



# Tax Alert

## The Tax Appeals Tribunal issues judgement on the applicability of Excise Duty on fees charged by digital lenders

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March 2025

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### Get in touch

**Job Kabochi**

Partner, Indirect Taxes  
job.kabochi@pwc.com  
+254 (20) 285 5000

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**Maurice Mwaniki**

Associate Director,  
Customs and International  
Trade  
maurice.mwaniki@pwc.com  
+254 (20) 285 5000

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**Michael Wachinga**

Senior Manager,  
Indirect Taxes  
michael.wachinga@pwc.com  
+254 (20) 285 5000

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The Tax Appeals Tribunal (“TAT”) in August 2024, delivered its decision with respect to an appeal filed by Musoni Microfinance Limited (“Musoni”, “the Appellant”) against the Commissioner of Domestic Taxes (“the KRA”, “the Respondent”) in Appeal No. E125 of 2023.

In the judgement, the TAT ruled in favour of the KRA imposing 20% Excise Duty on fees, including interest, charged by Musoni, on the basis that Musoni did not adduce evidence to support its assertion that its lending is done manually, and it was not lending in the digital space. Further the appellant did not demonstrate that it is registered as a micro-finance institution or registered under any other Act.

### Background

The KRA conducted an audit of Musoni’s tax affairs and issued tax assessments on 01 December 2022, for VAT, withholding tax,

and Excise Duty totaling KES 149,184,175. Musoni objected to the assessments on 29 December 2022. Subsequently, on 24 February 2023 the KRA issued its objection decision, confirming an assessment of KES 146,208,564.

With respect to Excise Duty, the KRA took the view that Musoni was a digital lender pursuant to the Central Bank of Kenya (Digital Credit Providers) Regulations, 2022 (“DCP Regulations”) and as such its revenue was subject to Excise Duty.

### The Appellant’s contention

Musoni submitted that the Excise Duty Act (“EDA” “Excise Act”) does not define a digital lender, as such it sought to use the definition as per the Central Bank of Kenya Act (“CBK Act”). Musoni argued that the KRA had misdirected itself in finding that any person not excluded by the DCP Regulations is by implication a digital lender.

According to Musoni, the CBK Act provided a definition of a digital lender. The CBK Act defines the terms ‘digital credit provider’, ‘digital credit business’, ‘digital channel’ and ‘digital credit’. It was Musoni’s argument that the KRA could not interpret regulation 2 of the DCP Regulations to oust the express



provisions of the main CBK Act which require a digital lender to carry out lending business over a digital channel.

To demonstrate that it did not carry out its business over a digital channel, Musoni argued that its lending process involved in-person interactions, with loan documentation completed manually, and disbursements made via bank accounts or M-Pesa.

Further, the mobile app that it owned (Musoni mobile app) was not in use and was yet to be rolled out to the members of the public.

### **The Respondent's contention**

According to the KRA, Musoni is a digital credit provider pursuant to the Central Bank DCP Regulations and therefore liable to comply with Paragraph 6, Part II of the First Schedule to the Excise Duty Act which imposes excise duty on fees charged by digital lenders at a rate of 20% effective 1 July 2022.

The KRA argued that the DCP Regulations offer guidelines for digital lenders and lists entities that are excluded from the regulations.

The KRA took the position that Musoni is not covered by any of the excluded Acts and by virtue of being an operator in the lending space it was liable to

Excise Duty on fees charged by digital lenders.

Consequently, the assessment raised based on the KRA's decision of classifying Musoni as a digital lender was valid.

### **Tax Appeals Tribunal decision**

The TAT ruled in favor of the KRA, concluding that Musoni was liable to Excise Duty of 20% in accordance with Paragraph 6, Part II of the First Schedule to the Excise Duty Act.

The Tribunal acknowledged Musoni's pleadings that it operates a manual system of lending, disburses funds through either a bank account or M-Pesa mobile platform and admitted to having a digital application that was not operational at the time.

The TAT noted that the DCP regulations list's institutions excluded from the Excise Duty, and although Musoni indicated it is a micro-finance institution and therefore excluded, it did not provide any evidence to demonstrate its actual registration status.

The TAT concluded that by not providing its registration documents Musoni had not discharged its burden of proof to demonstrate that it was not a digital lender and therefore the KRA was justified in confirming the Excise Duty assessment on digital lending.

### **Considerations for businesses**

In light of the TAT ruling, institutions in the lending business should consider evaluating their status within the DCP regulations.

This is to ensure they are able to ascertain that they have accorded the correct Excise Duty treatment to their revenue streams and mitigate exposures.

It is important for businesses to note that the Tax Laws Amendment Act 2024 amended the Excise Duty Act by introducing the definition of a "digital lender" as any person holding a valid digital credit provider license issued by the CBK.

The amendment further clarifies that the fees charged by digital lenders, which are subject to excise duty, do not include interest or the return on loans. These amendments came into effect on 27 December 2024.

Accordingly, it is advisable for businesses in the sector to carefully consider their Excise Duty position, pre and post 27 December 2024, taking into account their unique circumstances.

**Please feel free to contact your usual PwC contact or any of our indirect tax experts herein should you wish to discuss further.**

