Tax Alert

Highlights of the Tax Laws Amendment Act

The Tax Laws Amendment Act, 2024 ("TLAA", "the Act") was assented into law on 11 December 2024 by the President and takes effect from 27 December 2024. The Act amends various Laws which include: the Income Tax Act, CAP. 470 ("ITA"), Value Added Tax Act, CAP. 476 ("VAT Act"), Excise Duty Act, CAP. 472 and the Miscellaneous Fees and Levies Act CAP. 469C ("MFLA").

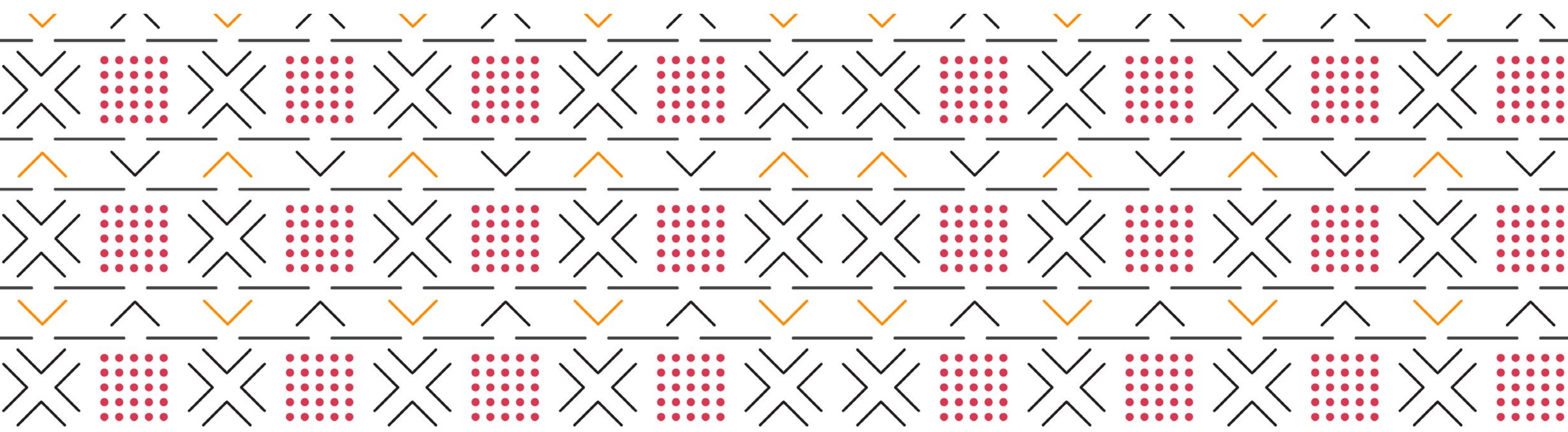
We note that the Act has retained most of the provisions contained in the Tax Laws Amendment Bill, 2024 ("Bill"). Please refer to our prior alert on the Bill – (see link) for additional details on the changes proposed by the Bill.

In this Alert, we provide an analysis of the key changes introduced by the Act.[1] The effective date for these changes is 27 December 2024, which may raise a practical challenge from a compliance perspective.

[1] Please note that this is not a comprehensive review of all sections of the amendments. For a comprehensive review, review of the main legislation and our previous bulletins would be required.

Income Tax Act CAP. 470 ("ITA") – Corporate Income Tax

Issue	Impact
Amendment of the definition of "royalty"	The Act has retained the amended definition of royalty as proposed by the Tax Laws Amendment Bill, 2024 ("Bill"). The amendment seems aimed at distinguishing between the right to use copyright in a software vis-a-vis the right to use a copyrighted software which has been the subject of various tax disputes. As analyzed in our tax alert on the Bill, whilst the amendment explicitly includes software, it is still unclear whether the amendment achieves the objective of addressing issues raised in respect of the 'right of use'
The imposition of withholding tax on payments to non-residents and residents in respect of supply of goods to a public entity at the rate of 5% and 0.5% respectively.	The Act imposes WHT on payments to non-residents and residents in respect of supply of goods to public entities at the rate of 5% and 0.5% respectively. This is likely to increase the government's expenditure should the government suppliers gross- up their costs to factor in the withholding tax costs. For completeness, we note that whilst changes have been effected to Section 35 of the ITA, no changes have been effected to Section 10 which deems income as accrued or derived from Kenya in respect of non-residents.
Imposition of withholding tax on Resident or non-resident person(s) owning or operating a digital marketplace or platform, who makes or facilitates a payment in respect of digital content monetization, property or services at the rate of 5% and 20% respectively.	The Act has retained this provision but deleted reference to "goods" which was contained in the Bill. Whilst the deletion of goods from this provision is welcome, there persists a few concerns relating to this amendment. These are: • Increased costs of operating digital marketplaces in Kenya. Initially, the digital marketplace operators (especially non-resident operators/owners) were only subject to 1.5% digital services tax ("DST") and not subject to withholding tax. The introduction of withholding tax on making or facilitation of payment in respect of digital content monetization, property or services will result in an increase in costs which the operators may pass on to the end consumers; • As currently drafted, the amendment to Section 10 can be construed to also capture transactions that do not originate from or terminate in Kenya; and • The amendment does not also take into account the different models of e-commerce hence interpreting it in respect of the various e-commerce models presents difficulties including payment service providers.



Issue	Impact
Repealing and replacing of the Digital Service Tax ("DST") with the Significant Economic Presence ("SEP") tax	The Act has repealed DST which was applicable at the rate of 1.5% and replaced it with SEP tax whose tax rate is 3%. Further, whilst the Act exempts non-residents with an annual turnover of less than five million from SEP tax, it does not anticipate significant economic presence to arise from the number of users and as such the SEP tax appears to be very similar to the DST. The tax is applicable on deemed taxable profit which is 10% of the gross turnover. This does not appear to reflect the financial realities of businesses in the digital sector given that most of these platforms are in the investment stage of growth. In light of the introduction of WHT on payments for facilitation of payments over a digital marketplace, SEP appears to have been rendered redundant.
Introduction of a minimum top-up tax	A domestic minimum top up tax has been introduced by the Act in a move seen as alignment of the country's landscape to the international tax developments led by the OECD under the two-pillar solution. The minimum top up tax is applicable on entities that are part of in-scope multinational group and is aimed at bringing the effective tax rate on the Group's profits up to the 15% minimum rate. We would expect the minimum top up tax to be relevant to Kenyan subsidiaries of multinationals which have accelerated capital allowances deductions or under lower tax regimes such as the SEZ or EPZ tax frameworks.

Income Tax Act CAP. 470 ("ITA") – Employment Tax

<table>
<tr><th>Issue</th><th>Impact</th></tr>
<tr><td>Amendments to tax-free thresholds, reliefs and exemptions</td><td>The TLAA has retained the changes proposed in the Bill to:
Increase the tax-free threshold for meal benefits to KES 60,000 per annum (KES 5,000 per month)
Increase the tax-free threshold for non-cash benefits that are not specifically provided for in the ITA to KES 60,000 per annum (KES 5,000 per month)
Increase the maximum deductible employee pension contributions to KES 360,000 per annum (KES 30,000 per month)
Increase maximum deductible owner-occupier interest to KES 360,000 per annum (KES 30,000 per month)
Further, the following provisions relating to deductions in determination of the taxable income of an individual have also been retained in the TLAA:
employee Affordable Housing Levy ("AHL") contributions
Social Health Insurance Fund ("SHIF") and
post-retirement medical fund ("PRMF") contributions (subject to a limit of KES 15,000 per month)
Additionally, the TLAA has retained proposals on amendment of provisions relating to pension withdrawals from a registered pension fund, provident fund and individual retirement fund, public retirement scheme or National Social Security Fund.
The TLAA has also retained proposed revisions to the conditions for exemption of income earned by a non-resident contractor, sub-contractor, consultant or employee involved in the implementation of a project financed through a 100% grant under an agreement between the Government of Kenya and a development partner.</td></tr>
<tr><td>Exemption from tax of reimbursement of expenditure incurred by public officers</td><td>The TLAA exempts from tax reimbursement of expenditure incurred by public officers for purposes of performing official duties notwithstanding the ownership or control of any assets purchased.

This provision was not proposed through the Bill and is effective 27th July 2022.

The provision does not however specify any limits on the expenditure that may be reimbursed to public officers, nor does it define persons who qualify as public officers.

Notably, the revised tax-free threshold for non-cash benefits not expressly provided for in the ITA would also apply on the reimbursements to public officers in respect of assets purchased whose value is within this threshold. Similarly, the current tax-free threshold for per diems of KES 2,000 per day would also be applicable on such reimbursements to public officers. Therefore, this provision may be viewed as discriminatory since workers in the private sector do not enjoy a similar tax regime.</td></tr>
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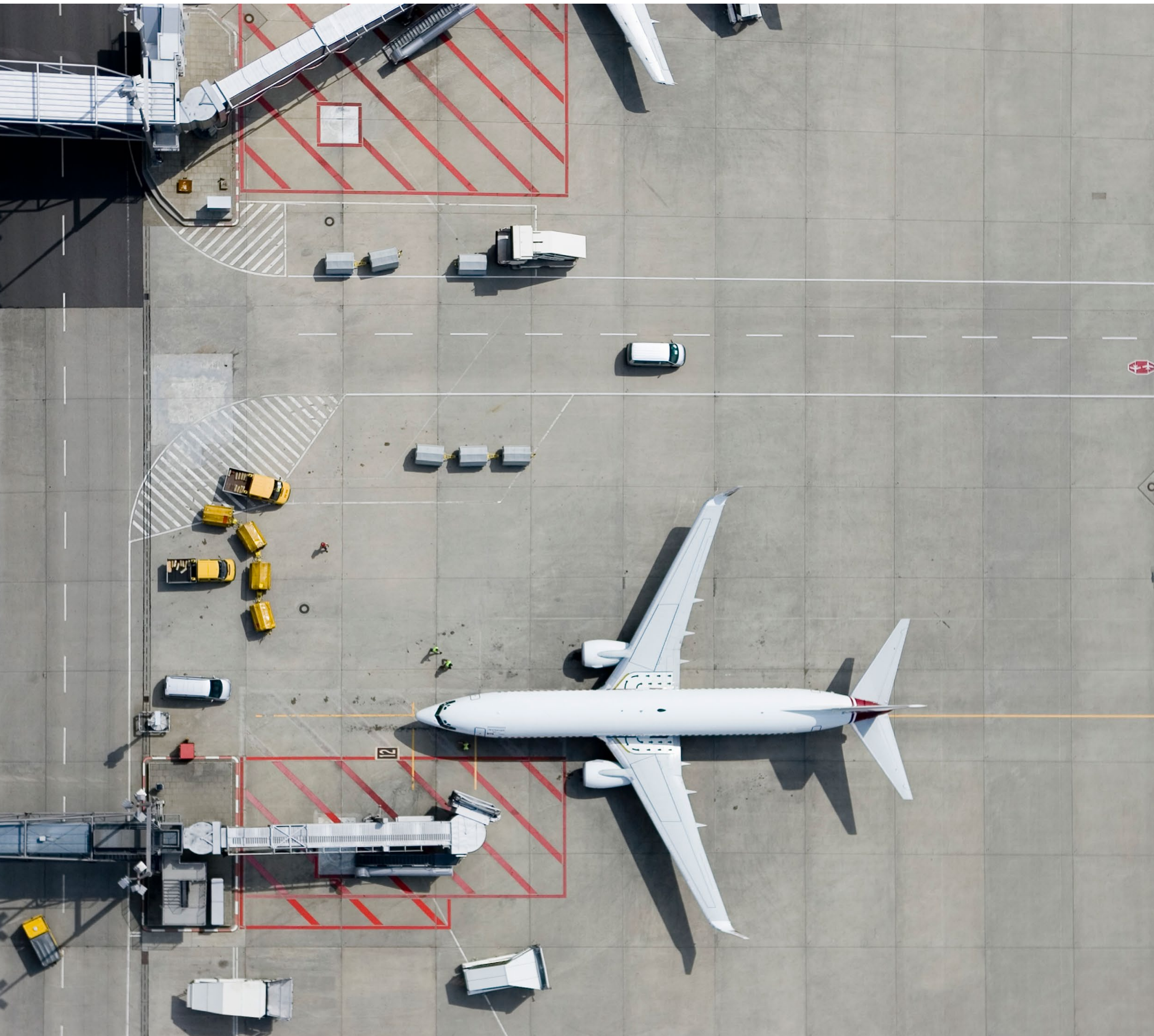
Value Added Tax Act, CAP. 476 ("VAT Act")

Issue	Impact
Amendment of Section 17 of the VAT Act to add a new paragraph (ea) in subsection (5). This new paragraph addresses situations where a supply was taxable at the standard rate of 16% prior to 1 July 2022 then subsequently enjoyed a reduced standard rate of 8% and eventually became zero-rated or exempted, leading to excess VAT credits. These changes meant that businesses could no longer offset input VAT against output VAT payable, resulting in a permanent credit position. Businesses with such credits ought to lodge an application to the Commissioner for relief, within six months of this provision's commencement, despite the existing provisions under subsection (5) allowing for cash refunds of excess credits.	Whilst this amendment did not form part of the tax amendment proposals under the Bill, it is a welcome move. This amendment allows businesses to apply for relief on these excess credits, ensuring they are not unfairly disadvantaged by the change in VAT status. However, the amendment appears to be transitional, providing only a six-month window from the enactment of the Tax Laws Amendment Act for impacted businesses to apply for this relief. However, it is not clear the referenced relief will result in an actual cash refund or an allowance to incorporate such credits into VAT returns, particularly in cases where the change in VAT law resulted in a taxable supply becoming exempt.
Repeal of the threshold set out under the input tax apportionment formula by deleting Section 17(7) of the VAT Act.	The amendment ensures input VAT is claimed only to the extent that it is incurred to generate taxable supplies. Whilst suppliers with more than 90% taxable supplies will no longer be able to enjoy full input tax deduction, those with less than 10% taxable supplies are now eligible for partial input tax claim. Anticipated increase in revenue by the Government with removal of such input tax claim restrictions.
Delisting of the following exempt goods under Section A of Part I to the First Schedule to the VAT Act: i. International Paper (IP) Super Soft Fluff Pulp - For-Fluff 310 Treated Pulp 488*125mm (Cellulose), Tariff Number 4703.21.00; ii. Taxable goods supplied under pre-25th April 2020 government contracts with VAT exemptions, applicable for the remaining contract period and subject to the Cabinet Secretary for Energy's recommendation;	The Act has retained only 2 of the 10 proposed deletions from the First Schedule under the Bill. Consequently, the 8 items that have been dropped from the proposed for deletion remain exempt from VAT, helping to maintain lower operational costs for airlines, support the tourism industry's competitiveness, and encourage investment in manufacturing. However, the retention of these 2 proposed deletions from the exemption schedule by the Act makes them subject to VAT at the standard rate of 16%. This amendment aligns with the Government's Medium-Term Revenue Strategy (MTRS) to re-evaluate the merits of various exemptions and their overall impact on the economy.

Issue	Impact
Amendment of the existing exemptions under Section A of Part I to the First Schedule to the VAT Act by: i. Extending the VAT exemption in Paragraph 57 to include the National Intelligence Service and the Defence Forces Welfare Services, in addition to the Kenya Defence Forces and National Police Services. Paragraph 57 specified that all goods, such as supplies, equipment, machinery, and vehicles for official use by the Kenya Defence Forces and the National Police Service, are exempt from VAT; ii. Expanding Paragraph 69 by deleting the existing proviso and substituting it with a new proviso that specifies that goods of tariff number 4703.21.00 for use in the manufacture of baby diapers, adult diapers, sanitary towels (pads), and tampons are exempt from VAT; iii. Amending Paragraph 101 by deleting the existing proviso and substituting it with a new proviso that specifies that the VAT exemption shall apply on Alcoholic or non-alcoholic beverages supplied to the Defence Forces Welfare Services as opposed to the Kenya Defence Forces Canteen Organisation; and iv. Amending Paragraph 146 by deleting the existing proviso and substituting it with a proviso that limits the exemption period for capital goods determined to promote investment in the manufacturing sector, with an investment value of at least two billion shillings, granted before 1st January 2024, and continuing for twelve months after enactment of the Act.	By extending VAT exemptions to include the National Intelligence Service and the Defence Forces Welfare Services, this is aimed to bring harmony to the VAT treatment to all goods supplied for official use by security agencies. Similarly, exempting goods used in manufacturing essential hygiene products like diapers and sanitary towels will have the effect of inflating the production cost of such goods due to non-deductibility of input VAT. The increase in the cost of these goods will be passed down to the manufacturers of the essential hygiene products resulting on higher costs.
Introduction of additional new exemptions under Section A of Part I of the First Schedule to the VAT Act by inserting the following: i. The supply of denatured ethanol of tariff number 2207.20.00; and ii. Taxable goods of tariff heading 54.07 and tariff heading 6309 imported as raw materials for the manufacture of the textile products in Kenya upon recommendation of the Cabinet Secretary for investment, trade and industry.	The introduction of these exemptions is in addition to those proposed under the Bill, which the Act has maintained.
Introduction of a VAT exemption on “transfer of a business as a going concern” under Paragraph 35 of Part II of the First Schedule to the VAT Act.	Whilst the Act has upheld this proposed amendment from the Bill, it remains unclear what qualifies as a “transfer of business”. Guidelines ought to be issued to provide clarity.

Issue	Impact
The Act has retained the exempted services that were proposed to be deleted under the Bill. The Bill proposed to amend Part II of the First Schedule by delisting the following services: i. Betting, gaming, and lotteries services. ii. Hiring, leasing, and chartering of aircraft, excluding helicopters of tariff numbers 8802.11.00 and 8802.12.00. iii. Air ticketing services supplied by travel agents. iv. Entry fees into national parks and national reserves. v. The services of tour operators, excluding in-house supplies	By retaining these exemptions, the Act ensures that these services remain VAT-exempt, which helps to keep costs lower for businesses and consumers in these sectors.



Excise Duty Act, CAP. 472 (“EDA”)

<table>
<tr><th>Issue</th><th>Impact</th></tr>
<tr><td>Introduction of a definition of a “digital lender” under Section 2 of the EDA.
A “digital lender” is defined to mean “a person holding a valid digital credit providers license issued by the Central Bank of Kenya”.</td><td>This is a welcome move as it provides legislative clarity and formal recognition for digital lenders, ensuring they operate within a defined legal framework.</td></tr>
<tr><td>Amendment of Section 36 (1A) of the EDA to change the time frame for paying excise duty on alcoholic beverages.
Prior to the change, excise duty had to be paid within 24 hours of removing the goods from the factory. The change extends the time frame to the fifth day of the following month after the transaction.</td><td>The Act has upheld this proposed amendment from the Bill.</td></tr>
<tr><td>The Act has amended Part 1 of the First Schedule of the EDA to exclude ‘fertilized eggs for incubation’ from the ambit of excise duty, imposed at a rate of 25% on imported eggs of tariff heading 04.07.</td><td>With the exclusion of ‘fertilized eggs for incubation’ from excise duty, costs for licensed incubators are reduced, local poultry production is encouraged, and consumer prices may stabilize. The excise duty rate for other imported eggs remains at 25%.</td></tr>
<tr><td>The Act has amended Part 1 of the First Schedule of the EDA by deleting the description “Imported pasta of tariff 1902 whether cooked or not cooked or stuffed (with meat or other substances) or otherwise prepared, such as spaghetti, macaroni, noodles, lasagna, gnocchi, ravioli, cannelloni, couscous, whether or not prepared” and the corresponding rate of excise duty rate of 20%.</td><td>The removal of the excise duty is a welcome move particularly because there is only one local pasta manufacturer, who cannot meet the local demand.

Additionally, basic food items with insufficient local supply should not be subject to excise duty, as this helps ensure affordability and accessibility for consumers.</td></tr>
<tr><td>The Act has amended Part 1 of the First Schedule of the EDA by deleting the word “imported” from the tariff description “Imported Articles of plastic of tariff heading 3923.30.00 and 3923.90.90.” Plastic of tariff heading 3923.30.00 and 3923.90.90,” will be subject to an excise duty rate of 10%.</td><td>The amendment ensures equitable taxation and promoting fair competition to both imported and locally produced plastic articles which will now be subject to a 10% excise duty.</td></tr>
<tr><td>Increase in the Excise Duty rates for various excisable services listed under Part II of the First Schedule to the EDA.
<table>
<tr><th>#</th><th>Description</th><th>Excise Duty rate</th><th>Amended rate</th></tr>
<tr><td>4A</td><td>Betting</td><td>12.5%</td><td>15%</td></tr>
<tr><td>4B</td><td>Gaming</td><td>12.5%</td><td>15%</td></tr>
<tr><td>4C</td><td>Prize competition</td><td>12.5%</td><td>15%</td></tr>
<tr><td>4D</td><td>Lottery (excluding charitable lotteries)</td><td>12.5%</td><td>15%</td></tr>
</table></td><td>Whilst the Act has deleted the proposal in the Bill to increase the rate of Excise Duty on ‘Telephone and Internet data services’ from 15% to 20%, it retains the increased Excise Duty rates for betting, gaming, prize competitions, and lotteries.

This measure aims to discourage excessive participation in gambling activities, addressing social concerns related to gambling addiction.</td></tr>
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Amendment of Part III of the First Schedule to the EDA to interpret the following terms: The Act defines; "fees charged by digital lenders" include: *"any fees, charges or commissions charged by digital lenders relating to their licensed activities but does not include interest, preloan interest, post-loan interest, return on loan or any share of profit or an insurance premium or premium based or related commissions specified in the insurance Act or regulations made thereunder"*.; and	This amendment is a welcome development as it clarifies the excise duty treatment of fees charged by digital lenders, bringing them in line with traditional financial institutions under the Central Bank of Kenya Act. Previously, the term "fee" was undefined, creating ambiguities about which revenue streams were subject to excise duty. This uncertainty led to confusion regarding tax obligations and compliance requirements for digital lenders, potentially affecting their operations, costs and pricing strategies. The definition of a "small independent brewer" clarifies the criteria for which brewers can be categorized as small-scale, setting a clear production volume limit of 150,000 litres per month. This clarity helps identify which brewers are eligible for the reduced excise duty rate, ensuring that only those who meet the specified criteria can benefit.
A "small independent brewer" to mean a *"manufacturers of beer, cider, perry, mead, opaque beer, wine and fortified wines and mixtures of fermented beverages with nonalcoholic beverages manufactured whose production volume does not exceed 150,000 litres per month."*	This definition supports fair competition, prevents misuse of the reduced rate, and encourages the growth of genuinely small-scale brewers by providing them with a competitive advantage.

Miscellaneous Fees and Levies Act, CAP. 469C ("MFLA")

Issue	**Impact**
Increase of the rate of Railway Development Levy ("RDL") from 1.5% to 2%.	The increase in RDL will result in a corresponding increase in the cost of goods imported into Kenya. It will adversely impact end consumers as both traders and manufacturers will pass on the cost through the local prices of goods.
Exemption from IDF and RDL for goods of tariff headings 5407 and 6309 imported as raw materials for manufacture of textile products in Kenya upon recommendation of the Cabinet Secretary responsible for investment, trade and industry.	Items of heading 5407 are woven fabrics of synthetic filament yarn and other woven fabrics, while tariff heading 6309 is for worn (or second hand) clothing, footwear and other worn articles. The reduction in the cost of importation of these items would be a relief to Kenyan textile manufacturers who incorporate them as inputs.

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