



Indirect Taxes Bootcamp

Striking the right balance

February 2017

VAT

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Charge to tax

- In Kenya, VAT is chargeable on:
 - Taxable supplies made by registered persons in Kenya;
 - Importation of taxable goods; and
 - Supply of imported taxable services.
- Applicable VAT rate for taxable supplies is; zero (for zero rated supplies) or 16%;
- Liability to tax vests on the registered person and is due at the time of supply;
- CS empowered to vary the rate of tax up or down by 25% of the VAT rate; and
- Zero rated supplies are taxable for all intents and purposes.

Registration for VAT

- Registration threshold – Taxable supplies of KES 5 million in a year;
- Sale of capital assets or sale of business excluded from registration threshold;
- Application for registration within 30 days of being liable to register;
- Option for voluntary registration;
- Commissioner empowered to register a person who fails to register;
- Registration to take effect in the first tax period after registration is due, or other date as specified in the registration certificate;
- Registration certificate to be displayed in a conspicuous place;
- ***Case for group registration? – Draft VAT Regulations***

Place of Supply Rules

A supply of goods occurs in Kenya if:

- The goods are delivered or made available in Kenya;
- The supply of the goods involves their installation/assembly in Kenya; and
- Where goods are delivered outside Kenya, the goods were in Kenya when their transportation commenced.

Place of Supply Rules

A supply of services is made in Kenya if:

- The supplier's place of business from which the services are supplied is in Kenya; or
- The supplier is non-resident, the recipient is non-registered and the services are:
 - √ Physically performed in Kenya by a person in Kenya at time of supply;
 - √ Directly related to immovable property in Kenya;
 - √ Radio and television broadcasting received at an address in Kenya;
 - √ Electronic services; or
 - √ Transfer, assignment of, or grant of a right to use, a copyright, patent, trademark or similar right in Kenya.

Appointing of a tax representative – Tax Procedures Act (TPA)

- A non-resident providing above referred services to a non-registered Kenyan citizen is deemed to have made a supply of services in Kenya;
- The non-resident is liable to register for VAT should the value of the services supplied reach the registration threshold;
- Due to non-residency status, the non-resident would, under the TPA, be required to appoint a tax representative;
- Appointed representative assumes all duties and obligations of the non-resident under the VAT law;
- No guidelines as yet on the qualifications and criteria of appointment of tax representatives;
- We have not seen KRA place specific focus on this despite the increase in e-commerce;
- Next steps?

Place of supply rules – case studies

Scenario

Kimani purchases a book from Amazon while in the comfort of his home in Kileleshwa. He pays for the book via his credit card

Question:

Is VAT applicable on the above transaction?

Who should pay the VAT?

Has a supply taken place in Kenya?

Tax Representative

Scenario

Company XYZ Ltd provides financial information and news services to businesses across the world. It does not currently have a presence in Kenya (i.e. is not VAT registered).

Question:

Does company XYZ need to have a tax representative in Kenya?

Any other companies you can think of that need to have tax representatives in Kenya?

Time of supply of goods and services

Generally, the time of supply is the earlier of:

- a) The date goods are delivered or services performed;
- b) For construction works, the date a certificate is issued;
- c) The date an invoice for the supply is issued; or
- d) The date payment for the supply is received (in whole or part).

Time of supply of goods and services

However;

- For supplies through machines operated by use of coins, notes or token - the date of withdrawal of the coins, notes or tokens;
- For successive supplies - the date when payment for each successive supply is due or received.

The time of supply of imported goods is;

- For goods cleared for home use – the time of customs clearance;
- For goods cleared to a licensed warehouse – the time of final clearance from the warehouse for home use;
- For goods cleared to an EPZ – the time of clearance for home use;
- In any other case, the time the goods are brought into Kenya.

Taxable value

The taxable value of a supply is;

- Consideration for the supply; or
- In case the supplier and recipient are related; the open market value (OMV)*
- *No guide on how to determine OMV – Draft VAT Regulations define OMV as consideration for arm's length transaction;
- Consideration for a supply includes the total of;
 - amount in money paid/payable;
 - OMV at time of supply of an amount in kind paid/payable; and
 - Any taxes, duties, levies, fees and charges paid/payable (excluding VAT) on or by reason of the supply reduced by any discounts/ rebates.

Taxable value

Items to be included in consideration	Items to be excluded from consideration
• Packaging material – any wrapper, package, box, bottle, or containers	• For goods purchases under hire purchase agreement – the associated finance charge
• Goods contained in or attached to packaging material;	• Late payment interest
• Any other liability payable to the vendor on or by reason of the supply	• For accommodation/restaurant services – The tourism levy
• Incidental costs incurred by supplier to make the supply – other than disbursements	• *charges in lieu of tips also excluded through Finance Bill 2016

The taxable value of imported goods is the sum of:

- Customs value & including any customs duty/levy paid;
- To extent not included – freight and insurance costs; and
- Cost of incidental or ancillary services.

Input tax deduction

- Deduction allowed to extent that input tax is incurred on a supply/import acquired to make taxable supplies;
- Registered person to hold prescribed documentation; tax invoice, customs entry forms and receipts, credit note and debit note;
- Law allows one to deduct input tax within six months;
- Purchase, hire, repair and maintenance of passenger cars and mini buses still blocked, unless in the course of business of dealing in or hiring them.
- Entertainment, restaurant and accommodation services still blocked unless;
 - √ Incurred in the ordinary course of business of a person to provide such services; or
 - √ Provided while recipient is away from home for business purposes

Input tax deduction

Partial Exemption

Deductible input tax for a registered person who makes both taxable and exempt supplies is determined as follows:

- Full deduction of all input tax directly attributable to taxable supplies;
- No deduction of all input tax directly attributable to exempt supplies; and
- Apportionment of input tax attributable to both taxable and exempt supplies using the below formula:

$$\text{Total Input tax} \times \frac{\text{Total Taxable Supplies}}{\text{Total Supplies}}$$

- If the fraction of the formula is:
 - √ > 90% - total input tax is deductible;
 - √ < 10% - no input tax is deductible;
 - √ Any other fraction - Apportion.

Input tax deduction – Case study

ABC Ltd is a company that manufactures and sells wheat flour. It also earns rental income from commercial property it owns within its premises. ABC Ltd earned the following income in the month of March 2016.

Wheat Flour Sales- KES 10,000,0000

Rental Income – KES 500,000.

During the same month, ABC Ltd outsourced transport services from Msafiri Limited. Msafiri Ltd raised an invoice of KES 1,000,000 for its services. In addition to the above, ABC Ltd received two invoices from KPLC. KES 1,000,000 related to the factory whereas KES 50,000 was incurred on the commercial property it rents. ABC Ltd also requested XYZ B.V (a company based in the Netherlands) to provide it with advisory services for a proposed venture they would like to undertake in the Netherlands. XYZ B.V. billed ABC Ltd KES 500,000 for the service.

Question:

Determine the VAT payable by ABC Ltd for the month of March 2016;

Would ABC Ltd be required to account for Reverse VAT?

Assuming that ABC Ltd only makes zero-rated supplies, would Reverse VAT be applicable?

Points to remember:

Sale of wheat flour is exempt

VAT Refunds

How do VAT refunds arise?

- Where a registered person makes zero-rated supplies
- Where VAT is paid in error (or overpaid) to the tax authority
- In the case of bad debts

Timelines for VAT refund claims

- Initially no timelines in VAT Act for refunds occasioned by zero rating;
- Finance Act 2015 - VAT refund claims now to be lodged within 12 months from the date when the tax became due and payable;
- No timelines on the part of KRA and the National Treasury to audit and settle refund claims.

VAT refunds status

Concerns/challenges associated with VAT refunds

- Negative impact on cash flow & cost of doing business;
- Administrative challenges to KRA – resourcing issues;
- Backlogs occasioned by complexity of repealed VAT Act;
- The VAT Act 2013 significantly reduced the list of zero-rated items to help curb the VAT refunds headache;
- Joint verification exercise by the KRA and the National Treasury revealed that the VAT refunds backlog was estimated at KES **19.2 billion by the end 2013.**

VAT refunds status

Suggested solutions

- Conversion of VAT arrears into debt instruments such as bonds that earn interest;
- Offsetting the VAT arrears against other outstanding taxes:
 - ✓ The TPA allows refunds to be used to offset against other taxes payable.
 - ✓ The KRA Act also permits the offsetting of VAT arrears against other taxes.

Steps taken so far

- The KRA constituted a task force to oversee the processing of VAT refunds;
- A portion of the VAT refunds relating the period after 2013 has been settled by the KRA in instalments;
- Significant number of refund claims already processed by the KRA awaiting release of funds from National Treasury.

Invoices and Returns

• **Invoices**

- A registered person who makes a taxable supply required to furnish purchaser with tax invoice;
- VAT may only be charged on taxable supplies;
- Contravening this is an offence and any VAT charged on non-taxable supplies to become due within 7 days of the invoice date;
- Only one original invoice, credit note or debit notes may be issued.
- The Act now allows issuance of a copy clearly marked as such to be provided to a customer for deduction of input tax

• **Returns**

- VAT returns to be filed not later than the 20th day after the end a tax period;
- Taxpayers allowed to apply for extension of time to submit a return;
- Application must be done before the due date for submission of the return;
- Granting the application at the Commissioner's discretion;
- Late filing penalty – Higher of KES 10,000 or 5% of tax payable;
- Return amendment provisions moved to the TPA.

Keeping of records

- Registered persons required to keep a full and true written record of all their transactions in Kenya for a period of 5 years;
- Such record may be kept in electronic form or otherwise and in Swahili or English;
- Records to be kept include:
 - ✓ Tax invoices issued in serial order;
 - ✓ Credit and debit notes issued in chronological order;
 - ✓ Purchase invoices, customs entries and receipts;
 - ✓ Details of imported services;
 - ✓ Tax account;
 - ✓ Periodical stock records; and
 - ✓ Such other records as may be specified.

Key provisions moved to the Tax Procedures Act, 2015 (TPA)

Major VAT administrative provisions moved to the TPA w.e.f 19 January 2016 include:

- Functions and powers of the Commissioner to enforce the provisions of the VAT law;
- Appointment of tax representatives;
- Interest on late payment;
- Withholding VAT provisions;
- Collection and recovery of tax;
- Assessments and amendment of assessments;
- Enforcement provisions; security for tax, production of records, and power to inspect;
- Provisions relating to objection;
- Forfeiture and seizure of goods;
- Settlement of cases and rulings by the Commissioner; and
- Provisions relating to offences and penalties

Trending VAT areas

Key VAT areas of focus by the revenue authority include:

- VAT on export of services;
- Input tax deduction;
- VAT on e-commerce;
- Withholding VAT;
- Reconciliation of sales per financial statements and sales declared in VAT returns.

Questions and & Answers



Customs

Contents

1. Objectives
2. Sources of Customs law
3. The East Africa Customs Union
4. Incoterms
5. Tariff Classification
6. Valuation
7. Post Clearance Audit

Objectives

- To understand the laws governing the Customs regime in Kenya;
- To understand how Customs value is computed;
- To understand tariff classification and the importance of tariff classification;
- To understand what is involved in Customs Post Clearance Audits;

Sources of Customs Laws

- World Trade Organization

A forum for governments to negotiate trade terms and sort out trade problems

Based in Geneva Switzerland

Promotes trade through administering rules of trade between nations

- World Customs Organization

Intergovernmental body whose mission is to enhance the effectiveness and efficiency of Customs administrations

Represents 180 Customs administrations across the globe that collectively process approximately 98% of world trade

Based in Brussels

Offers its Members a range of Conventions and other international instruments, as well as technical assistance and training services

Sources of Customs LawsContd

- COMESA laws
 - The COMESA Rules of Origin
- EAC Customs laws
 - The EAC Customs Union Protocol
 - The EAC Customs Management Act
 - The EAC Customs Management Regulations
 - The EAC Common External Tariff
 - The EAC Rules of Origin
- National Statutes
 - The Miscellaneous Fees & Levies Act 2016
- International Conventions e.g. HS Convention, Revised Kyoto Convention

The road to EAC integration



The East Africa Customs Union

- Regional intergovernmental organization established through the EAC Protocol which entered into force on 7 July 2000
- Original Partner states - Kenya, Uganda, Tanzania,
- Rwanda and Burundi became full Members with effect from 1 July 2007
- South Sudan acceded to the Treaty on 15 April 2016 and shall become a full Member once the instruments of ratification of the Treaty are deposited with the Secretary General of the Community.

Import Duty Rates

	Category	Description
0%	Raw materials	Goods not subjected to any form of transformation in production. This category also includes residues, waste and scrap in as far as they are only necessary for recovery of raw materials
	Capital goods	Durable industrial production goods i.e. most plant and machinery
10%	Intermediate goods	Goods that have undergone some degree of transformation. Such goods would require further processing before they are ready for final consumption. This category also includes 'parts' as far as they are identified as such in the HS code
25%	Finished goods	Goods that are ready for consumption
> 25%	Sensitive goods	Goods considered of economic importance by the Partner States e.g. sugar at , Milk, rice, wheat, etc.

Incoterms

Definition

- **Incoterms = International Commercial Terms**
- Set out terms in respect of:
 - Carriage of goods from seller to buyer;
 - Export and import clearance;
 - Division of cost and risks between the parties;
- Categories of Incoterms
 - **Group E** - seller minimizes risk by making goods available at his own premises
 - **Group F** - seller arranges and pays for the pre-carriage in the country of export
 - **Group C** - seller arranges and pays for the main carriage but without assuming the risk of the main carriage
 - **Group D** - seller's cost/risk is maximized because he must make the goods available upon arrival at the agreed destination

	"E" Term Origin	"F" Terms Freight Charges Not Paid			"C" Terms Freight Charges Paid				"D" Terms Destination / Arrival			
Sales Terms	EXW Ex-Works (Place)	FCA Free Carrier (Place)	FAS Free Alongside Ship (Port)	FOB Free On Board (Port)	CFR Cost & Freight (Port)	CIF Cost, Freight & Insurance (Port)	CPT Carriage Paid to (Place)	CIP Carriage & Insurance Paid to (Place)	DAT Delivered At Terminal (Place/Port)	DAP Delivered At Place (Place)	DDP Delivered Duty Paid (Place)	
Services	Responsibility & Charges											
Warehouse Services	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	
Export Packing	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	
Origin Loading	Buyer	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	
Inland Freight	Buyer	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	
Port Rec Charges	Buyer	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	
Forwarder Charges	Buyer	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	
Ocean/Air Freight	Buyer	Buyer	Buyer	Buyer	Seller	Seller	Seller	Seller	Seller	Seller	Seller	
Dest Port Charges	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Seller	Seller	Seller	
Customs Clearance	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Seller	
Customs Duties	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Seller	
Dest Delivery Charges	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Seller	Seller	
	Risk/Responsibility, Transfers											
Risk Transfers	At Warehouse Named Place	On Truck at Named Place	At Named Port Alongside Ship	At Named Port On Board Ship	On Board Vessel at Port of Shipment	On Board Vessel at Port of Shipment	On Board Vessel at Port of Shipment	On Board Vessel at Port of Shipment	On Board Vessel at Port of Shipment	Unloaded at the Port or Cargo Terminal Named Place	On Delivering Carrier at Named Place	On Delivering Carrier at Named Place Duty & Tax Paid

Tariff Classification

Aim of nomenclature

- A systematic classification of all goods
- Internationally uniform classification
- Common international customs 'Language'
- Simplicity, certainty in customs agreements
- International uniform data collation

Purpose of nomenclature

- Description of goods
- Determine code for statistical purposes
- Establish duty, VAT, Excise Regime
- Identify restrictions/prohibitions e.g. scrap metal, dangerous chemicals, endangered species
- Certificate of Origin

Classification criteria

The material content

Function or use of the article

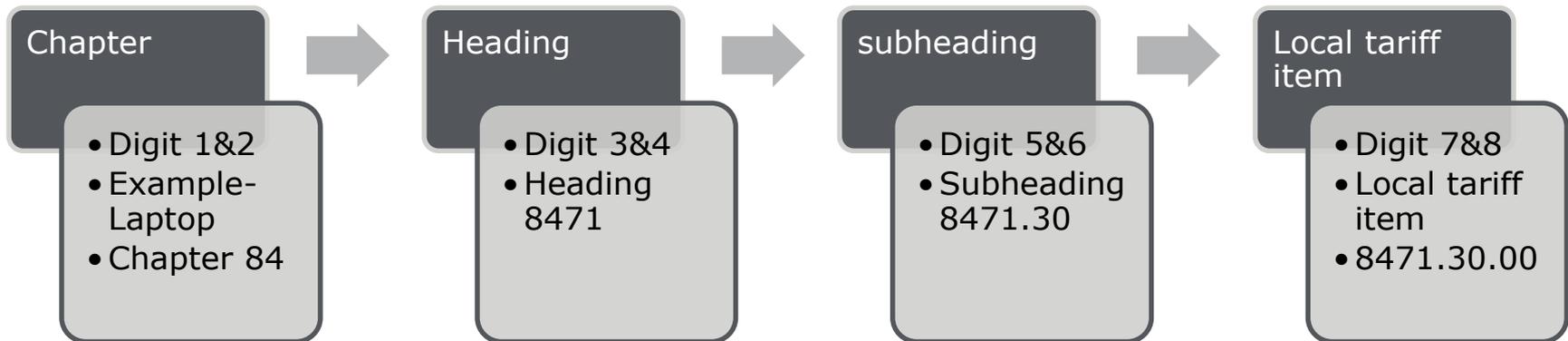
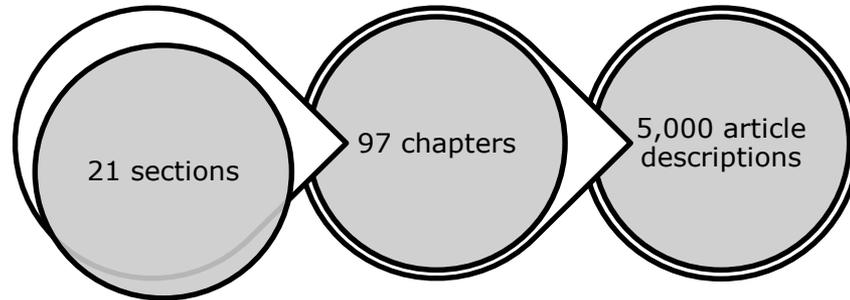
Material content criteria

Section	Description
I	Live Animals, Animal Products
II	Vegetable Products
III	Animal or vegetable fats
IV	Prepared Foodstuffs
V	Mineral Products
VI	Products of the Chemical or Allied Industries
VII	Plastics, Rubber and articles thereof
VIII	Raw Hides and Skins, leather
IX	Wood and articles of wood
XIII	Articles of stone, glass and glassware
XV	Natural or cultured pearls, precious stones

According to use or function

Section	Description
XII	Footwear, headgear
XVI	Machinery and mechanical appliances
XVII	Vehicles, aircraft, vessels etc.
XVIII	Optical, photographic etc. instruments
XIX	Arms and ammunition

Structure of the HS



Classification Rules

- Rule 1 - Classification to be determined according to terms of heading and any relative section or chapter heading notes

Direct classifications are made:

–Not only where the item is mentioned in the heading text

BUT

–Also after consulting the Section and Chapter Notes

–These Notes should be consulted for EVERY classification

- Many items can be classified using Rule 1 e.g.
- A live sheep is classified in 01.04
- A leather suitcase is classified in 42.02
- A base metal is classified in 83.01
- Chilled apricots are classified in 08.09

Classification Rules

- Rule 2 (a) - Reference to an article shall include the incomplete or unfinished article.
 - Portable CD player without cabling
 - Freezer without a compressor
 - Motor vehicle without engine or wheels
 - Bicycle without saddle or gearing
- Rule 2 (b) - Reference to a material or substance shall include a mixture of the material or substance.
 - Mixture of horsehair (60%) and wool (40%) ??
= 05.03 Horsehair.
 - Mixture of horsehair (50%) and wool (50%) ??
= Rule 3

Classification Rules

- Rule 3 - Goods capable of more than one classification:
 - a. Specific description preferred over general description
 - Tufted textile carpet for cars 57.03 ? 87.08 ?

57.03

- b. Mixture & composite goods to be classified in accordance to essential character.
- c. If (a) & (b) fail, use last tariff heading.

Classification Rules

Rule 4 - Goods not capable of even one classification: - Tariff heading of most akin goods.

Rule 5 - Addition to above rules - covers:

a. Cases e.g. Camera, Musical instrument, Gun, drawing instrument, necklace and similar containers

- Presented with the articles themselves

- Suitable for long term use

- Shaped or fitted to contain a specific articles(s)

- Of a kind normally sold with the articles(s)

- Classify with the goods

- Does not apply to containers that give the whole its essential character

Classification Rules

Rule 5(b) Packing materials & packing containers

- Subject to Rule 5(a)
- Packing materials and packing containers
- Presented with the goods
- Normally used for packing such goods
- Classify with the goods
- Except where containers are suitable for repetitive use

Basket headings

- 0106 other live animals
- 2811 other inorganic acids
- 4421 other articles of wood
- 6914 other ceramic articles
- 9205 other wind musical instruments

Section and Chapter notes

Note 2 to chapter 16... sets criteria for meat preparations

Note 3 to chapter 61... defines elements of a "suit"

Note 9 to chapter 61...determines how to classify garments which cannot be determined whether for men or ladies

Note 4 to chapter 91 helps to classify parts suitable for use in clocks and other articles

Note 1 chapter 1 determines where live animals are to be classified

Note 4 to chapter 5 defines Horsehair

Note 3 chapter 5 determines which teeth are to be classified as Ivory

Note 2 to section XV defines expression "parts of general use"

Classification Procedures

- When classifying a commodity you are suppose to ask the following questions:
 - What is it?
 - What material or substance is it made of?
 - What are its functions or use?
 - In what form is it usually imported?
 - Is this the only possible classification?
- These are very important questions to consider one to come up with the most appropriate classification.

Customs Valuation

Importance of customs valuation

- Basis for ad valorem Taxes
- Impact on VAT
- Assess Profitability
- Determination of prices
- Basis for Tax planning

Customs valuation methods

Method 1 – Transaction value (TV)

Method 2 – (TV) of identical goods

Method 3 – (TV) of similar goods

Method 4 – Deductive method

Method 5 – Computed method

Method 6 – Fall-back method

Method 1 - transaction value

- The TV is the price actually paid or payable for goods when sold for export.
- Confirmation of Transaction Value?
- Conditions to be fulfilled:
 - Evidence of sale for export
- Sale of goods is the sole consideration
- Full prices, paid or to be payable (seller receives money & title changes)
- Sufficient information for adjusting factors
 - No condition or restriction on the disposition or use
 - Buyer and seller should not be related
 - Sale proceeds of the subsequent sale should not accrue directly or indirectly
 - No considerations that cannot be adjusted i.e. declare all considerations

Deductions

- Buying commissions
- Interest charges on finances(borrowed for purposes of importation)
- Allowable discounts – given without discrimination
- Duties and Taxes paid in Partner State
- Expenses paid within a Partner State – freight, handling charges

Additions

Cost of containers – what type of containers? Those sold together with product and cannot be re-used e.g. water bottles

Cost of packing material – boxes, crates, pallets, bales

Selling commissions and brokerage fees

Assists - Goods and service provided free of charge or at reduced prices directly or indirectly by the seller

Royalties, license fees, warranty related to imported goods and paid as a condition of sale

Value of any proceeds of subsequent sale going back to the seller

Freight & Insurance

All costs incurred in the country of export – transport, handling costs

Calculation of Duty

$$D = (V \times Ra) \text{ or}$$

$$D = (Q \times Rs)$$

where

D= Import Duty

Ra= Ad valorem rate

Rs= specific Rate

Q= Quantity

V= Value

Customs valuation

- The duties payable on importation is as follows:
- CIF – This is the customs value of the goods i.e. the Cost, Insurance & Freight
- Customs Value = CIF + Any other source charges
 - Import Duty: % of the Customs value of the goods
 - Excise Duty: % of the (Customs value + Import Duty)
 - VAT: 16% of the (Customs value + Import Duty + Excise Duty)
 - IDF: 2.% of the Customs value or KES. 5,000, whichever is higher, is payable
 - RDL: 1.5% of the Customs value

Valuation of Assists

In determining the value of assist:

Add if:

- Not included in the value
- Are supplied by the buyer free of charge
- Used in the production of imported goods

Categories of assist:

- Raw materials; parts; components
- Tools; dies; moulds; similar goods
- Goods consumed; catalyst
- Engineering; developments; artwork; design work and plans and sketches undertaken elsewhere than in the country of import.

Exercise

Importer X purchases a brand new motor vehicle at a cost of USD 6,500 Exworks. The exporter issues importer X with an additional 4 tyres for free which are valued at a market value of USD 200. The following costs are incurred in the country of exportation:

Inspection costs- USD 1,000

Transport costs – USD 500

Engine service – USD 200

Buying commission – USD 100

Insurance – USD 1,000

Freight to Kenya – USD 1,500

Other details include:

Exchange rate is 102

Import Duty – 25%

VAT – 16%

Excise Duty – 20%

Compute the total Tax payable

Method 2: Transaction Value of Identical Goods

Goods which are the same in all respects including physical characteristics, quality and reputation.

The goods must have been produced in the same country as the goods being valued.

Identical goods from a different person shall be used only where there are no identical goods produced by the same person as the goods being valued.

Where more than one transaction value of identical goods is found the lowest value is to be used.

Method 3: Transaction Value of Similar Goods

Have like physical characteristics like component materials which enable them perform same function and be commercially interchangeable.

Can consider quality of the goods, their reputation and existence of a trademark.

Goods should be produced in the same country as the goods being valued.

Where more than one transaction value of similar goods is found the lowest value is to be used.

Common Requirements under Identical/similar goods

Identical/similar in relation to imported goods

Produced in the same country

Exported at or about the same time as the imported goods

Same quality and commercial level as imported goods or else adjusted for any differences

With two or more possible prices, select the lowest

Method 5: Deductive value

The unit price at which similar or identical goods are sold in the greatest aggregate quantity at or about the time of importation of the goods being valued to unrelated parties less:

- Commissions or profits and general expenses;
- Local expenses e.g. cost of transport and insurance after importation;
- Local duties; and
- Other charges.

Method 6: Computed Value

Consists of the sum of:

- Cost or value of materials, fabrication and other processing costs (raw materials/transport/subassemblies/prefabrication).
- Profit and general expenses equal to that usually reflected in the sales of goods of the same class or kind.
- Cost or value of all other expenses necessary to reflect the freight, insurance, loading/unloading and handling charges.

Method 7: Fall Back Value

Whatever is Reasonable.

Though not on the basis of:

- Domestic selling prices in the Partner State of goods produced locally.
- System providing for the acceptance of a higher value of two alternative values.
- Domestic price at country of exportation.
- The price of goods for export to a country other than the Partner State.
- Minimum customs Values.
- Arbitrary or fictitious values.

Value for export

- The export is the FOB value
- Selling price of the exported goods
- Add transport to the point of exit
- Add handling charges

Post Clearance Audits

Post clearance audits

Areas of Focus

1. Payments

- Liability of owner for acts of a duly authorised agent – EACCMA Sec 148;

Public Notice issued by KRA in this respect



KENYA REVENUE AUTHORITY

PAYMENTS RELATING TO CUSTOMS

Kenya Revenue Authority (KRA) wishes to REMIND all importers that any payments relating to Customs should be made directly to the Commissioner of Customs Services, in the following manner:

1. The payments should be by **BANKER'S CHEQUE ONLY**. The cheques should be paid directly by the importer (not their appointed clearing agent) to our designated banks.
2. The cheques should be written out as follows:
"Commissioner of Customs Services Dept A/C Importer's name or firm"
3. By importer's name, in this instance, it refers to the consignee of the imported goods specified in the Customs declaration (entry).
4. KRA wishes to further advise importers to ensure that the correct import duty and taxes are remitted to Customs since false declaration or any contravention of tax laws attracts heavy penalties, in addition to other legal sanctions.

Commissioner of Customs Services

*KRA Complaints and Information Centre can be reached through the following channels:
In person: Office of the Commissioner General, Times Tower, 30th Floor
Mail: P. O. BOX 48240-00100 GPO Nairobi, Phone: (020) 281-7700
(Hotline): (020)281-7800(Hotline):020)343342. Fax:(020)341342. Email:ci@kra.go.ke
Visit our website at <http://www.kra.go.ke>*

Tulipe Ushuru, Tujitegeme!



Post clearance audits

2. Customs Valuation

- Related party transactions
- Insurance debit notes or 1.5% factor
- Freight notes
- Other source charges
- Installation and commissioning costs
- Assists
- Royalties

2. Tariff Classification

- In accordance with the CET as revised;

Post clearance audits

4. Record Keeping and Document Retention

- Section 235 and 236 EACCMA provides the Commissioner of Customs with the authority to require production of and to inspect all customs related, commercial and any other documents related to imported goods within a period of five years.
- Lack of original documentation of import documents C63/CB17, IDFs, air waybills, bills of lading, proforma invoices, final invoices, IDF form fees receipt
- Lack of other documents such as insurance papers, funds transfer remittance advices, purchase orders, goods received notes, quotations, correspondences with supplier, supplier price list and catalogues etc.

Customs audits

- Ensure availability of records
- Undertake self assessment to validate adopted method and ensure prices meet customs requirements
- Establish scope for legitimacy of reducing values for customs
- Justify values and prices

Getting it right

- Experienced staff dealing with Customs issues
- Staff armed with relevant resources
- Robust internal controls within the company
- Periodic reviews on Customs issues

Questions and & Answers



Excise Duty

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Objectives

At the end of this presentation participants will be able to:

- Understand the basic concepts of excise duty
- Understand excise controls imposed on excisable persons
- Understand record keeping requirements
- Understand licensing procedures and requirements
- Understand cases where refunds arise.
- Understand penalties and offences with regards to contravention of excise laws and procedures
- Understand goods and services that are exempted from excise duty

Sources of excise law

The sources of Excise law in Kenya include:

- The Excise Duty Act 2015
- The Tax Procedures Act 2016
- Relevant Gazette Notices
- The East Africa Community Customs Management Act
- National statutes
- The Domestic Taxes Department is responsible for management of Excise law
- A new simple and modern stand-alone excise duty Act came into force on 1st December 2015
- The Act collates legal provisions from the Customs and Excise Act Cap 472 relating to excise duty into one legal document

Introduction

Definition of excise duty

- Dictionary meaning - tax, levy. “cut out surgically” “remove section of”
- OECD classification 5121 - Excises are *taxes levied on particular products, or on a limited range of products, which are not classifiable under 5110 (general taxes), 5123(import duties) and 5124 (export duties). They may be imposed at any stage of production or distribution and are usually assessed by reference to the weight or strength or quantity of the product, but sometimes by reference to value*
- Section 2 of the Excise Duty Act - Excise duty imposed under the Excise Act
- Many countries use the term “consumption tax” or “special consumption tax” or “special sales tax”

Policy considerations

- Policy considerations which Government examine when looking at excise taxation include:
 - Revenue sources
 - Health
 - Environment
 - Fiscal
- It is very rare to find a country which does not charge excise on alcohol, cigarettes and petroleum
- Excise often referred to as a 'luxury tax', a 'sin tax', and in some cases a 'pollution tax'
- The main objectives of excise taxation is to raise revenue for the Government
- Political Earmarking - Many Governments use excise taxation to influence the consumption of certain goods ultimately to achieve desired Government policy outcomes
- Externalizing costs - These costs relate to those resources required by a Government to treat the harm created by the consumption of certain products e.g. alcohol and cigarettes

Policy considerations ...contd

- Excise can create a 'user pays' environment, in which those who consume certain products are funding any potential need for intervention or other impact on communities and individuals. Petroleum taxes are an example of this approach, where motorists are funding the maintenance of the public roads
- There are commodities and services in which the Government may want consumption curbed or perhaps redirected. For example alcohol and cigarettes
- They can also seek to reduce consumption by directing consumers to lower strength alcohol products by creating excise rate differentials
- Tax administration
 - Avoidance and evasion issue
 - Point of imposition (where there are the least number of collectors)
 - Simplicity in terms of rates applied across a product e.g alcohol

Types of Rates

- Specific - a specified amount of tax is charged per unit of measure of the excisable product. E.g. Kshs. 100 per litre for beer
- Ad valorem - refers to a percentage rate of duty charged on the value of an excisable product. e.g. 10% for food supplements
- Hybrid of specific or ad valorem whichever is higher
- The new excise duty Act has moved away from use of hybrid and *ad valorem* to use to specific rate

Imposition of excise duty

Excise duty shall be charged on

- Excisable goods manufactured in Kenya by a licensed manufacturer
- Excisable services supplied in Kenya by a licensed person
- Imported excisable goods into Kenya

Excise duty is payable by

- The licensed manufacturer
- Licensed person making the supply, or
- The importer of excisable goods

Excisable goods and services

- Section 2 of the Excise Duty Act define excisable goods as the goods specified in Part I of the First Schedule
- The First Schedule of the Excise Duty Act specifies goods and services subject to excise duty and the excise duty rates
- Examples of goods subject to excise duty:
 - Beers
 - Wines and spirits
 - Juices
 - Mineral Water
 - Food supplements
 - Petrol
 - Diesel

Excisable goods and services

- Kerosene
- Cosmetics
- Sodas
- Cigarettes
- Motor vehicles
- Motor cycles
- Examples of services subject to excise duty
 - Mobile cellular phone services
 - Other wireless telephone services
 - Fees charged for money transfer services by cellular phone service providers, banks, money transfer agencies and other financial institutions
 - Other fees charged by financial institutions

Goods not subject to excise duty

- Goods which meet the conditions set out in the Second Schedule (exemption schedule)
- Goods exported under customs control, including ship stores
- Exported services
- Goods destroyed with the prior written permission of the Commissioner, under the supervision of an authorized officer before their removal from the factory
- Denatured spirits for use in the manufacture of gasohol or as a heating fuel
- Goods lost or destroyed by accident or other unavoidable cause:
 - in the course of their removal from the factory
 - before removal from the factory, or
 - on board an aircraft or vessel prior to importation into Kenya

Time and place of supply

The Excise Duty Act 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, or
- Date on which the invoice is issued, or
- Date on which payment is received

For imported goods, the time of importation will continue to 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

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

Timing of liability

- Liability for excise duty on goods arises at the time of importation or removal of excisable goods from a licensed manufacturer's **factory**
 - Section 2 defines **factory** as any premises at which a licensed manufacturer is licensed to **manufacture** and **store** excisable goods, but does **not** include any part of the premises through which excisable goods are sold to the public
- Liability for excisable services shall arise at the **time of supply** of the service

Excise Valuation - goods

Imported goods

Section 9(2) provides that the value of imported goods for purposes of levying excise duty shall be the sum of

- the customs value as determined under the EAC CMA, and
- the amount of import duty, suspended duty and dumping duty if any

Locally manufactured goods

Section 9(3) provides that the value of locally manufactured goods for purposes of levying ad valorem excise duty shall be the ex-factory selling price excluding

- value added tax
- cost of excise stamps, and
- the cost of any returnable package, box, bottle or container

Excise valuation - services

- The excisable value of excisable services shall be:
 - 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
 - In any other case, the open market value of the services
- The excisable value for excisable services shall **not** include VAT
- The excisable value for fees charged by financial institutions shall not include interest or an insurance premium
- The new Act defines **other fees** to include any fees, charges or commissions charged by licensed financial institutions ,excluding interest on loan or return on loan or an insurance premium or premium based or related commissions

Excise returns

- Licensed manufacturers or licensed suppliers of services should submit monthly excise duty returns not later than the 20th day of the succeeding month whether excise duty is payable or not
- The TPA provides for application of extension of time required to submit the excise return
- Application should be done before the due date

Relief for raw materials

Where excise duty has been paid on imported or manufactured goods which are subsequently used to manufacture **other excisable goods**, the excise duty is offset against the excise duty payable on the finished goods

Obligations of a licensed manufacturer

- Keep and maintain metering and measuring devices
- Store excisable goods in the factory in a manner to facilitate the taking of a full account of the goods
- Keep a materials account of raw materials and intermediate goods in the approved form (**Form E6**)
- Keep a finished goods account in the approved form (**Form E6**)
- Ensure that excise duty is paid on any excisable goods consumed at the factory
- Comply with such other requirements as may be specified in the Regulations
- Notify commissioner of any discrepancies between the actual and recorded inventory

Any goods which cannot be accounted to the satisfaction of the commissioner are deemed to have been removed from excise control in the month when the discrepancy occurs

Record keeping

Persons liable to pay excise duty are required to maintain the following documents for a period of 5 years from the end of the relevant reporting period:

- An inventory of raw materials and intermediate goods for use in manufacture of excisable goods
- An inventory of finished goods
- Any other documents to facilitate computation of the person`s excise duty liability such as:
 - Excise returns
 - Production schedules
 - Proof of duty payment
 - Import and export entries where applicable
 - Income schedules incase of services

Licensing

The Act provides that persons carrying out the following activities should be licensed or registered by the Commissioner:

- The manufacture of excisable goods in Kenya
- The importation into Kenya of excisable goods requiring an excise stamp
- The supply of excisable services
- The use of spirit to manufacture goods in Kenya that are not excisable goods, or
- The carrying out of any other activity in Kenya for which the Commissioner, by notice in the Gazette, may impose a requirement for a licence

Licensing

Application for a license

- Application for a license is done to the Commissioner of Domestic Taxes Department
- The applications should be in the prescribed form E1 and accompanied by the prescribed payment
- The application is lodged with the KRA through personal delivery or by post
- The license specifies the class(es) of goods the manufacturer is licensed to manufacture and the licensed factory
- The specified factory can only be used for manufacturing the specified goods
- Only the specified person in the license can manufacture the goods in the licensed factory

Licensing

Grounds for refusing an application

- The applicant has been convicted of an offence under the **Excise Duty Act** or the **TPA**
- The applicant has been convicted of an offence involving dishonesty or fraud under **any law**
- The applicant is declared bankrupt or insolvent; or is in the process of liquidation or receivership
- The factory, plant or equipment, specified in the application is not adequate to manufacture or secure excisable goods
- The applicant has not kept proper records as required under **any tax law** or has failed to comply with its obligations under a **tax law**, or

Licensing

Grounds for refusing an application...contd

- The above grounds 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 application relates
- A written notice of the decision on the decision is given to the applicant by the Commissioner including reasons for refusal where applicable
- The license takes effect from the date specified in the notice and remains in force until its cancelled or suspended

Licensing

License specifications

- The license specifies the class(es) of goods the manufacturer is licensed to manufacture and the licensed factory
- The specified factory can only be used for manufacturing the specified goods
- Only the specified person in the license can manufacture the goods in the licensed factory

Licensing

Obligations of a licensed person

- Display the original license in a conspicuous place in the principal place of business, and
- in case of excisable services, a certified copy of the license at every other place of business
- Notify the Commissioner, in writing
 - If the licensed person ceases to carry on the licensed activity
 - If there is any change in the name, address, place of business, ownership, constitution, or nature of the principal activity or activities carried on by the licensed person
 - of any period in which the licensed person closes operations on a temporary basis within 7 days if unplanned and 7 days before closure if planned, or
 - If there is any change in the factory specified in the license, or the plant and equipment used to manufacture excisable goods

Licensing

Grounds for suspension of a license

- Change in the name, address, place of business, ownership, constitution, or nature of the principal activity or activities carried on by the licensed person
- If the licensed person ceases to carry on the licensed activity
- Temporary closure of operations
- Failure to maintain proper records
- Non-compliance with obligations set out in the Excise duty Act
- Breach of license conditions
- Licensed person makes misleading statement to the Commissioner
- The factory, or plant or equipment is no longer adequate to manufacture or secure excisable goods

Licensing

Cancellation of a license

A license may be cancelled where:

- The Commissioner receives a notification that the licensed person has ceased carrying on the licensed activities
- Failure to appeal the suspension of the license within the required time
- Failure to comply with a notice served on actions required to be taken to restore the license within the required time, or
- The Commissioner rejects an appeal against the license suspension

The obligations and liabilities of the licensed person are not affected by the cancellation

Licensing

Consequences of cancellation and suspension of licenses

Licensed Manufacturers

- Immediate prohibition of manufacturing excisable goods
- Immediate payment of all outstanding excise duty on excisable goods on hand
- Disposal of excisable goods and materials in the manufacturer's factory as directed by the Commissioner
- The Commissioner may require the manufacturer to move the goods in the manufacturer's factory to another place approved by the Commissioner
- The Commissioner may take control of the manufacturer's factory and any excisable goods at the factory

Licensing

Consequences of cancellation and suspension of licenses...contd

Licensed Service Provider

- Supplier should cease to supply the excisable services, and
- Pay outstanding excise duty

The Commissioner may require a licensed person to pay cancellation and suspension costs and the costs shall be treated as tax for the purposes of imposing fines and penalties

Licensing

Notification requirements

- Where the Commissioner seeks to suspend revoke, cancel or not renew a license he should:
 - Give 21 days notice to the licensee
 - Give the grounds of the intended action.
 - Require the licensee to remedy any circumstances which may require to be remedied
- The licensee should take the required action within 21 days
- The Commissioner should acknowledge in writing the action taken by the licensee or proceed to confirm the effect of the intended notified action
- The licensee may appeal to the Tax Appeals Tribunal within 14 days if dissatisfied with the decision of the Commissioner and serve the Commissioner with the appeal application within 7 days of filing

Licensing

Notification requirements...Contd

- The Tax Appeals Tribunal hears and determines the appeal without undue delay and its decision is binding on the Commissioner
- Any party aggrieved by the Tax Appeals decision may appeal to the High Court

Refunds

Cases where refunds may arise

Excise duty refunds may arise where:

- Goods are damaged or stolen during transportation to Kenya
- Goods are damaged or destroyed while subject to excise control
- Goods are returned to the seller as per the sales agreement
- Excise duty has been paid on spirits that have subsequently been used to manufacture unexcisable goods
- The licensed person has accounted for excise duty but has not been paid for the supplied goods or services
- Where excise duty has been paid on importation of excisable goods which have subsequently been exported, Section 138 of the EAC CMA on duty drawback is applicable in this case

Refunds

Requirements

- Applications should be done in the prescribed form within 12 months from the date of payment of the duty
- In case of refunds arising from bad debts applications should be made on the earlier of:
 - 3 years from the date of the sale of the goods or services, or
 - the purchaser becoming legally insolvent

General offences and penalties

Section	Offence	Penalty
TPA sec 83	Late filing of excise returns	5% of payable excise duty or KShs 20,000 whichever is higher.
TPA Sec 83	Late submission of documents required by law other than tax return	KShs 1,000 per day subject to a maximum of KShs. 50,000
TPA Sec 38	Late payment of excise duty	1% simple interest of payable amount capped at principal amount.
EDA Sec 38(1)	Manufacture of excisable goods or importation of excisable goods requiring stamps without a license	Double the payable excise duty
EDA Sec 38(2)	Manufacture of excisable goods in unlicensed premises	
EDA Sec 38(3)	Manufacturer deemed to have removed excisable goods from excise control without accounting for excise	
EDA Sec 25(1)	Contravention of obligations of licensed manufacturers in relation to excisable goods under customs control	Fine not exceeding KShs 5 million or imprisonment for a term not exceeding 3 years on conviction.
EDA Sec 28(4)	Removal excisable goods requiring stamps from the designated area	
EDA Sec 19(1)	Failure to display license	
EDA Sec 19(2)	Failure to notify the commissioner of changes in operations	

General offences and penalties....contd

The court may in addition to the penalties impose:

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

Excise duty exemptions

Goods

- 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

Excise duty exemptions

Services

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

Changes in excise duty rates

Goods Description	Old rate (5th Schedule C&E Act)	Current 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

Changes in excise duty rates...Contd

Goods Description	Old (5th Schedule C&E Act)	Current rate (1st Schedule Excise Duty Bill 2015)
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 5 per litre
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

Changes in excise duty rates...Contd

Goods Description	Old rate (5th Schedule C&E Act)	Current rate (1st Schedule Excise Duty Bill 2015)
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	KES. 150 Per litre
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. 175 Per litre
Cigars, cheroots, cigarillos, containing tobacco or tobacco substitutes	130%	KES 1000 Per Kg.
Electronic cigarettes	Nil	KES 3000 Per unit
Cartridge for use in electronic cigarettes	Nil	KES 2000 Per unit
Cigarettes containing tobacco or tobacco 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.

Changes in excise duty rates....Contd

Goods Description	Old rate (5th Schedule C&E Act)	Current rate (1st Schedule Excise Duty Bill 2015)
Motor cycles of tariff 8711 other than motor cycles ambulances	Nil	KES 10,000 Per unit
Plastic shopping bags	50%	KES 120 Per Kg.

Grey areas

Provision of excise duty rebates in the Excise Duty Act

Section 7 provides that no excise duty shall be charged on exports

Changes in Budget 2016/17

- Introduction of excise duty on:
 - Kerosene at KES 7.205 per litre
 - Cosmetics and beauty products at 10%
- Change of excise duty regime on motor vehicles from specific *to advalorem* at a rate of 20%
- Removal of excise duty on ordinary water
- Exemption of excise duty on materials, equipment and motor vehicles for aid funded projects
- Excise duty on plastic bags to be applicable on all plastic bags except vacuum bags for packing foods, tea, juices and coffee

Questions and & Answers





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