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The Excise Duty Bill 2015 Analysis

Diving deep

Preamble

The Excise duty Act 2015 will come into force on enactment of the Excise duty bill which was tabled in parliament on 11 June 2015. Accordingly all the provisions this bill discussed herein will take effect once the bill has been debated in parliament and the bill signed into law.

Introduction of a stand-alone Excise Duty Bill

The measure

A new simple and modern stand-alone excise duty bill has been introduced incorporating international best practices. The bill has collated legal provisions from the Customs and Excise Act Cap 472 relating to excise duty into one legal document.

Who will be affected

Local manufacturers and importers of excisable goods, consumers in general.

Our view

Prior to the enactment of the EAC Customs Management (EAC CMA) in 2004, Kenya's Customs and Excise legislation were both covered by the Customs and Excise Act. After enactment of the EAC CMA, the customs legislation came under the purview of the EAC CMA and its regulations. The Customs and Excise Act was however not repealed as it still contained the excise legislation.

Introduction of a stand-alone Excise Duty Bill will enable the Government to collate the excise legislation in one document separate from the yet to be repealed Customs and Excise Act, but also to modernise it and align it with international best practice. On enactment of the Bill, the Customs and Excise Act is expected to be repealed.

Change of excise duty tax base to units of quantity only

The measure

The Excise Duty Bill proposes to introduce a new tax based on units of quantity (specific regime) only on harmful goods so as to compensate for harmful effects caused by production, supply, consumption or use of goods whose costs are not directly reflected in their price.

The Bill will impose a charge on:

1. Sticks of harmful cigarettes and tobacco;
2. Volumes of harmful alcoholic beverage and sugar sweetened beverage consumed;
3. Volume of polluting fossil fuels and age of motor vehicles purchased; and
4. Weight of environmentally damaging plastic bags.

Who will be affected

Local manufacturers, importers of excisable goods, consumers.

Our view

The charging of excise duty using a specific tax regime based on units of quantities is a move away from the current taxation of goods which is either based on a specific regime only, an ad valorem regime only or on a hybrid regime where excise duty is charged based on both quantity and value whichever is higher. However, food supplements will continue to be charged at an ad valorem rate.

By using of a specific regime, calculation of excise will be unaffected by value and this will minimize potential for excise valuation disputes. The rates will have to be adjusted annually to cater for inflation and it may ease administration since the determination of the tax base for ad valorem regimes can be complex. From this perspective it is a welcome move.

However, consumers should be on the lookout for possible excise duty increases as the Government seeks to raise more tax to fund the expansionary budget. As such, consumers may need to dig deeper into their pockets to finance consumption of such products considered harmful or luxuries.

Removal of Excise Duty

The measure

The Excise Duty Bill on enactment will remove excise duty on goods that have no harmful effects that are currently excisable under the Fifth Schedule of the Customs and Excise Act Cap 472. Examples of such goods include: cosmetics such as petroleum jelly, deodorants, body lotions, certain food preparations.

Who will be affected

Local manufacturers, importers of excisable goods, consumers.

Our view

The removal of excise duty on goods that have no harmful effects is in line with the objects of the proposed Excise Bill. This is a welcome move that will reduce the excise duty on products that are currently being taxed largely for revenue purposes and not because they cause any negative externalities. It is however noted that water has been included in the list of excisable products which may be an error as the Cabinet Secretary in his budget statement mentioned that bottled water will not be subject to excise. It is possible that this will be addressed before the Bill is enacted. Hopefully the positive effects of this change will trickle down to the consumers by way of making these products cheaper.

Remission of excise duty on beer or wine

The measure

The new Excise Act will give the Cabinet Secretary, National Treasury the powers to grant remission of excise duty on beer or wine manufactured from sorghum, millet or cassava or any other agricultural products excluding barley that is grown in Kenya. This will be done by notice in the Gazette which shall specify the products and conditions to be met for the remissions to be granted.

Who will be affected

Farmers of agricultural products (except barley), manufacturers, consumers.

Our view

The remission of excise duty on these agricultural products will encourage local beer manufacturers to manufacture beer using locally grown produce hence providing an incentive for farmers. Remission of beer made from sorghum, millet or cassava was first introduced in 2013 and will now been expanded to include other agricultural products excluding barley. Wine made from these crops will also enjoy remission. The availability of cheap beer and wine due to remission of excise duty will also help reduce the consumption of illicit brew through availability of affordable and good quality beer and wine.

Enhancement of excise duty on non-biodegradable plastics

The measure

In an effort to address the effects of environmental degradation, the Cabinet Secretary, National Treasury has proposed the enhancement of the excise duty on non-bio degradable plastics to KShs. 120 per kilogram.

Who will be affected

Importers and local manufacturers of non-biodegradable plastics.

Our view

The Customs and Excise Act currently imposes excise duty on shopping plastic bags at the rate of 50% of their excisable value. The new bill proposes to enhance the excise rate to a specific rate of KShs. 120 per kilogram in line with the specific regime on goods. This will make non-biodegradable plastic bags expensive thereby promoting environmental conservation. However this should be accompanied by sensitization on the importance of environmental conservation.

Arm’s length valuation of goods and services

The measure

The new Excise Bill proposes to introduce the arm`s length concept in the valuation of goods and services and has defined open market value as the price that the goods/services would fetch in an arm’s length transaction at the wholesale level.

Where the open market value cannot be determined, the Commissioner is empowered to determine the same based on generally accepted principles of valuation as an objective approximation of the price the goods/services would fetch in an arm’s length transaction at the wholesale level.

Who will be affected

Manufacturers of excisable goods, suppliers of excisable services and consumers in general.

Our view

This provision introduces the arm’s length concept of determining value, a concept that has been adopted in various provisions in the Bill and aims to ensure that transactions are carried out independently and that relationships do not affect the value of excisable goods/services. However, where the Commissioner is given the power to determine the value of goods and services the issue of objectivity is questionable. Similar provisions are already prevalent in other revenue legislation.

Time of supply of excisable services and imported goods

The measure

The Bill introduces time of supply rules for both excisable services and goods.

Time of supply of excisable services shall be the earlier of:

- Date on which services are performed;
- Date on which the invoice is issued; or
- Date on which payment is received.

For imported goods, the time of importation will be when the goods are cleared for home use at the port or from a warehouse, removed from an export processing zone or in any other case at the time the goods are brought into Kenya.

Who will be affected

Manufacturers and importers of excisable goods, consumers in general.

Our view

These rules provide clarity especially with regard to excisable services and imported excisable goods as the tax point is now clear.

Imposition of Excise Duty

The measure

The Excise Bill provides that excise duty shall be charged on excisable goods manufactured in Kenya by a licensed manufacturer, on excisable services and on imported excisable goods and provided that excise duty shall be payable by the licenced manufacturer, licenced person making the supply or the importer of excisable goods.

Who will be affected

Manufacturers of excisable goods, suppliers of excisable services and consumers in general.

Our view

The Bill has put together the items on which excise duty will be charged. These were previously provided in different sections. It provides clarity on who shall be responsible for payment of excise duty.

Timing of liability for excise duty

The measure

Liability for excise duty shall arise at the time of importation or removal of excisable goods from a licensed manufacturer's factory; while for excisable services liability shall arise at the time of supply of the service. The Bill has also introduced a provision to require that excise duty shall arise where goods are consumed in a licensed manufacturer's factory since they will be treated as removed from the factory at the time of consumption.

Who will be affected

Manufacturers of excisable goods, suppliers of excisable services and consumers in general.

Our view

The Bill has collated the various provisions relating to timing of liability for excise duty under one provision. In the Customs & Excise Act there are different tax points for different locally manufactured excisable products. The bill now proposes that excise duty on all excisable goods that are locally manufactured will be accounted for at the time of removal from the factory. It also includes excisable goods consumed in the factory that were in some instances not accounted for since they did not leave the factory.

Goods and Services not liable to excise duty

The measure

Excise duty shall not be charged on the following:

- Exempt goods under the Second Schedule;
- Exported goods under customs control and exported services;
- Excisable goods destroyed by the manufacturer with written approval by the Commissioner and supervision of an officer prior to removal from the factory;
- Excisable goods destroyed or lost by accident or other unavoidable cause except where compensation received for the loss includes the duty payable as a consequence of an insurance policy, indemnity or other agreement; a settlement; or a judicial decision.

The Section further provides that excisable services shall be considered exported from Kenya if the services are supplied from a place of business in Kenya for use or consumption outside Kenya.

Who will be affected

Manufacturers of excisable goods, suppliers of excisable services and consumers in general.

Our view

The section on remission of excise duty has been removed and some of the provisions have been deleted. These include remission of goods delivered to NAAFI and AFCO.

A new provision has been provided where goods are destroyed and excise duty is compensated, excise will be payable.

The Bill now defines an exported excisable service.

Variation of Rates of Excise Duty

The measure

The amount by which the excise rates can be varied has changed from 30% to 25% of the rate as specified in the First schedule of the Excise Duty bill.

Who will be affected

Manufacturers and importers of excisable goods, consumers in general.

Our view

This provision will guard against significant changes in excise duty rates and promote stability of the duty rates. The proposed change will largely apply to goods and services attracting an ad valorem rate. A similar percentage for permissible variation is provided for in the Value Added Tax Act 2013.

Adjustment for inflation

The measure

The Commissioner can adjust the specific rate of excise duty annually to take into account inflation in accordance with the formula:

A x B

where :

A is the rate of excise duty on the day immediately before the adjustment day; and

B is the adjustment factor for the adjustment day calculated as one plus annual average rate of inflation of the preceding financial year

Who will be affected

Manufacturers and importers of excisable goods, consumers in general.

Our view

The indexing of excise duty rates is a method used by several countries to ensure that the excise rates charged do not erode the public's purchasing power during periods of inflation. The specification of a formula to be used in adjusting for inflation will ensure that the indexation is done in a fair, predictable and consistent manner.

Excisable Value of excisable services

The measure

The excisable value of excisable services shall be:

1. If the excisable services are supplied by a registered person in an arm's length transaction the fee, commission or charge payable for the service; or
2. In any other case, the open market value of the services.

The excisable value shall not include VAT and for fees charged by financial institutions it shall not include interest on loan or return on loan or an insurance premium.

Who will be affected

Suppliers of excisable services, business and consumers.

Our view

The provision has provided some clarity on what constitutes the excise value for services which incorporates the arm's length principle as the key factor in determining the value. In the absence of an arm's length transaction the open market value will apply. The arm's length transaction can be challenged by the tax authority and this therefore leaves a lot of room for disputes in valuation unless proper guidelines are issued.

Ex-factory selling price of excisable goods

The measure

The definition of the ex-factory selling price has been amended to mean the price payable by a purchaser where the goods are sold by the manufacturer in an arm's length transaction and in any other case, the open market value of the goods at the time of removal from the manufacturer's factory.

Who will be affected

Manufacturers and importers of excisable goods, consumers in general.

Our view

The Customs & Excise Act previously defined the ex-factory selling price as the price at which goods are sold from a factory exclusive of VAT and excise duty.

This provision changes the definition to require that the ex-factory selling price for excise duty purposes be the arm's length value or open market value. This implies that the determination of an arm's length transaction is critical in arriving at the ex-factory selling price. It is possible that the KRA can challenge if a transaction is indeed at arm's length and revert to the open market value. However it is worth noting that the ex-factory selling price under the excise duty bill 2015 still excludes VAT and excise duty as in the Customs & Excise Act.

Place of supply of excisable services

The measure

Supply of excisable services will be deemed to have been made in Kenya when the services have been supplied from a place of business of the supplier in Kenya.

Who will be affected

Suppliers of excisable services.

Our view

This is a new provision that provides clarifies on when excisable services will be subject to excise duty.

Licensing

The measure

The Bill sets out reasons upon which the Commissioner may refuse to grant a licence. These include, where the applicant is convicted of an offence under the Act or the Tax Procedures Act ("TPA") or convicted under any other law with regard to dishonesty or fraud, where the applicant is declared bankrupt or under receivership; where the reasons listed apply to a person related to the applicant and the Commissioner is satisfied that the related person is reasonably expected to be involved in the conduct of the activity to which the applicant relates; where the applicant has kept proper records or failed to comply with obligations.

Who will be affected

Manufacturers and importers of excisable goods, supplier of excisable services, manufacturers who use spirit to manufacture non excisable goods.

Our view

The Customs & Excise Act empowers the Commissioner to refuse to grant a licence without assigning any reason. This was unfair and contrary to the laws of natural justice. The Bill has rectified this by specifying the reasons upon which a licence can be denied.

It is interesting to note that the Bill has gone further to not only assess the applicant but also persons related to the applicant who are likely to be involved in the activity for which a licence is sought.

Excise Control of excisable goods

The measure

Excisable goods stored in a factory of a licensed manufacturer shall be subject to excise control. The Bill provides that goods will be subject to excise control until they're removed from the manufacturer's factory, exported or destroyed in accordance with the Act. It further makes provisions for the obligations of licensed manufacturers and powers of the Commissioner with regard to goods under excise control.

A licensee who cannot account for any quantity of excisable goods to the satisfaction of the Commissioner will be deemed to have removed such goods from excise control and will be liable to a penalty equal to double the excise duty payable on those goods.

Who will be affected

Manufacturers of excisable goods.

Our view

The section introduces specific provision dealing with excise control on excisable goods and restates various provisions of the Customs & Excise Act.

Penalties and Offences

The measure

The Bill provides a penalty of double the excise duty payable on goods in the instances of manufacture of excisable goods or supply of excisable services without a licence, importation of excisable goods requiring excise stamps without a licence, manufacture of goods in premises that are not licensed for those goods and where the manufacturer cannot account for manufactured excisable goods.

A breach of other provisions set out in the Bill such as manufacture of unlicensed goods in a factory, breach of obligations relating to goods under excise control, failure to notify the Commissioner of discrepancies between actual and recorded inventory of goods under excise control or of change in business particulars, failure to display excise licence, breach of any provisions relating to excise stamps will attract a fine not exceeding KES. 5 million, imprisonment to a term not exceeding 3 years or both.

Where an offence is committed, a court may impose a fine not exceeding the higher of:

- The maximum specified for the offence; or
- Three times the value of the excisable goods to which the offence relates.

Who will be affected

Manufacturers of excisable goods, suppliers of excisable services.

Our view

The penalties imposed under these sections are higher than previously imposed under the Customs & Excise Act as the government is looking to discourage non-compliance.
It is interesting to note that one of the fines that the court may impose is three times the value of the excisable goods and not three times the value of the excise duty that would have been payable. This is likely to be very punitive and is possibly a drafting error.

Tax avoidance schemes

The measure

This section provides that if the Commissioner is satisfied that a person entered into a scheme with the sole purpose of enabling the person obtain a tax benefit and a tax benefit is obtained, the Commissioner may within five years from the last day of the month when the liability arose, assess the tax liability as if the scheme had not been entered into.

Who will be affected

Manufacturers and importers of excisable goods, suppliers of excisable services.

Our view

This brings the excise legislation in line with the Income Tax and VAT legislation, although these sections have rarely been invoked. However, tax planning schemes will need to be carefully considered to ensure that they are commercially justifiable. The Tax Procedures Bill 2015 imposes a penalty of twice the tax benefit.

Application of the East African Community Customs Management Act

The measure

The Bill provides that the provisions of the EAC CMA and any customs related rules made thereunder before or after the commencement of this bill shall apply on imported excisable goods liable to customs duties or not, as if all such goods were liable to duties of customs and as if those duties include excise duty.

Who will be affected

Importers of excisable goods.

Our view

The Bill has introduced a provision on applicability of the EAC CMA and any related rules on excisable goods for consistency on imposition of custom duties on imported goods.

Regulations

The measure

The Cabinet Secretary is empowered to make any Regulations that will aid in:

- Prescribing any fee or charge to be levied on excisable goods imported into, or manufactured in Kenya
- Prescribing any matter required to be prescribed for the purposes of the Excise Act.

Who will be affected

Manufacturers and importers of excisable goods, suppliers of excisable services.

Our view
This will enable a smooth transition into the new Act pending publication of new Regulations and Rules.

Repeals and transitional clauses

The measure

The transitional clauses provide for repeal of the Customs & Excise Act, provisions with regard to assessments and collection of taxes, payment and refund of tax, continuation of registration effected under the Customs & Excise Act etc.

Any tax arising under the repealed Act due to be paid or refunded at the commencement of the Excise duty act, shall be paid or refunded as if it were tax due to be paid or refunded under the Excise Act.

The Bill further provides that the commencement of the Excise Act shall not affect a penalty or punishment incurred in respect of an offence committed against the repealed Act in force at the commencement of this Act.

Who will be affected

Manufacturers and importers of excisable goods, suppliers of excisable services.

Our view
This section provides for measures to enable a smooth transition from the Customs & Excise Act to the Excise Duty Act with minimal inconvenience to businesses.

Exempt Excisable goods and services

The measure

The Bill provides for exemption from payment of excise duty on the following excisable goods when purchased before clearance through Customs or removal from excise control:

- Bona fide ship stores.
- Goods imported or purchased by a diplomatic or consular mission.
- Goods imported or purchased by foreign government, international organisation or aid agency.
- Motor vehicles for use by persons with disability.
- Excisable goods including a motor vehicles imported by a returning resident or a person changing residence subject to certain conditions.
- Goods imported or purchased for official use by the Kenya Red Cross.
- Motor vehicle previously owned and used by a deceased person outside Kenya.
- Excisable goods imported by and in possession of a passenger subject to limitations under the fifth schedule (Part B Item 5) of the EAC CMA.

Excisable services that will be exempt from excise duty under the Bill include:

- Services supplied in Kenya to a diplomatic or consular mission.
- Services supplied in Kenya to a foreign government, international organisation or aid agency.

Who will be affected

Manufacturers and importers of excisable goods, suppliers of excisable services to privileged organisations, privileged consumers in general.

Our view

The goods subject to exemption have been significantly reduced in line with the other national Acts where the Government aims to minimize exemption facilities that were previously granted

Changes in Excise Duty Rates

The measure

Excise duty has been introduced on the following items:

- Condensates at KES. 6,225 per 1000l @ 20degC
- Electronic cigarettes at KES 3000 per unit.
- Cartridges for use in electronic cigarettes at KES 2000 per unit.
- Motor vehicles of tariff heading 8704 at KES 200,000 for motor vehicles over 5 years old from the date of first registration and KES. 150,000 for motor vehicles between 0-3 years from the date of first of registration.
- Motor cycles of tariff 8711 other than motor cycle ambulances at KES. 10,000 per unit

The excise duty rate has been increased for the following items:

- Gas oil (automotive, light, amber for high speed engines) from KES 8,244 per 1000l @ 20degC to KES 10,305 per 1000l @ 20degC
- Food supplements from 7% to 10%

Who will be affected

Manufacturers, importers and consumers of excisable goods.

Our view

The excise duty bill has introduced excise duty on electronic cigarettes and their cartridges to raise revenue as these goods are deemed to be luxurious with inelastic demand.

Excise duty has been introduced on motor vehicles of tariff heading 8704 used for goods transport and motor cycles of tariff heading 8711. This will negatively impact the goods transport sector due to increase in prices of motor vehicles such as pick-up trucks and a possible increase in transport costs. The boda boda business which is very popular among the low income earners in Kenya will also be negatively affected by the KES 10,000 excise duty.

The oil and gas industry will also be impacted by the introduction of excise duty on condensates and the increase of excise duty on gas oils for high speed engines.

The excise duty rate on food supplements has soared to 10% from 7% and this is expected to be passed on to consumers of the food supplements. The dietary supplements industry in Kenya has been making efforts to boost the demand of the very expensive food supplements which are unpopular among the Kenyan population. These efforts may be thwarted by the increase in excise duty.

Proposed Excise Duty Rates

Goods Description	Current Rate (5th Schedule C&E Act)	New proposed rate (1st Schedule Excise Duty Bill 2015)
Condensates	Nil	KES. 6,225 per 1000l @ 20degC
Motor Spirit (gasoline) regular	KES. 19,505 per 1000l @ 20degC	No change
Motor Spirit (gasoline) premium	KES 19,895 per 1000l @ 20degC	No change
Aviation Spirit	KES 19,895 per 1000l @ 20degC	No change
Spirit type Jet Fuel	KES 19,895 per 1000l @ 20degC	No change
Special boiling point spirit and white spirit	KES 8,500 per 1000l @ 20degC	No change
Other light oils and preparations	KES 8,500 per 1000l @ 20degC	No change
Partly refined (including topped crude) of HS code 2710.19.10	KES 1,450 per 1000l @ 20degC	No change
Kerosene type Jet Fuel	KES 5,755 per 1000l @ 20degC	No change
Other medium oils and preparations	KES 5,300 per 1000l @ 20degC	No change
Gas oil (automotive, light, amber for high speed engines)	KES 8,244 per 1000l @ 20degC	KES 10,305 per 1000l @ 20degC
Diesel oil (industrial heavy, black, for low speed marine and stationery engines)	KES 3,700 per 1000l @ 20degC	No change
Other gas oils	KES 6,300 per 1000l @ 20degC	No change
Residual fuel oils(marine, furnace and similar fuel oils) of a Kinematic viscosity of 125 centistokes	KES 600 per 1000l @ 20degC	KES 300 per 1000l @ 20degC
Residual fuel oils (marine, furnace and similar fuel oils) of a Kinematic viscosity of 180 centistokes	KES 600 per 1000l @ 20degC	No change
Residual fuel oils (marine, furnace and similar fuel oils) of a Kinematic viscosity of 280 centistokes	KES 600 per 1000l @ 20degC	No change
Other residual fuels oils	KES 600 per 1000l @ 20degC	No change
Fruit juices (including grape must), and vegetable juices, unfermented and not containing added spirit whether or not containing added sugar or other sweetening matter.	7%	KES 10 per litre
Food supplements	7%	10%
Waters and other non-alcoholic beverages not including fruit or vegetable juices.	7%	KES 10 per litre

Goods Description	Current Rate (5th Schedule C&E Act)	New proposed rate (1st Schedule Excise Duty Bill 2015)
Beer, Cider, Perry, Mead, Opaque beer and mixtures of fermented beverages with nonalcoholic beverages and spirituous beverages of alcoholic strength not exceeding 10%	KShs. 70 per litre or 50% of the value whichever is higher	KES. 100 Per litre
Powdered beer		KES. 100 Per Kg.
Wines including fortified wines, and other alcoholic beverages obtained by fermentation	80 per litre or 50% of the value whichever is higher	
Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 10%	120 per litre or 35% of the value whichever is higher	KES. 150 Per litre
Cigars, cheroots, cigarillos, containing tobacco or tobacco substitutes	130%	KES. 175 Per litre
Electronic cigarettes	Nil	KES 1000 Per Kg.
Cartridge for use in electronic cigarettes	Nil	KES 3000 Per unit
Cigarettes containing tobacco or tobacco	Nil	KES 2000 Per unit
Substitutes	130%	KES 2500 Per unit
Other manufactured tobacco and manufactured tobacco substitutes; “homogenous” and “reconstituted tobacco”; tobacco extracts and essences.	130%	KES 7000 Per Kg.
Motor vehicles of tariff heading 8702, 8703.	20%	less than three years old from the date of first registration KES150,000 per unit
	Motor vehicles of tariff heading 87.04	Over three years old from the date of first registration KES. 200,000 per unit
Motor cycles of tariff 8711 other than motor cycles ambulances	Nil	less than three years old from the date of first registration KES150,000 per unit
	Plastic shopping bags	Over three years old from the date of first registration KES. 200,000 per unit
Motor cycles of tariff 8711 other than motor cycles ambulances	Nil	KES 10,000 Per unit
Plastic shopping bags	50%	KES 120 Per Kg.

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