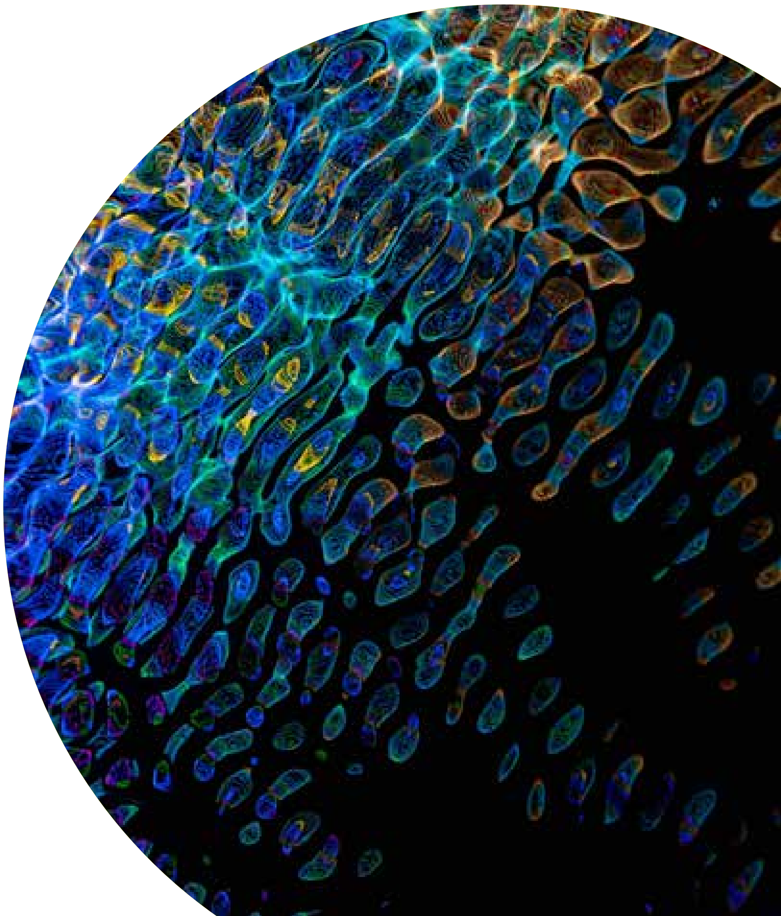
The Bill proposes to introduce a tax on digital assets to be charged at 3% of the transfer or exchange value of the digital asset. The list of digital assets includes cryptocurrencies, token codes, non-fungible tokens or any other token of a similar nature. The tax ought to be remitted within 24 hours of being deducted. This proposal may discourage trading in digital assets, especially as it taxes the transfer value rather than the gain made from the sale.

6. Reduced rate of residential rental income tax

The Bill proposes to reduce the rate of residential rental income tax from the current 10% to 7.5%.

7. Changes to the turnover tax regime

There is a proposal to increase the rate of turnover tax from the present 1% to 3%. The Bill further proposes to change the turnover tax range from KES 1 million and KES 50 million, to KES 0.5 million to KES 15 million. If passed, smaller and more informal businesses will be in a position to elect to be in the turnover tax regime.



8. Changes to the thin capitalisation regime

Under the existing thin capitalisation provisions, the amount of interest that a thinly capitalised taxpayer may deduct as an expense is capped at 30% of earnings before interest, tax, depreciation and amortisation (EBITDA), regardless of the source of the loans.

Under the proposed amendments, the interest restriction (limited to 30% of EBITDA) will only apply on loans from non-resident lenders and will not apply to loans taken out from local lenders. Furthermore, any disallowed interest may be taken into account as an allowable deduction in the three subsequent years as long as the deduction of interest on loans from non-residents does not exceed the 30% EBITDA threshold.

This proposal may see more companies borrow from the local financial sector.

9. Widened scope of Capital Gains Tax (CGT)

CGT currently applies to the gains that arise from the transfer of property situated in Kenya. The Bill proposes to widen the scope of CGT to include the following:

• The gains derived from the alienation of shares or comparable interests, including interests in a partnership or trust, if, at any time during the 365 days preceding the alienation, the shares or comparable interests derived more than 20% of their value directly or indirectly from immovable property situated in Kenya.

• The gains derived from the alienation of shares of a company resident in Kenya if the alienator, at any time during the 365 days preceding such alienation, held directly or indirectly at least 20% of the capital of that company.

The effect of these proposals is that CGT will apply to indirect disposals of property and this may discourage investment in companies and partnerships that derive significant value from Kenyan immovable property. The taxation of indirect transfers of shares will also seal one of the tax planning loopholes and lead to increased tax collections for the government.

10. Timeline for payment of CGT shortened

The Bill includes proposals that will require transferors of property to pay the applicable CGT liability at the earlier of two events – either upon the receipt of the full purchase price or upon the registration of the transfer.

11. No more rebasing values of property based on transfers exempt from CGT

Where a transfer of property is exempt from CGT and the property is subsequently transferred within five years, the adjusted cost of the second transfer shall be based on the original adjusted cost as determined in the first (exempt) transfer.

Currently, it is possible to rebase the value of properties based on transfers that are exempt from CGT. The aim of this move is to eliminate tax planning opportunities for individuals to exploit CGT exemptions by artificially inflating the asset's cost for purposes of an exempt transfer and then subsequently on-selling the property to third parties.

12. Mortgage refinance companies classified as Financial Institutions

Mortgage refinance companies licensed under the Central Bank of Kenya Act are to be included in Schedule 4 to the Income Tax Act as Financial Institutions. This is a positive move as it exempts interest payments made to these mortgage refinance companies from WHT.

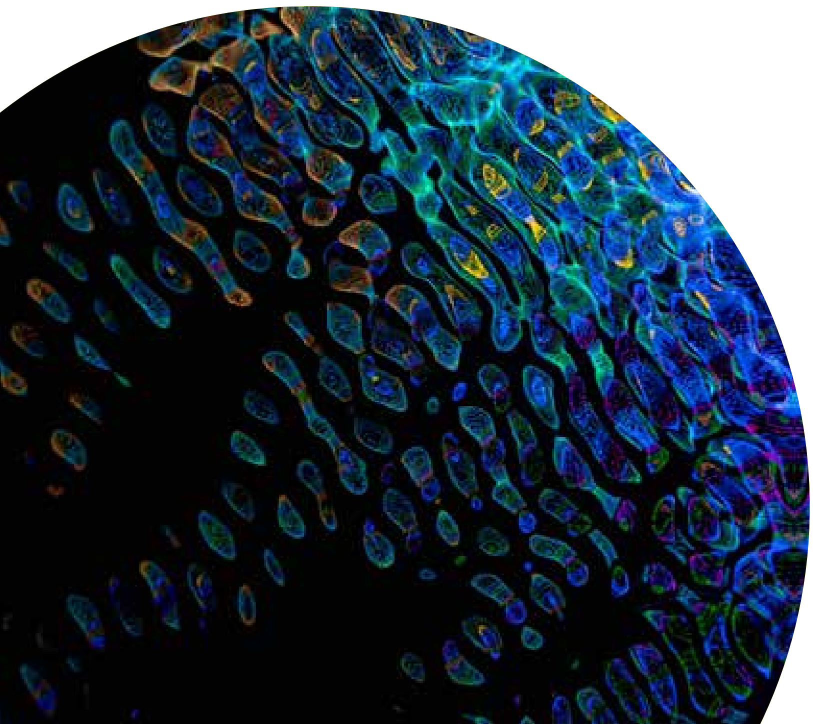
13. Tax-free treatment of mileage reimbursements for employees

Under the current tax laws, there is no specific provision for the tax treatment of mileage reimbursement received by employees from their employers. However, the Bill proposes to exempt mileage reimbursements received by employees for official duties from tax. To qualify for this tax exemption, the reimbursement amount must be based on the standard mileage rate approved by the Automobile Association of Kenya (AA Kenya). Currently, KRA recognises the application of AA Kenya rates for mileage reimbursement by employers. This means that employers who reimburse mileage at the approved AA Kenya rate are not required to treat it as a taxable benefit for the employee.

The proposed amendment to the ITA will provide clarity and legal backing for the tax-free treatment of mileage reimbursement based on AA Kenya rates.

14. Tax treatment of club entrance and subscription fees paid by employers on behalf of employees

Under existing legislation, club fees, including entrance and subscription fees, paid by an employer on behalf of an employee are not allowable deductible expenses in the calculation of the employer's taxable corporate income.



In other words, employers cannot claim these expenses as tax deductions. The Bill proposes amendments that would allow the club fees paid by an employer on behalf of an employee to be considered as deductible expenses in the employer's income calculation. This means that employers would be able to claim these expenses as deductions, reducing their taxable income.

15. Deferral of taxation of shares awarded to employees of eligible start-ups

This proposed amendment aims to defer the taxation of benefits derived from shares allocated to employees by eligible start-up companies in place of cash emoluments. This deferral provision would postpone the taxation of these benefits until 30 days after the earlier occurrence of the following events:

- five years elapse from the end of the year in which the shares were awarded;
- the shares are disposed of by the employee;
- the date the employee ceases to be employed by the eligible start-up.

An eligible start-up company, as defined by the Bill, is a business incorporated in Kenya that meets the following criteria:

- its annual turnover does not exceed KES 100 million;
- it is not engaged in management, professional or training business;
- it has not been formed through the splitting or restructuring of an existing entity;
- its existence does not exceed five years.

If enacted, these amendments would serve as an incentive for persons taking up employment at eligible start-ups.

16. Introduction of tax relief on post-retirement medical fund contributions

The Bill proposes to introduce amendments that provide tax relief for resident individuals who contribute to a post-retirement medical fund.

Under the proposed provisions, eligible individuals can claim a personal relief called post-retirement medical fund relief for the year of income in which they have made such contributions. The amount of post-retirement medical fund relief will be calculated as 15% of the contribution paid or KES 60,000 per annum, whichever is lower. This relief aims to provide individuals with additional tax benefits for contributing to post-retirement medical funds.

The introduction of this tax relief on post-retirement medical fund contributions is aimed at easing the tax burden on individuals and encouraging savings for future medical expenses during retirement.

B. Value Added Tax (VAT)

17. Services exported out of Kenya to be exempt from VAT

Services exported out of Kenya are currently subject to VAT at the standard rate of 16%. The Bill proposes to treat these services as exempt from VAT. The impact of this is that any input VAT incurred will not be deductible, thus increasing the cost of operations of entities that export services in Kenya.

VAT exemption of exports is in contrast to international best practice, which sees exports being zero-rated for VAT. This amendment does not aid Kenya's quest to be a regional service centre.

18. Petroleum products to be subject to VAT at 16%

The Bill proposes to subject petroleum products to VAT at the standard rate of 16%. This is an increase from the current rate of 8%. This would mean that consumers of petroleum products, such as fuel for vehicles, would have to pay a higher price as a result of the increased VAT rate. Moreover, businesses that rely on petroleum products as part of their production process would experience an increase in their input costs, which could lead to higher prices for goods and services, impacting consumer spending and the Kenyan economy at large.

19. Exemption of liquified petroleum gas (LPG) from VAT

The proposed amendment seeks to exempt LPG from VAT by deleting the provision that currently applies an 8% VAT rate on LPG. In theory, the exemption will promote accessibility to affordable energy and support sustainable and environmentally-friendly practices in Kenya. The reality is, however, that VAT exemption does not automatically lead to reduced costs as suppliers of exempt goods and services cannot claim input VAT, and this ends up being an additional cost.

20. Expansion of VAT obligations for suppliers of services without a fixed place of business in Kenya

The Bill proposes to amend the VAT Act by expanding the VAT obligations for non-resident suppliers of services who do not have a fixed place of business in Kenya. The amendment removes the requirement that the recipient of the supply must be a registered person and includes both registered and unregistered persons.
This change aims to bring all non-resident suppliers under the VAT registration requirement, potentially leading to wider VAT reach and the possibility of double taxation.

21. Amendment to deductibility of input tax

The Bill proposes to introduce an amendment that will require taxpayers to fulfil both conditions stated in the law to be eligible for the deduction of input tax. Under the proposed amendment, taxpayers must not only possess valid tax invoices, but also provide evidence that the VAT has been declared and paid to KRA by the supplier.

This amendment will place a new burden on taxpayers in that it will effectively require them to police the tax compliance of independent third parties with whom they conduct business. The amendment will undermine any compliance efficiency that would be achieved from real-time VAT reporting systems such as TIMS and eTIMS.

22. Introduction of VAT on compensation for the loss of taxable supplies

The Bill proposes to introduce amendments to the effect that compensation received by a bona fide owner of taxable supplies for the loss of such supplies will be treated as a taxable supply. The taxpayer will be required to declare and remit VAT on the compensation to KRA, regardless of whether or not the compensation includes VAT.

The proposed amendment raises questions regarding the obligation to declare VAT when compensation does not include VAT. It is unclear whether recipients are required to declare VAT in addition to the compensation received or if the received amount is deemed to include VAT. This proposed change will have a significant impact on the general insurance sector. The ambiguity in the rationale and wording of the law ought to be addressed through engagement with stakeholders before the Bill is passed into law.

23. VAT registration threshold for persons supplying imported digital services

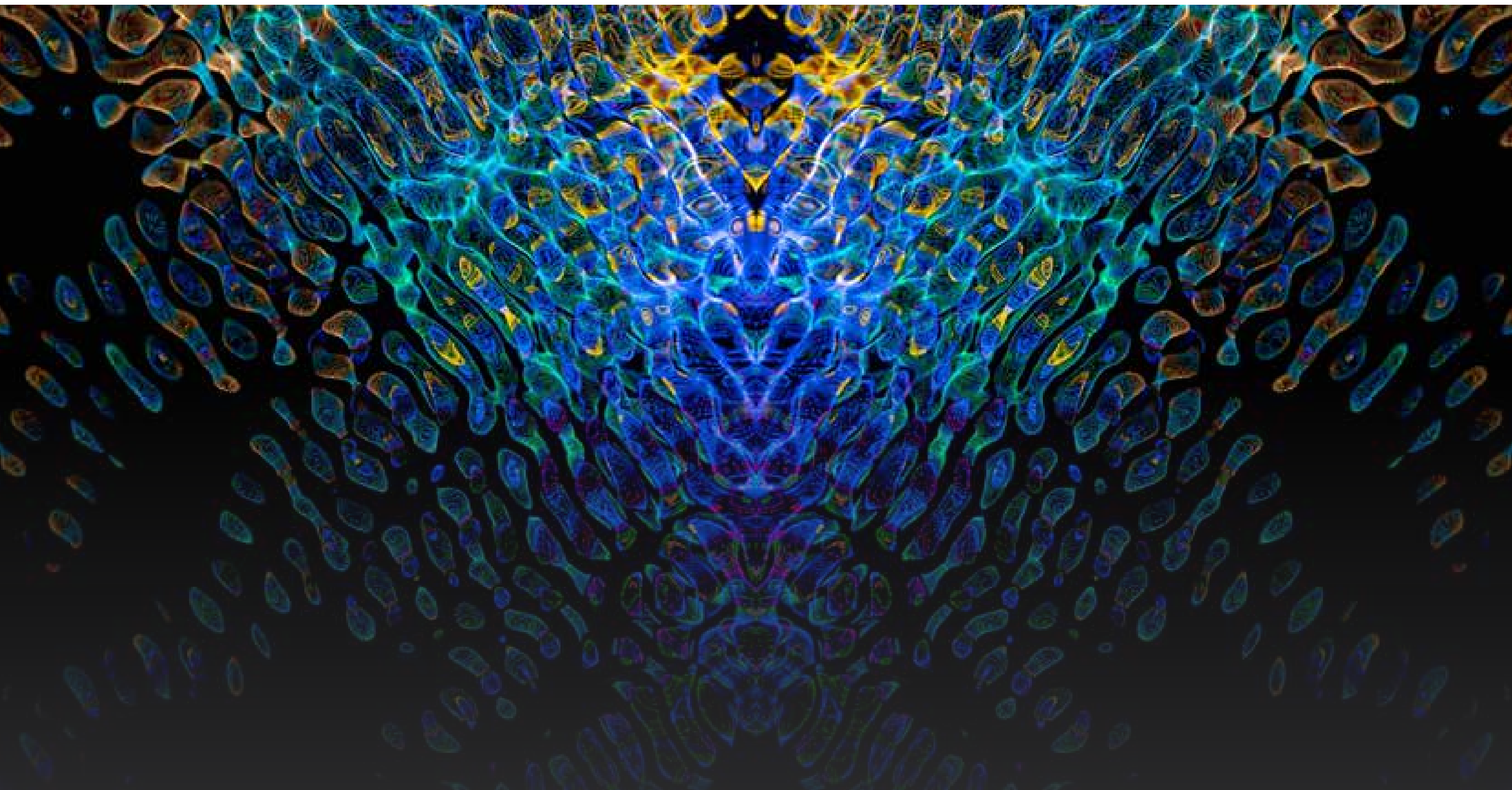
The Bill proposes to introduce amendments that clarify that persons supplying imported digital services must register for VAT regardless of whether or not their taxable supplies meet the turnover threshold of KES 5 million.

The intention of this amendment is to ensure that all suppliers of imported digital services are brought within the scope of VAT registration, irrespective of their turnover level.

24. Record-keeping of transactions

The Bill proposes amendments to the VAT Act to remove the requirement for records of transactions to be kept in Kenya. This will allow taxpayers to store their records outside the country.

The amendment aligns with the modern practices of record-keeping, allowing taxpayers the flexibility to maintain their records in a digital format and store them remotely, ensuring efficiency and compliance with record-keeping obligations.



25.VAT exemptions expanded

The Bill proposes the introduction of VAT exemptions on various goods including:

- medicaments containing alkaloids or derivatives, in measured doses or for retail sale;
- diagnostic or laboratory reagents, including those for malaria and blood grouping;
- vaccines for human and veterinary medicine;
- medicaments containing hormones or products of heading no. 29.37, not in measured doses or for retail sale;
- chemical contraceptive preparations based on hormones or other products;
- goods related to aircraft, spacecraft and their parts;
- taxable goods for the construction and equipping of specialised hospitals;
- tea sold for value addition before exportation.

These proposed changes are intended to provide relief and encourage economic growth while ensuring compliance with regional trade regulations. As mentioned before, VAT exemption is far from ideal when it comes to reducing costs to consumers.

26.Zero-rating of inbound international sea freight

The Bill proposes an amendment to the VAT Act to introduce zero-rating for inbound international sea freight. Currently, the Act does not provide for this zero-rating provision. According to this amendment, registered persons offering inbound international sea freight services will be able to apply a zero rate of VAT to these services. The purpose of this amendment is to clarify the treatment of inbound sea freight services provided by shipping lines that are registered for VAT in Kenya. This proposal aims to bring consistency and clarity to the VAT treatment of inbound international sea freight services provided by registered persons in Kenya.

27.Change of VAT status from exempt to standard-rated

The Bill proposes to remove several goods and services from the exemption schedule, thereby changing their status from exempt to standard rated. The affected items include:

- taxable goods and services used for the construction of tourism facilities, recreational parks, convention and conference facilities, subject to the recommendation of the Cabinet Secretary responsible for recreational parks;
- bioethanol vapour (BEV) stoves classified under HS Code 7321.11.00 (cooking appliances and plate warmers for liquid fuel);
- plant, machinery and equipment used in the construction of a plastics recycling plant;
- maize (corn) flour, cassava flour, wheat or meslin flour, and maize flour containing cassava flour by more than 10% in weight;
- fetal doppler-pocket (Wgd-002) Pc and pulse oximeter-finger held (Gima brand) Pc of tariff number 9018.19.00, subject to approval by the Cabinet Secretary responsible for health matters;
- capital goods that may be determined by the Cabinet Secretary to promote investment in the manufacturing sector, provided the investment value is not less than KES 2 billion.

The proposed amendment will result in these supplies being subject to standard-rated VAT, leading to an increase in their cost.

28.Change of VAT status from zero-rated to exempt

The Bill proposes to change the status of some supplies that are currently zero-rated to exempt. The supplies are:

- inputs or raw materials supplied to pharmaceutical manufacturers in Kenya for manufacturing medicaments, as approved by the Cabinet Secretary in consultation with the Cabinet Secretary responsible for health matters;

- inputs and raw materials supplied to manufacturers of agricultural pest control products, upon the recommendation of the Cabinet Secretary responsible for agriculture matters;
- agricultural pest control products;
- fertilisers of Chapter 31;
- transportation of sugar cane from farms to milling factories.

This proposal will lead to these businesses losing the ability to claim input tax credits, resulting in increased costs and reduced profitability.

29. Transfer of a business as a going concern

Currently, the transfer of a business as a going concern is subject to VAT at the standard rate of 16%. The Bill proposes to exempt these supplies from VAT.

This is a welcome move as the VAT burden on transfers of a business as a going concern was a hinderance to mergers and acquisitions.

C. Excise Duty

30. No more annual inflation adjustments for excise duty

The law currently permits the KRA to adjust the rates of excise duty to take into account inflation once every year. If this proposal is passed into law, the KRA will no longer have this power, resulting in the erosion of the real value of excise duty revenue. This would have an impact on the government's revenue collection, as it would reduce the amount of money collected from excise duties, potentially leading to budget deficits or the need to increase other taxes to compensate. On the other hand, businesses and consumers may benefit from the fixed excise duty rates as they will have more certainty on the cost of goods and services subject to excise duty.

31. Payment of excise duty within 24 hours for betting and gaming industry

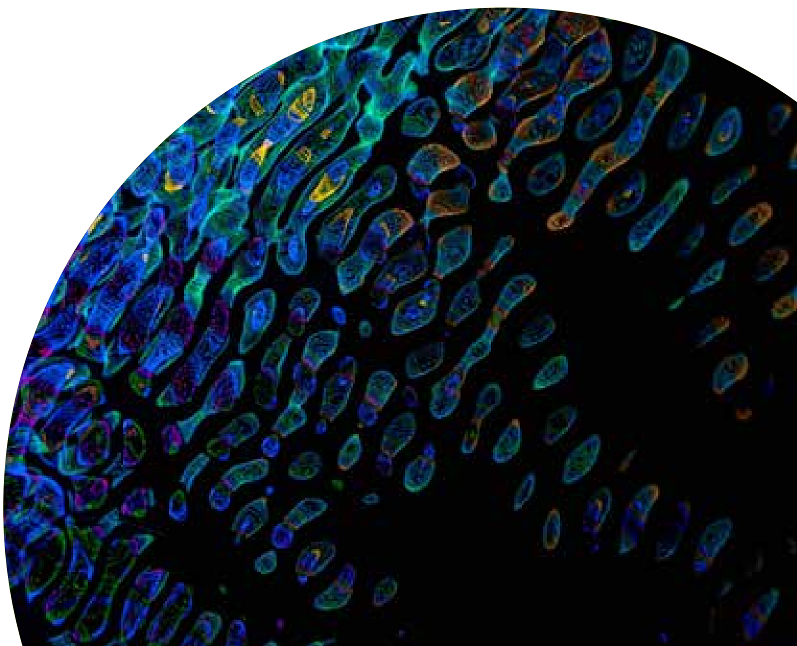
Excise duty on betting and gaming, offered through a platform or other medium, will be required to be remitted by a bookmaker within 24 hours from the closure of transactions for a given day.

This would create a shorter window for bookmakers to account for excise duty which could create additional compliance costs and administrative burdens for bookmakers.

32. Change in the notification process for licence suspension and remedial action

The Bill proposes to alter the notification process for licence suspension and remedial action. Currently, the Excise Duty Act, 2015 states that the Commissioner must provide a licensed person with written notice of the action required to remedy deficiencies that led to the licence suspension, specifying a date by which the action must be taken. The proposed amendment seeks to add the requirement that the specified date in the notice should be at least 14 days from the date of the notice.

The proposed amendment aims to prevent arbitrary revocation of excise licences by the KRA and provides a reasonable opportunity for taxpayers to address any non-compliance issues. This is a positive step that will enhance fairness in the administration of excise duty.



33. Enhanced offences and penalties for excise stamps

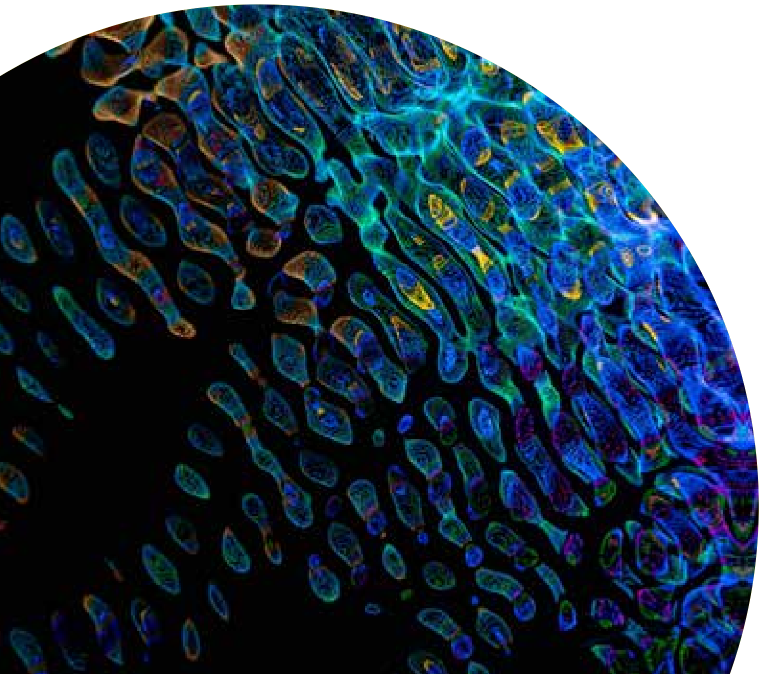
The Bill has proposed amendments that introduce specific offences related to the handling of excise stamps and impose corresponding penalties. These offences include defacing or printing over an affixed excise stamp; possessing excisable goods without affixed stamps; acquiring stamps without authority; counterfeiting stamps; and possessing or trading in goods with counterfeit stamps. The amendment also covers offences related to the possession, distribution, sale or trade of excisable goods without proper stamping.

Under the proposed amendments, individuals who commit any of these offences are subject to penalties upon conviction. The penalties include fines of up to KES 5 million or imprisonment for a term not exceeding three years, or both.

This amendment aims to address the issue of counterfeit excise stamps and unregulated trade in excisable goods.

34. Removal of condensates from the ambit of specific excise duty rates

The Excise Duty Act, 2015 currently imposes excise duty on condensate at a rate of KES 6,868.94 per 1,000 litres at 20°C. However, the proposed amendment in the Bill seeks to eliminate this provision from Part 1 of Schedule 1 of the EDA.



By removing the excise duty rates on condensates, the aim is to reduce costs and promote greater affordability for businesses operating in the sector. It will foster a more conducive business environment and promote cost reduction in the manufacturing of various petroleum products.

35. Excise duty on imported plastics

Currently, excise duty is applicable at a rate of 10% on "Articles of plastic of tariff heading 3923.30.00 and 3923.90.90." However, the Bill proposes a modification to subject excise duty solely on the imported articles of plastic, specifically those falling under tariff heading 3923.30.00 and 3923.90.90, by adding the word "imported" before the tariff description.

The proposed amendment aims to exempt locally manufactured plastics from excise duty, effectively removing them from its ambit. This revision is anticipated to benefit local manufacturers by providing them with a competitive advantage. It will contribute to the affordability and increased consumption of domestically produced plastics.

36. Extension of excise duty on confectionery

Currently, excise duty is applicable at a rate of KES 36.74 per kg on imported sugar confectionery falling under tariff heading 17.04. The Bill proposes an amendment by removing the term "imported" from the description of the excisable good. Consequently, the revised provision would subject all sugar confectionery falling under tariff heading 17.04 to excise duty at a rate of KES 36.74 per kg, irrespective of whether they are imported or locally manufactured.

Applying excise duty to confectionery products manufactured domestically will undermine the competitiveness of local producers, potentially impacting their viability and growth.

37. Addition to the list of excisable goods

The Bill includes several new items to be subject to excise duty, expanding the range of goods falling under its purview. The proposed additions are as follows:

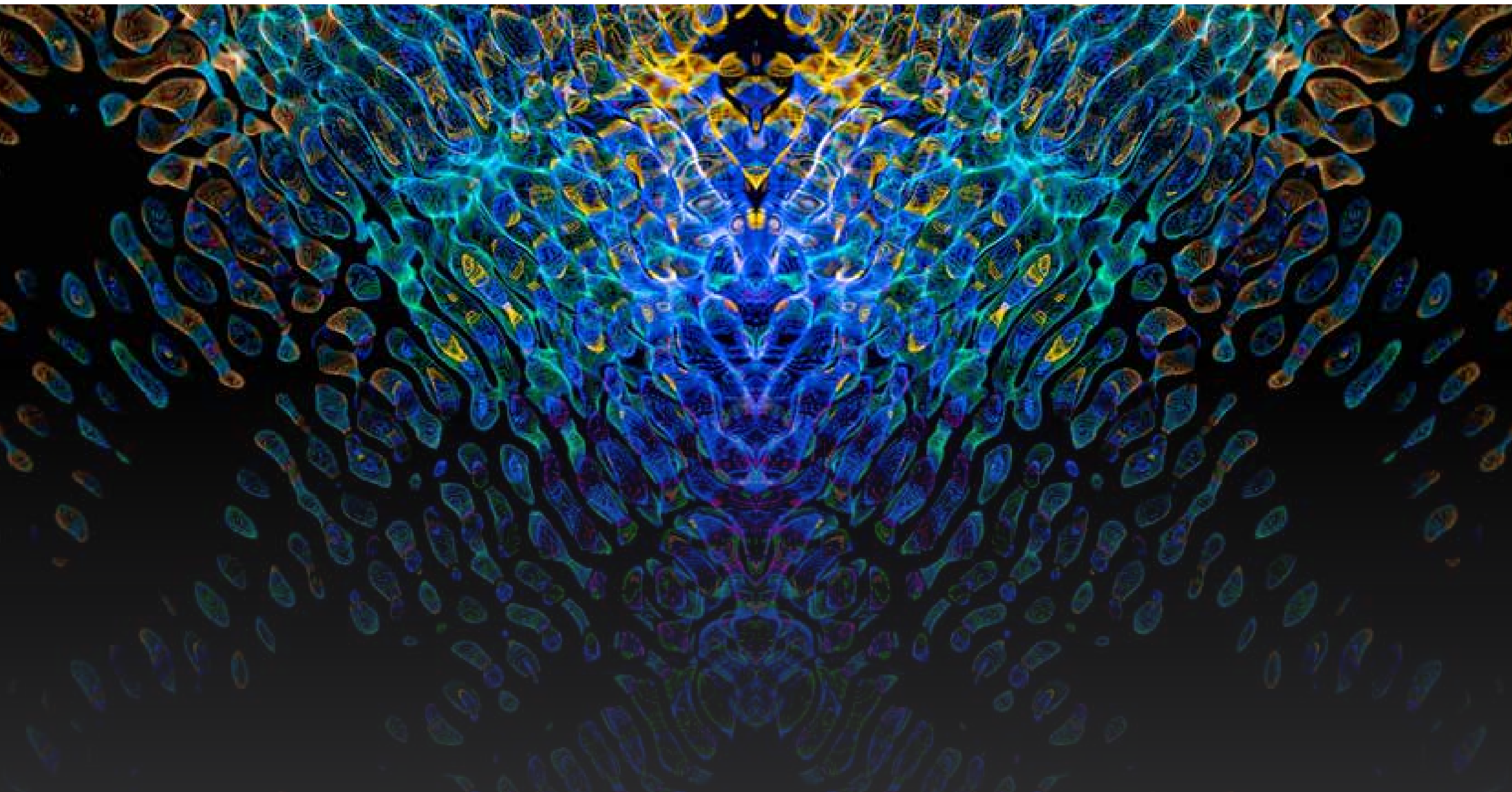
- imported fish: excise duty at a rate of KES 100,000 per metric tonne or 20%, whichever is higher;
- powdered juice: excise duty at a rate of KES 25 per kg;
- sugar (excluding sugar purchased by registered pharmaceutical manufacturers): excise duty at a rate of KES 5 per kg;
- human hair and products of heading 6703: excise duty at a rate of 5%;
- wigs, false beards, eyebrows, eyelashes and products of heading 6704: excise duty at a rate of 5%;
- artificial nails of tariff no. 3926.90.90: excise duty at a rate of 5%;
- imported cement: excise duty at 10% of the value or KES 1.50 per kg, whichever is higher;
- imported furniture (excluding furniture meeting East African Community Rules of Origin): excise duty at a rate of 30%;
- imported cellular phones: excise duty at a rate of 10%;
- imported paints, varnishes and lacquers of heading 3208, 3209 and 3210: excise duty at a rate of 15%;
- imported test liner of heading 4805.24.00: excise duty at a rate of 25%;
- imported fluting medium of heading 4805.19.00: excise duty at a rate of 25%.

The objective behind these proposals is to enhance revenue collection for the government by broadening the scope of goods subject to excise duty.

38. Proposed reduction in excise duty for telephone and internet data services

Currently, telephone and internet data services are subject to excise duty at a rate of 20%. The Bill, however, proposes to decrease the excise duty charged on these services to 15%.

By reducing the excise duty on telephone and internet data services, the government aims to facilitate increased connectivity and promote the use of digital technologies. This reduction in cost will contribute to the overall goal of expanding the digital infrastructure and fostering the growth of the digital economy in the country.



39. Proposed reduction in excise duty on money transfer service fees

Under the current law, excise duty is levied on fees charged for money transfer services provided by banks, money transfer agencies and other financial service providers. The applicable rate for excise duty on these fees is set at 20%.

The Bill, however, includes a proposal to reduce the excise duty on fees charged for money transfer services from 20% to 15%. This amendment aims to lower the financial burden on individuals and businesses utilising money transfer services.

The reduction in excise duty for money transfer service fees is a positive development as it will result in decreased costs for customers utilising these services.

40. Increased excise duty rates for betting, gaming, prize competitions and lotteries

The Bill proposes to increase the applicable rate of excise duty for betting, gaming, prize competitions and lotteries as follows:

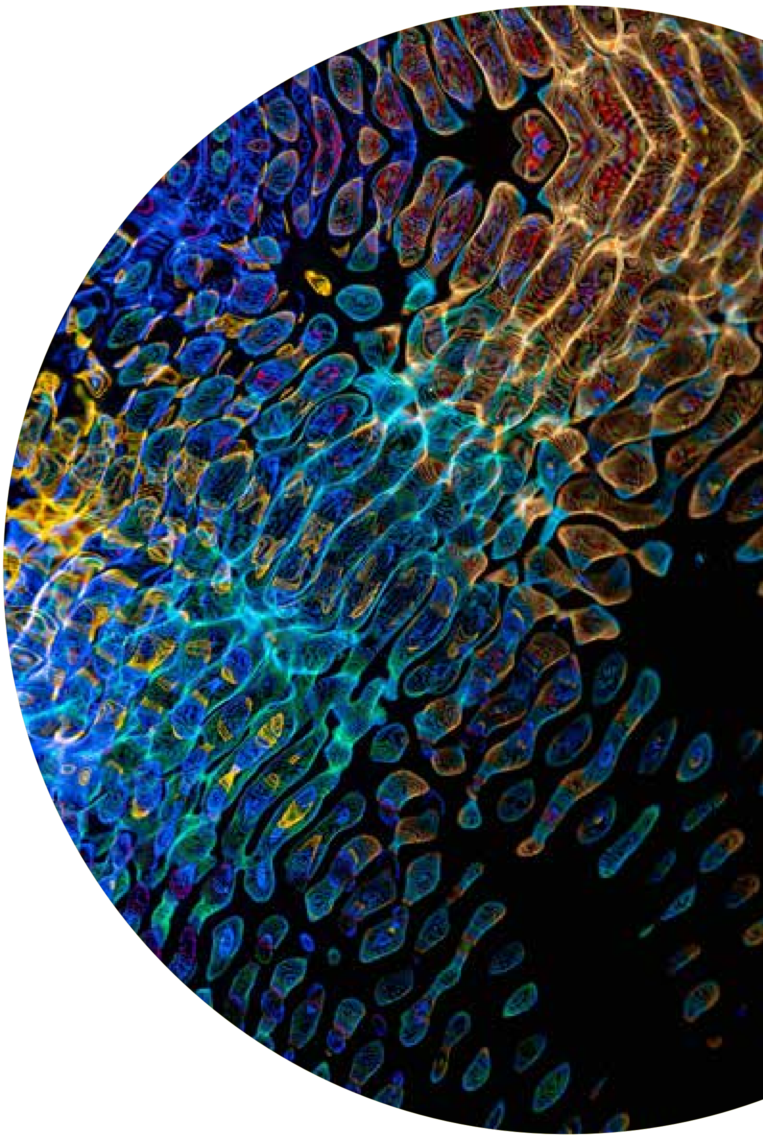
- excise duty on betting: current rate – 7.5% of the amount wagered or staked. Proposed rate – 20%;
- excise duty on gaming: current rate – 7.5% of the amount wagered or staked. Proposed rate – 20%;
- excise duty on prize competitions: current rate – 7.5% of the amount paid or charged to participate in a prize competition. Proposed rate – 20%;
- excise duty on lotteries (excluding charitable lotteries): current rate – 7.5% of the amount paid or charged to buy the lottery ticket. Proposed rate – 20%.

In summary, the proposed excise duty rate increases for betting, gaming, prize competitions and lotteries represent a significant shift. While the objective may be to generate more revenue and mitigate potential negative impacts, it is crucial to strike a balance that considers the interests of consumers, industry sustainability and the intended policy objectives.

41. Proposed increase in excise duty on fees for money transfer services by cellular phone service providers

Currently, fees charged for money transfer services by cellular phone service providers are subject to excise duty at a rate of 12%. However, the proposed amendment in the Bill suggests an increase in the excise duty rate to 15% for these services provided by cellular phone service providers or payment service providers licensed under the National Payment System Act, 2011.

The intention behind this proposal seems to be the harmonisation of the excise duty rate on fees charged for money transfer services across different financial institutions. By aligning the rates, the government aims to create a level playing field and avoid potential disparities in taxation.



42. Proposed excise duty on alcoholic beverages and gaming advertisements

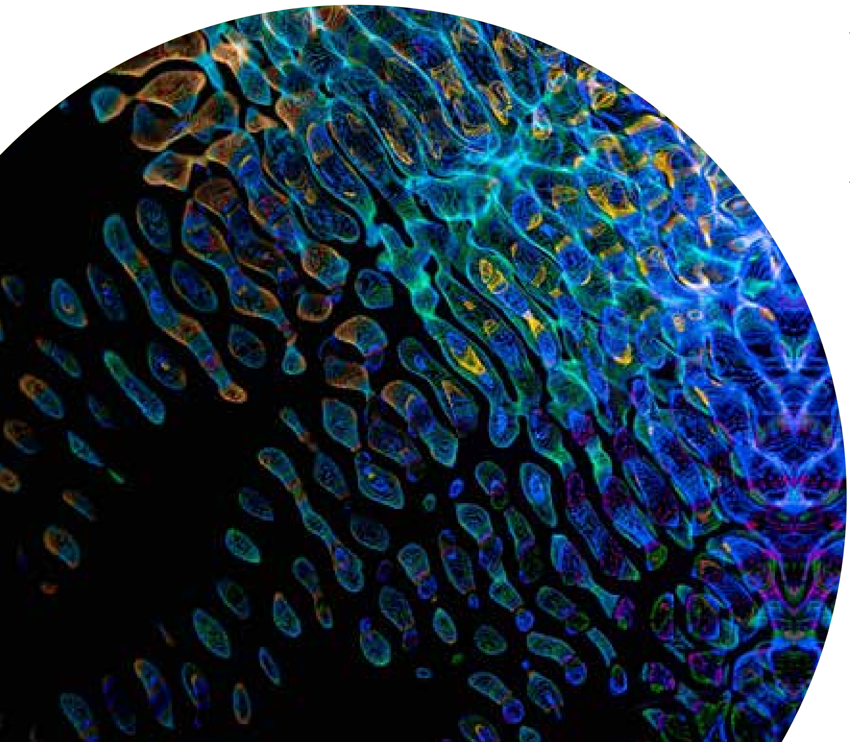
Currently, the Excise Duty Act of 2015 does not include provisions for imposing excise duty on fees charged for advertisement on television, print media, billboards and radio stations related to alcoholic beverages, betting, gaming, lotteries and prize competitions. However, the Bill proposes subjecting such advertisement fees to excise duty at a rate of 15%.

This proposal is aimed at discouraging the advertisement and subsequent consumption of these goods and services. Media organisations and advertising agencies will be impacted as these companies reconsider their advertising strategies and revenue streams.

43. Proposed excise duty on amounts charged by digital lenders

Currently, excise duty is levied at a rate of 20% on fees charged by digital lenders. However, the Bill introduces a new proposal that expands the scope of excise duty to cover any amount charged in respect of lending by digital lenders, also at a rate of 20%.

The purpose of this proposed amendment is to broaden the revenue sources subject to excise duty within the digital lending sector.



44. Proposed amendment to the definition of amount wagered or staked

Currently, the Excise Duty Act, 2015 provides a definition for "amount wagered or staked" as the amount of money placed by a person for an outcome in a betting transaction. However, the Bill introduces a proposal to amend this definition by including gaming, so that it will read as "the amount of money placed by a person for an outcome in a betting or gaming transaction."

The proposed amendment to include gaming within the definition of "amount wagered or staked" aims to streamline the taxation of gaming activities and increase government revenue.

45. Proposed amendment to the definition of "other fees" charged by financial institutions

The Excise Duty Act, 2015 currently defines "other fees" as including any fees, charges or commissions charged by financial institutions relating to their licensed activities. However, the Bill proposes to amend this definition by removing the phrase "relating to their licensed activities."

By removing the phrase "relating to their licensed activities," the proposed amendment broadens the scope of excise duty on fees or commissions earned by financial institutions. This change indicates that the excise duty may now apply to a wider range of fees and commissions charged by financial institutions, regardless of whether they are directly related to their licensed activities.

By removing the reference to licensed activities, the amendment broadens the scope of excisable services provided by financial institutions.

D. Tax Procedures Act (TPA, 2015) and Tax Appeals Tribunal Act (TAT, Act, 2013)

46. Taxpayers to deposit 20% of tax in dispute before appealing to the High Court

The Bill proposes that a taxpayer appealing to the High Court is to deposit with the KRA 20% of the disputed amount, or any security equivalent to the same amount before filing an appeal.

If passed, this will have a significant financial impact on taxpayers who will be required to pay a substantial amount of money upfront, which will hamper access to justice. The Supreme Court in Petition No. 16 (E023) of 2021 Westmont Holdings BHD v. Central Bank of Kenya and 2 others has already decided that it is unconstitutional to impose a condition precedent before a matter can be heard.

47. Changes to appeal submission requirements at the Tax Appeals Tribunal (TAT)

The Bill suggests modifications to the form of appeal at the TAT. Currently, the appellant is required to file a memorandum of appeal, statements of facts and the tax decision. However, the proposed changes seek to replace the "tax decision" with an "appealable decision" and allow appellants to submit additional necessary documents to facilitate the Tribunal's decision-making process. These adjustments aim to provide clarity, align with existing legislation and offer appellants the opportunity to present further supporting evidence. Overall, the proposed changes aim to streamline the appeal process at the TAT and enhance its fairness and effectiveness.

48. Appealable decisions

The TPA previously defined tax decisions to include refund decisions. The proposed amendment deletes refund decisions from the definition of a tax decision. The definition now makes it clear that refund decisions are to be appealed directly to the TAT. This change brings alignment between the provisions of the TPA and ensures a smoother and more straightforward appeals process for taxpayers.

49. Strengthening tax compliance for trusts: proposed amendment for resident trustees in Kenya

Under this proposed amendment, trustees who are resident in Kenya will be obligated to maintain and provide tax records for trusts that are registered in Kenya or abroad, regardless of whether the trust's income is generated within or outside Kenya.

The amendment specifically requires resident administrators of trusts to keep and make available to the KRA the necessary records as required by tax laws. This provision aims to ensure transparency and compliance with tax regulations for trusts administered by trustees residing in Kenya.

50. Streamlining tax administration: proposed electronic tax records system

The Bill proposes to empower the Commissioner to establish an electronic tax system for issuing tax invoices and maintaining records of stocks. Under this system, businesses, including resident individuals and Permanent Establishments (PEs), will be required to issue invoices or keep stock records through the electronic system.

This proposed amendment shows that Kenya is continuing the move towards fully electronic tax collection systems.

51. Removal of tax relief provision for doubtful recovery

Currently, the TPA allows for the abandonment of taxes in cases where their recovery is deemed impossible or would impose significant expenses on the Commissioner, subject to approval by the Cabinet Secretary.

The proposed amendment seeks to delete this provision. This may make it difficult to address genuine cases of difficulty in tax recovery.

52. Tax amnesty: relief from interest and penalties

This proposed amendment grants the Commissioner the authority to grant a waiver on interest and penalties for principal taxes that were due and paid before 31 December 2022. For taxpayers who have not paid the principal tax by 31 December 2022, they can apply for amnesty on the accrued interest and penalties related to the unpaid tax up until 3 December 2022. To qualify, taxpayers must propose a payment plan for the outstanding amount and commit to paying all the outstanding principal taxes by 30 June 2024.

This proposal offers relief to taxpayers who had tax debts payable before 31 December 2022 and serves as an incentive for taxpayers to settle their principal taxes to take advantage of the amnesty on interest and penalties.

53. Changes to security on property for unpaid tax

Currently, the Commissioner is allowed to notify the Registrar of Lands about unpaid taxes by a property-owning taxpayer. This notification enables the registration of a security against the property for the outstanding taxes. The Commissioner is required to notify the taxpayer within seven days of the notification to the Registrar.

The proposed amendment seeks to remove the obligation for the Commissioner to notify the taxpayer of the notification to the Registrar regarding the registration of a security for unpaid taxes. Instead, it establishes that the Registrar of Lands should notify the taxpayer within 14 days after registering the security for unpaid taxes.

The removal of the notification requirement may result in a lack of transparency and the potential for taxpayers' rights to be compromised. It is important to ensure that taxpayers have a fair opportunity to address any issues or disputes related to the registration of a security against their property.

54. Expansion of power to collect taxes from debtors of taxpayers

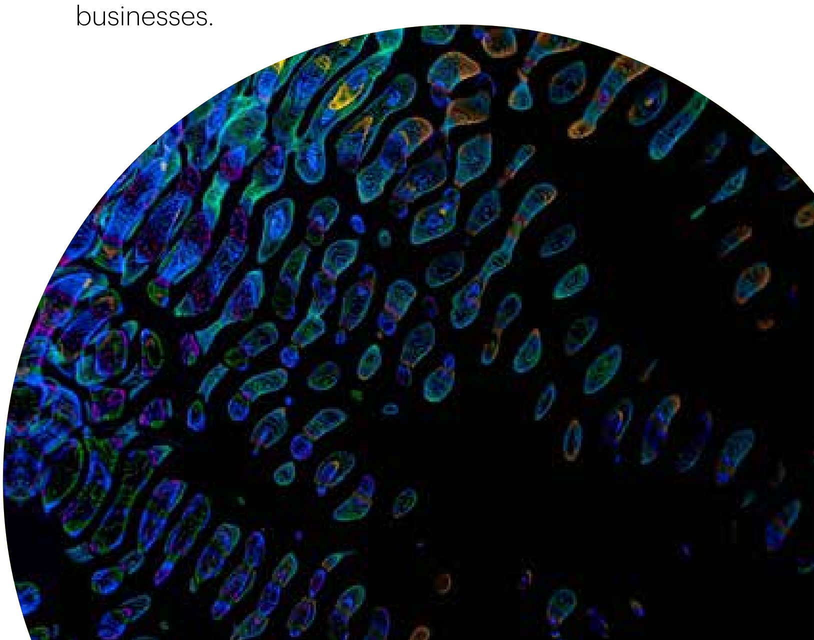
Currently, the Commissioner has the authority to collect taxes from individuals who owe money to a taxpayer. However, this power can only be exercised if the Commissioner has confirmed their assessment through an Objection Decision, and the taxpayer has failed to appeal to the TAT within the specified timelines.

The proposed amendment aims to broaden the circumstances in which the Commissioner can exercise this power. The expansion includes the following scenarios: the taxpayer defaults in paying an instalment; the Commissioner issues an assessment and the taxpayer does not object to or challenge its validity within the prescribed period; or the taxpayer makes a self-assessment, submits a return, but fails to pay the taxes before the due date, and also does not appeal against an assessment specified in a decision of the TAT or court.

55. Withholding VAT to be remitted within three days

The Bill includes proposed amendments that will require taxpayers to pay and account for withholding VAT within three days of the deduction being made. Additionally, registered manufacturers, regardless of their investment value, will no longer be excluded from the obligation to withhold VAT. Their taxable value of supplies will now be subject to withholding.

These shortened timelines for compliance will increase the cost and administrative burden on businesses.



56. Empowering the appointment of rental income tax agents

A new provision, section 42C, is proposed to be introduced in order to grant the Commissioner the authority to appoint agents for the collection and remittance of rental income tax on behalf of the Commissioner.

The proposed amendment aims to optimise the collection of rental income taxes and improve the overall tax administration process by leveraging the expertise and assistance of qualified agents.

57. Offsetting overpaid taxes against existing liability

The Tax Procedures Act, 2015 currently allows taxpayers to apply for a refund of overpaid taxes within five years. However, the refund can only be offset against future tax liabilities. Proposed amendments to section 47 seek to expand the scope of offsetting overpaid taxes to include both outstanding tax debts and future tax liabilities.

Under the proposed changes, if a taxpayer chooses to apply for a refund, the Commissioner would be required to refund the overpaid taxes within six months, instead of the current two-year period. Failure to refund within this timeframe would result in the automatic offsetting of the amount against the taxpayer's outstanding or future tax liabilities.

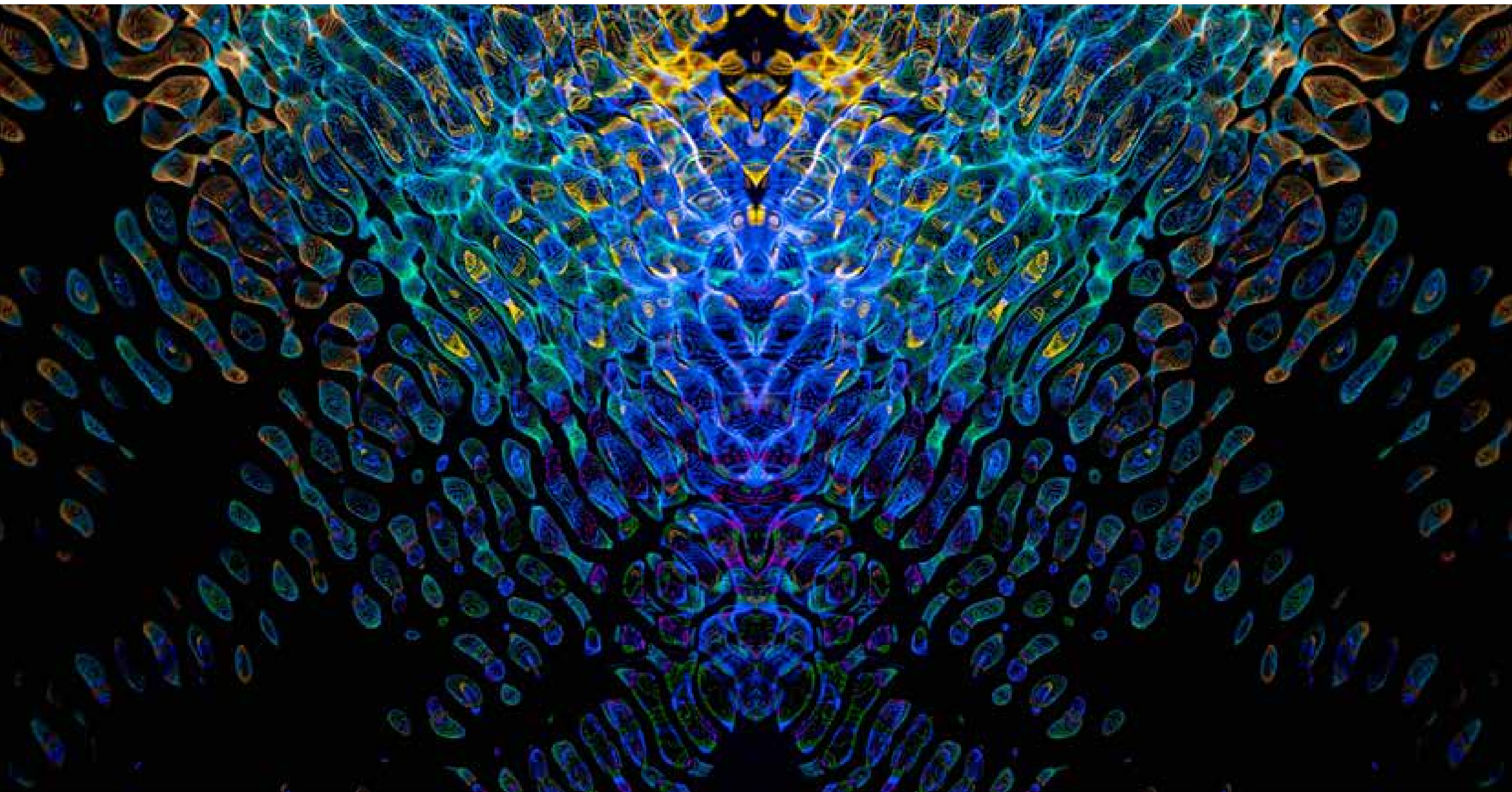
Additionally, the proposed provision establishes a time limit for the Commissioner to ascertain and determine refund applications that have undergone an audit. If the Commissioner fails to do so within 120 days, the application would be deemed as approved.

These amendments aim to provide taxpayers with the flexibility to offset overpaid taxes against their existing tax liabilities, thereby reducing the burden of outstanding debts.

58. Notice of objection to be validated within seven days

The Tax Procedures Act, 2015 currently stipulates that if a Notice of Objection lodged by a taxpayer is found to be invalid, the Commissioner is required to inform the taxpayer within 14 days.

Under the proposed changes, KRA would have the power to request the taxpayer to submit specified information within seven days after a notice of invalidity of a Notice of Objection has been issued. If the taxpayer fails to provide the requested documents or causes delays in doing so, the Commissioner may proceed to make an Objection Decision within 60 days.



It is worth noting that the proposed provision deviates from the mandatory requirement outlined in section 51(11) of the TPA, which states that the KRA must make an objection decision within 60 days once the taxpayer's objection decision is deemed valid.

By using discretionary language, such as the term "may", the proposed provision introduces the potential for inefficiency on the part of the KRA if the taxpayer fails to provide the additional requested documents.

It is important to strike a balance between the need for timely resolution of objections and the taxpayer's right to provide relevant information within a reasonable timeframe. Clear guidelines and communication should be established to ensure that both parties adhere to their respective obligations and that objection processes are conducted efficiently and fairly.

59. Settlement of disputes out of court or tribunal

The law currently stipulates that any disputes to be settled out of court must be resolved within 90 days. The Bill proposes to extend this timeline to 120 days.

This is a welcome proposal that will allow taxpayers sufficient time to resolve disputes with KRA out of court. The increased timeline will allow for a more comprehensive and thorough resolution of technical matters that may require additional time for examination and negotiation.

The proposed amendment strikes a balance between providing adequate time for resolution and maintaining the efficiency of the dispute settlement process. It acknowledges the complexities involved in tax disputes and allows for a more flexible and comprehensive approach to resolving them outside the court or tribunal setting.

60. Amendment of pleadings to include new grounds at the TAT or the courts

The law currently allows taxpayers to rely on the grounds stated in their objection when filing appeals to the TAT or the courts. The Bill proposes to remove the discretion of the TAT and the courts to allow a taxpayer to add new grounds. If passed into law, this amendment will require parties to strictly rely on the grounds stated in the initial objection, without any exception.

By removing the ability to add new grounds, taxpayers may face limitations in responding to evolving circumstances or introducing critical evidence that may strengthen their case. It restricts their ability to effectively address issues that may arise during the objection process and limits the opportunity for a fair and thorough examination of the matter.

61. Data management and reporting system for electronic documents

The Bill proposes amendments to establish a data management and reporting system for the submission of electronic documents. This system will enable the efficient and secure submission of electronic documents related to transactional data from selected individuals or entities who have been notified by the Commissioner.

The data to be submitted through this system includes payments made by individuals or businesses in the ordinary course of their operations. It also encompasses lump sum payments pertaining to royalties or other designated commercial or financial transactions, as determined by the Commissioner.

The introduction of the data management and reporting system for electronic documents represents a significant step towards modernising tax administration. It enables more efficient data collection, enhances transparency and strengthens the Commissioner's ability to ensure accurate tax assessments and promote fair tax compliance.

62. Increase in the rate of tax shortfall penalties

The current rate of the tax shortfall penalty is set at 75% of the tax shortfall. The Bill proposes to make this more punitive by having the rate apply at double the amount of the tax shortfall.

The objective of this proposed amendment is to impose stricter penalties on taxpayers who make false or misleading declarations. By doubling the tax shortfall penalty, the intention is to deter individuals or entities from providing inaccurate information or engaging in fraudulent practices when reporting their tax obligations.

63. Increased penalty for non-compliance with electronic tax system

Under the existing law, a taxpayer who fails to submit a tax return in electronic form or pay tax electronically as required by tax laws is subject to a penalty of KES 100,000.

The Bill proposes that taxpayers who fail to issue an electronic tax invoice, submit a tax return in electronic form or pay tax electronically as mandated by tax laws will be liable to a penalty of KES 1 million or 10 times the amount of tax due, whichever is higher. This substantial increase in penalties underscores the importance of full compliance with the electronic tax systems implemented by the KRA.

The higher penalty amount is intended to encourage taxpayers to adopt and utilise electronic tax systems effectively, contributing to improved tax compliance and revenue collection.

64. No more waivers of penalties and interest

Currently, the law grants the Commissioner discretionary power to remit penalties and interest upon application by a taxpayer. The Bill proposes to delete this provision.

This amendment is intended to reduce tax expenditures associated with the abandonment of taxes and to provide clarity regarding the remission of penalties and interest.

By removing these sections, the Commissioner's authority to grant remissions would no longer exist. Instead, the proposed introduction of an amnesty under section 37E of the TPA would establish a more defined framework for taxpayers to benefit from penalty and interest waivers. The proposed amnesty, however, only applies to penalties and interest that crystallised prior to 31 December 2022.

E. Other amendments

65. Reduction in the rate of import declaration fee (IDF)

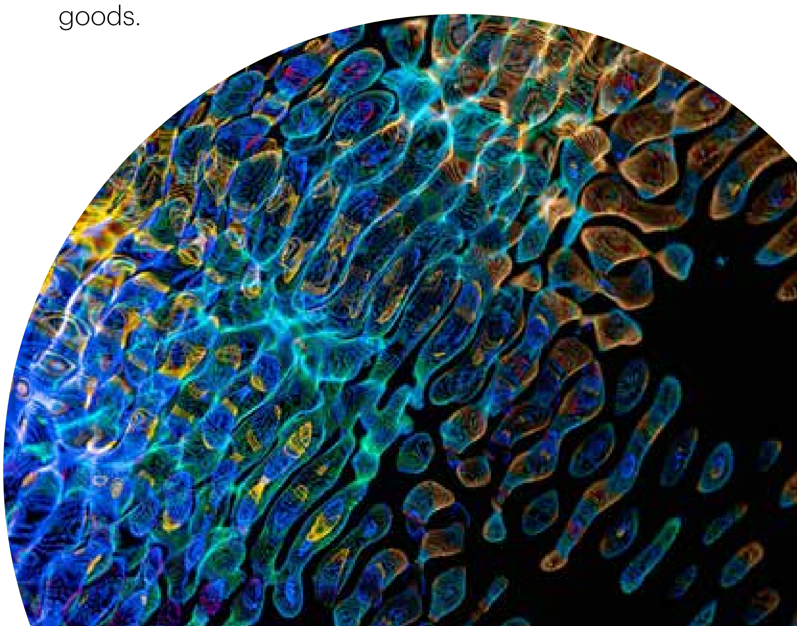
Currently, IDF applies at a rate of 3.5% on goods imported for home use. The Bill proposes to reduce this rate to 2.5%.

The proposed reduction in the rate of IDF is a positive development as it aims to lower the cost of importation. By decreasing the rate from 3.5% to 2.5%, importers will benefit from reduced fees when declaring goods for importation.

66. Reduction in rate of railway development levy (RDL)

Currently, RDL is applicable at a rate of 2% on goods imported for home use. However, the proposed Bill seeks to reduce the rate of RDL to 1.5%.

This reduction in the rate of RDL is a positive development as it will result in a decrease in the cost of importation. Importers will benefit from the lower levy, which can contribute to reducing the overall expenses associated with importing goods.



67. Proposed elimination of reduced IDF rate on goods imported under duty remission

Currently, goods imported under the East African Community (EAC) Duty Remission Scheme benefit from a reduced IDF rate of 1.5%. This lower rate of IDF applies to goods imported under the remission scheme.

However, the Bill proposes to remove this provision entirely, which means that goods imported under duty remission will be subject to the standard IDF rate. Consequently, the cost of manufacturing for goods imported under duty remission will increase due to the higher IDF rate. This additional cost is likely to be passed on to consumers in the form of higher prices.

68. Introduction of export and investment promotion levy

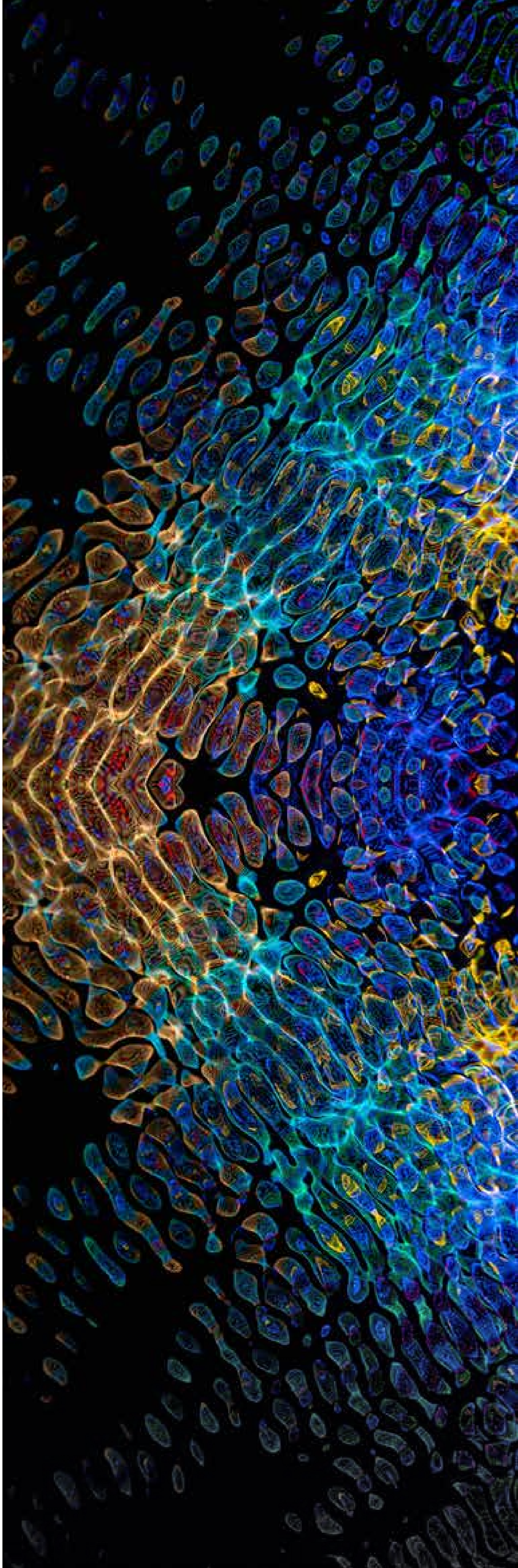
Under the current tax laws, there is no provision for an export and investment promotion levy. However, the proposed Bill aims to introduce this levy at a rate of 10% of the customs value. The levy will be applicable to specific imported goods listed in the newly introduced Schedule 3 of the Miscellaneous Fees and Levies Act.

The introduction of the export and investment promotion levy will result in a significant increase in the overall taxes paid on the importation of the specified goods.

69. National Housing Development Fund contributions

The Bill proposes to amend the Employment Act, 2007 to require employers to pay contributions to the National Housing Development Fund. The amount will be 3% of the employee's basic salary. The employer will match the employee's contributions. The total amount (employer + employee contributions) is to be capped at KES 5,000.

This proposal may still have an impact on small businesses with limited financial resources as employers. They will also be required to make a contribution to the fund, which could increase their overall cost of employment.



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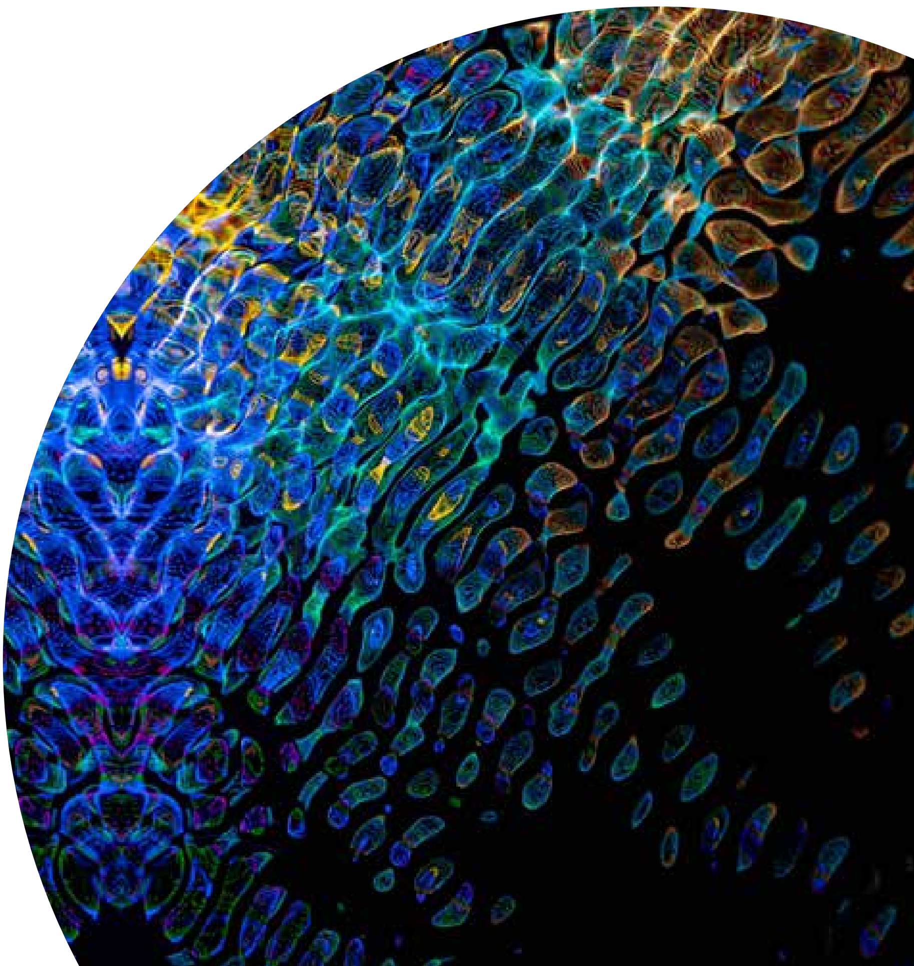

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