



# Finance Act, 2021 Highlights

# Income Tax Act



# Definition of Control

Item	Repealed/ amended Provision	Current Provision	Comments
Control	Definition of Control Deleted from the Tax Laws Amendment Act 2020	<p>Control relates to a person:</p> <ul style="list-style-type: none"> <li>▪ Direct or indirect holding of at least 20% of the voting rights in a company;</li> <li>▪ Advancing loans which comprise at least 70% of the book value of the total assets, excluding a loan from a non-associated financial institution;</li> <li>▪ A guarantee for any form of indebtedness at least 70% of the total indebtedness, excluding a guarantee from a non-associated financial institution;</li> <li>▪ The power to appoint more than half of the board, or at least one director or executive member of the governing board;</li> </ul> <p>Control relates to a person:</p> <ul style="list-style-type: none"> <li>▪ Exclusive rights over the know-how on which the entity is wholly dependent for the manufacture of goods or business carried;</li> <li>▪ The person or another designated person supplies/ purchases at least 90% of the purchases/ sales; or in the opinion of the Commissioner, influences the price or other conditions relating to the supply/sales;</li> <li>▪ Any other relationship dealing or practice that the Commissioner may deem to constitute control.</li> </ul>	Streamlining implementation of OECD guidelines to ensure that related party transactions are captured and documented in transfer pricing policy documents

# Definition of Permanent Establishment

Item	Repealed/ amended Provision	Current Provision	Comments
Permanent Establishment	<p>Section 2 of the ITA Repealed;</p> <p>A fixed place of business and includes a place of management, a branch, an office , a factory, a workshop, and a mine, an oil or gas well, a quarry or any other place of extraction of natural resources, a building site or a construction or installation project which has existed for six months or more where that person wholly or partly carries on business; provided that the permanent establishment of the person shall be deemed to include the PE of the person’s dependent agent.</p>	<p>A fixed place of business through which business is wholly or partly carried on and includes;</p> <ul style="list-style-type: none"> <li>▪ A place of management, a branch, an office, a factory, a workshop,</li> <li>▪ A mine, an oil or gas well, a quarry or any other place of extraction or exploitation of natural resources,</li> <li>▪ A warehouse, or storage facilities</li> <li>▪ A farm, plantation or other place where agricultural, forestry plantation or related activities are carried on</li> <li>▪ A sales outlet</li> </ul> <p>A building or construction site, assembly or installation project that has existed for:</p> <ul style="list-style-type: none"> <li>▪ a period of 183 days; or</li> <li>▪ an aggregate of between 30 to 183 days when carried on in one or more periods of time; or</li> <li>▪ for more than 30 days if carried on by a related enterprise.</li> </ul>	<p>Agricultural sector factored in</p> <p>Infrastructure projects mostly undertaken by non-residents directly or through other parties</p>

## Continuation... Definition of Permanent Establishment

Item	Repealed/ amended Provision	Current Provision	Comments
Permanent Establishment		<p>A building or construction site, assembly or installation project that has existed for:</p> <ul style="list-style-type: none"> <li>▪ a period of 183 days; or</li> <li>▪ an aggregate of between 30 to 183 days when carried on in one or more periods of time; or</li> <li>▪ for more than 30 days if carried on by a related enterprise.</li> </ul> <p>Provision of services including consultancy services for a period exceeding an aggregate of 91 days in a financial year.</p> <ul style="list-style-type: none"> <li>▪ An installation or structure used in exploration for natural resources for more than 91 days;</li> <li>▪ A dependent agent of a person who acts on their behalf in respect of any activities which that person undertakes in Kenya but excludes certain activities of a preparatory or auxiliary character.</li> </ul>	<p>Infrastructure projects mostly undertaken by non-residents directly or through other parties</p> <p>Short-term or intermittent consultancy services</p> <p>Exploration rigs often supplied by non-residents</p> <p>Provides clarity on who a dependent agent is</p>

# Definition of Infrastructure Bond

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Item	Repealed/ amended Provision	Current Provision	Comments
Infrastructure Bond	No provision	A bond issued by the Government for the financing of a strategic public infrastructure facility including a road, hospital, port, sporting facility, water and sewerage system, or a communication network.	Expected to entice investors to invest in Government bonds for infrastructure projects.



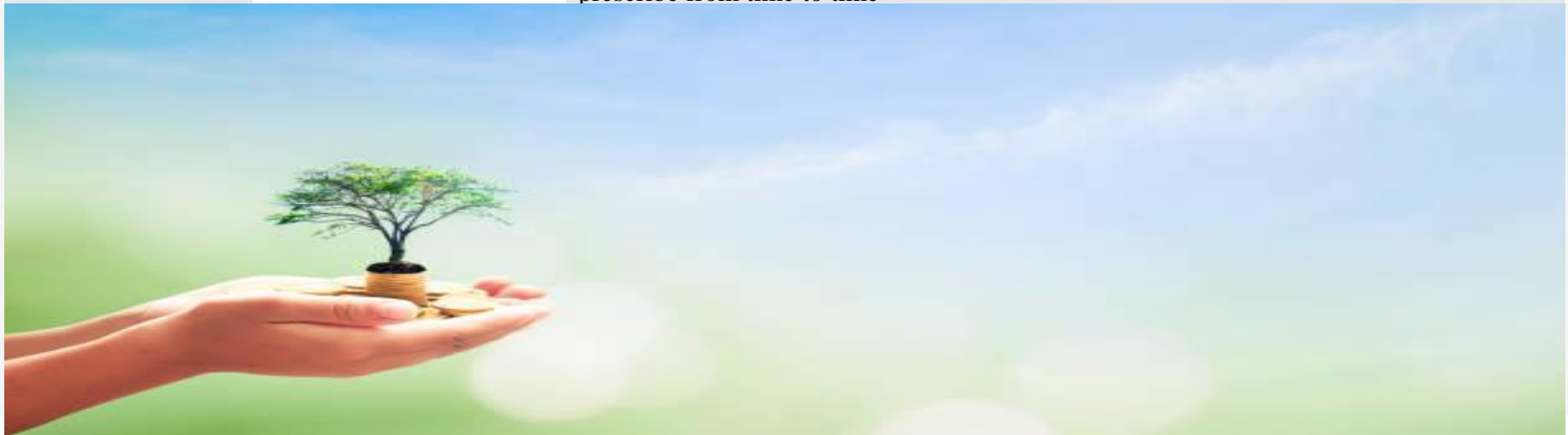
# Digital Tax

Item	Repealed/ amended Provision	Current Provision	Comments
Digital Services Tax	<ul style="list-style-type: none"> <li>▪ Tax on Income accruing through a digital marketplace</li> <li>▪ Both resident and non – resident persons were subject to DST</li> <li>▪ DST was due at the time of the transfer of the payment for the service to the service provider</li> </ul>	<ul style="list-style-type: none"> <li>▪ Tax on income accruing from a business carried out over the internet or an electronic network including through a digital marketplace.</li> <li>▪ Digital market place is defined as an online platform which enables users to sell or provide services, goods or other property to other users.</li> <li>▪ Only non-resident persons will be subject to DST.</li> <li>▪ Due on the 20th of the following month in which the digital services were offered.</li> <li>▪ Exempted               <ul style="list-style-type: none"> <li>a) Non-resident whose income is subject to WHT</li> <li>b) If the non-resident person’s income is from business of transmitting messages by cable, radio, optical fiber, television broadcasting, VSAT, internet, satellite or similar methods.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Scope expanded to cover all traders</li> <li>▪ Addresses any inconsistencies between the charging provision and the DST Regulations</li> <li>▪ Resident persons will not be subject to DST</li> </ul>

# Trust Income

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Item	Repealed/ amended Provision	Current Provision	Comments
Trust Income	Income under a registered trust chargeable under ITA	<p>The trust income shall apply in relation to a registered trust</p> <p>(a) any amount that is paid out of the trust income on behalf of any beneficiary and is used exclusively for the purpose of education, medical treatment or early adulthood housing</p> <p>(b) income paid to any beneficiary which is collectively below ten million shillings in the year of income;</p> <p>(c) such other amount as the Commissioner may prescribe from time to time</p>	Income from registered trusts paid out to beneficiaries or on behalf of beneficiaries





# Tax Losses & Minimum Tax Exemptions

Item	Repealed/ amended Provision	Current Provision	Comments
Tax Losses	Restricts loss carry forward beyond a period up of nine years from the year loss is incurred.	Proposes to remove the limitation on the carry forward of losses.	Aimed at balancing business environment, especially if loss-making companies will be paying Alternative Minimum Tax
Minimum Tax Exemptions	No provision	The exemption will apply to: a) business whose retail price is controlled by the Government; (b) Insurance business; (c) Manufacturing business where cumulative investment in the preceding four years from assent is at least ten billion shillings; (d) Taxpayer licensed under the Special Economic Zones Act, 2015 (e) Distribution business whose income is wholly based on a commission.	Clarifying taxpayers who are exempt from Minimum Tax.  For taxpayers to whom Minimum Tax is applicable, the High Court (in April 2021) suspended the operation of Minimum Tax until final determination of a main suit.

# Thin Capitalization

Item	Repealed/ amended Provision	Current Provision	Comments
Thin Capitalization & Interest Restrictions	Interest payments are disallowed proportionately if the sum of all loans is more than three times the aggregate of positive revenue, reserves and shares	<ul style="list-style-type: none"><li>▪ Interest expenses in excess of 30% of EBITDA (excluding exempt income) will be disallowed.</li><li>▪ The interest restriction will apply to;<ul style="list-style-type: none"><li>a) Interest on all loans</li><li>b) Payments that are economically equivalent to interest;</li><li>c) Expenses incurred in connection with raising of finance.</li></ul></li></ul>	<p>“Thinly capitalized” companies will be adversely affected.</p> <p>The exceptions to the new provisions are a positive move, especially for financial institutions and micro/ small enterprises registered under the Micro and Small Enterprises Act.</p>



# Multinational Enterprises

Item	Repealed/ amended Provision	Current Provision	Comments
Multinational Enterprises	No provision	<ul style="list-style-type: none"><li data-bbox="680 421 1329 714">▪ Multinational enterprise group” means a group that includes two or more enterprises which are resident in different jurisdictions including an enterprise that carries on business through a permanent establishment or through any other entity in another jurisdiction;</li> <li data-bbox="680 771 1329 1021">▪ “ultimate parent entity” (UPE) means an entity that-<ul style="list-style-type: none"><li data-bbox="680 856 1329 892">a) is resident in Kenya for tax purposes;</li><li data-bbox="680 899 1329 935">b) is not controlled by another entity; and</li><li data-bbox="680 942 1329 1021">c) owns or controls a multinational enterprise group</li></ul></li> <li data-bbox="680 1078 1329 1192">▪ UPE to submit return to the Commissioner within 12 months after the last day of the financial year.</li></ul>	Aligning with the OECD guidelines on country by country reporting

# Income from Settlement

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Item	Repealed/ amended Provision	Current Provision
Income from Settlement	Definition of the term “Settlement” is amended	In relation to transfer of assets, the term “settlement” will apply to those transferred through a registered family trust.



# Registered Family Trust- Tax Exemption

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Item	Repealed/ amended Provision	Current Provision	Comments
Registered family trust- tax exemption	No provision	<p>The following are now exempt from income tax;</p> <ul style="list-style-type: none"><li>▪ Property including investment shares, which is transferred or sold for the purpose of transferring the title or the proceeds into a registered family trust.</li><li>▪ The income or principal sum of a registered family trust</li><li>▪ Any capital gains relating to the transfer of title of immovable property to a family trust</li></ul>	Encouraging registration of family trusts for purposes of succession



# NHIF & Tax Rebate

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Item	Repealed/ amended Provision	Current Provision	Comments
NHIF	Only policyholders of education, life and health insurance enjoy an insurance relief on the premiums paid	Proposal to grant a personal relief of 15% of contributions made to NHIF, subject to a limit of KShs 60,000 per annum	Seeking to encourage (voluntary) NHIF contributions.
Tax Rebate	Section 31 of the Income Tax Act	Tax Rebate has been extended to employers who hire graduates from universities and Technical and Vocational Education and Training Centers.	Aimed at encouraging employers to employ from these institutions



# Limitation of Benefit on DTAs

Item	Repealed/ amended Provision	Current Provision	Comments
Limitation of benefit on DTAs	Repealed provision; Benefits on a treaty will be applicable where at least 50% of the underlying ownership of the payee seeking to benefit from the DTA is held by person (s) who is/are resident(s) of such country.	An arrangement for relief from double taxation results in reduced tax being payable in Kenya by a person who is resident of the other contracting state, such benefit shall not accrue to the person if 50% or more of the underlying ownership of the person is held by a person or persons who are not residents of the other contracting state.	Aligning with international best practices on beneficial ownership whether at individual or corporate level.



# Withholding Tax

Item	Repealed/ amended Provision	Current Provision	Comments
Withholding Tax (Extractive Industries)	<ul style="list-style-type: none"> <li>▪ WHT on service fees paid by a contractor or a licensee charged at 5.625%</li> <li>▪ WHT deducted by a contractor in the case of management, training or professional fees charged at 12.5%.</li> </ul>	<ul style="list-style-type: none"> <li>▪ WHT on service fees paid by a contractor or a licensee increased from to 10%.</li> <li>▪ WHT deducted by a contractor in the case of management, training or professional fees to 10%.</li> </ul>	<p>Might increase the cost of doing business in Kenya</p> <p>Aimed at eliminating ambiguity.</p>
Withholding tax for Income from Trusts	No provision	There is now a 25% withholding tax for deemed income to beneficiaries.	



# Interest Restriction

Item	Repealed/ amended Provision	Current Provision
Interest restrictions applicable to a contractor or a licensee	No provision	Interest restrictions rules will apply to contractors or licensee in mining and petroleum operations.



# Capital Allowances

Item	Repealed/ amended Provision	Current Provision	Comments
Capital Allowances (Basis of computing)	Reducing balance	Straight line method	Allowances are now certain annual figures, and are claimed within certain timelines

Item	New Rate (%)
Heavy earth moving equipment	25
Computer & computer peripheral hardware, calculators, copiers	
Motor vehicle*	
Software	
Filming equipment purchased by a local producer	
Furniture & Fittings	10
Telecommunications equipment	
Educational building*	

Item	New Rate (%)
Machinery used for manufacture	50 for first year and 25 per year on residual
Buildings used for manufacture*	
Hotel Buildings	
Hospital buildings*	
Aircrafts	
Ships	
Petroleum or gas storage facilities*	10
Commercial building*	

# Capital Allowance

Item	Repealed/ amended Provision	Current Provision	Comments
Repeals and Transitional	The Provisions of the third schedule were to be in force till 31 December 2021	Now the provisions of the third schedule to be in force till 31 <sup>st</sup> December 2022.	The Capital allowances rate as enacted in the Tax Laws (Amendment) Act, 2020 will continue to apply.
Claiming Investment Deduction outside for Nairobi County and Mombasa County	No provision	Any investment allowance on any WDV's shall be claimed on a straight-line basis. Second Schedule provides that Investment deduction shall be 100% where; (a) the cumulative investment value in the preceding three years outside Nairobi City County and Mombasa County is at least two billion shillings (b) the investment value outside Nairobi City County and Mombasa County in that year of income is at least two hundred and fifty million shillings; or (c) the person has incurred investment in a special economic zone.	This is a welcome move following the repeal of the Second Schedule by the Tax Laws Amendment Act, 2020.
Definition of "Farm works"	Not defined	Under Second Schedule "Farm works" means; farmhouses, labour quarter, any other immovable building necessary for the proper operation of the farm, fences, ditches, drains, water and electricity supply works and other works necessary for the proper operation of the farm	This provides clarity after the repeal of the Second Schedule by the Tax Laws Amendment Act, 2020.

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# VAT

# Value Added Tax Act

## Reverse VAT

- ❖ VAT on imported service is applicable to both registered and non-registered person for VAT.
- ❖ Service imported by any person attracts RVAT;
  - i. the registered person who deals in mixed supplies is required to pay RVAT if they are not entitled to a full tax credit of the input VAT;
  - ii. Non-registered person importing services are required to pay full VAT without recourse to input deduction.

## VAT on Digital Services

Increasing of scope of taxation of digital services

- ❖ Supplies made over the internet or electronic network to be taxable
- ❖ A DMP is an online platform, which enables users to sell or provide services, goods or other property to other users.

## Restriction of input VAT

On leasing or hiring of passenger cars or mini-buses and their repair & maintenance.

# Value Added Tax Rates

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Description	Previous	Current
Diagnostic or laboratory reagents, of tariff number		
Electro-diagnostic apparatus,		
Dexpanthenol		
Physiotherapy accessories		
Medical ventilators and the inputs	16%	Exempt
Other instruments and appliances		
Ozone therapy, oxygen therapy, aerosol therapy		
Artificial teeth and dental fittings		
Other breathing appliances and gas masks		

# Value Added Tax Rates

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Description	Previous	Current
Apparatus based on the use of x-rays, whether or not for medical, surgical or dental		
Biogas		
Pre -fabricated biogas digesters		
Needle holders and urine bags,		
Other instruments and appliances, including surgical blades	16%	Exempt
Other instruments and appliances		
Apparatus based on the use of alpha, beta or gamma radiations		
Apparatus based on the use of x-rays, whether or not for medical, surgical or dental		

# Value Added Tax Rates

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Description	Previous	Current
Exportation of taxable services	0%	
Transfer of assets/ transactions related to the transfer of assets into REITs and asset-backed securities.		
Taxable goods imported or purchased for geothermal, oil or mining prospecting or exploration		Exempt
Specialized equipment for the development and generation of solar and wind energy	16%	
Taxable goods supplied to persons that had an agreement or contract with the Government prior to 25 April 2020 and the agreement or contract provided for exemption from VAT		



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# Excise Duty



# Excise Duty Rates

Description	Previous	Current
Imported sugar confectionary of tariff heading 17.04	KShs 20 per Kg.	Kshs 35 per Kg
Locally manufactured white chocolate-	Exempt	Kshs 200 per Kg
Imported glass bottles within EAC		Exempt
Jewellery		
Articles of plastic		10% of value
Imported pasta		20% of value
Imported furniture		24% of value
Imported eggs		
Imported onions		25% of value
Imported potatoes, potato crisps and potato chips		
Unsaturated polyester		10% of value
Alkyd		

# Excise Duty Rates

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Description	Previous	Current
Emulsion VAM		10% of value
Emulsion-styrene		
Homopolymers		
Emulsion B.A.M		
Emulsion VAM		
Emulsion-styrene		
Homopolymers		
Emulsion B.A.M		
Telephone and internet data services	15% of Value	
Amount wagered or staked on betting		
Amount wagered or staked on gaming		

# Excise Duty Rates

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Description	Previous	Current
Products containing nicotine intended for inhalation without combustion or oral application		Kshs 1,200 per kg
Price competition		7.5% of value paid
Lottery excluding charitable lotteries		
Fees and commissions on loans		20%
Illuminating Kerosene		Exempt
Excisable services on sale of a ring back tune to a subscriber		

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# Tax Procedures Act

# Tax Procedures Act

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## **International Tax Agreements**

The Act gives effect to multilateral agreements and treaties relating to international tax compliance and prevention of evasion of tax or exchange of information as provided in the agreements and treaties.

## **Common Reporting Standard Obligation(CRS)**

- ❖ All local resident financial institutions will required to furnish the Commissioner with a return on reportable accounts held, managed or administered by them.
- ❖ The CS is required to publish Regulations prescribing the CRS.



**Agreement**

# Penalties for non-compliance

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Offence	Penalty
False statement or omission of information	KShs 100,000 or 3 year imprisonment or both
Failure to file a return	KShs 1,000,000
Failure to comply where no other penalty is prescribed	KShs 20,000 and KES 20,000 for each day (up to a maximum of 60 days)





## Other changes

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- ❖ **Registration** of all persons trading in a digital market place
- ❖ **Recoverability of unpaid tax** - The Commissioner shall submit a report to the CS each year containing the details and amounts of taxes abandoned.
- ❖ **Utilizing tax refunds** - Protection of taxpayers from being charged interests or penalties on any outstanding tax liabilities that can be offset with an approved tax refund amount from the date of notification that the refund has been ascertained.
- ❖ **Protection of KRA officers** - KRA officers are protected from being personally liable for any act or omission done or committed in good faith while performing their duties.

**TAX REFUND**

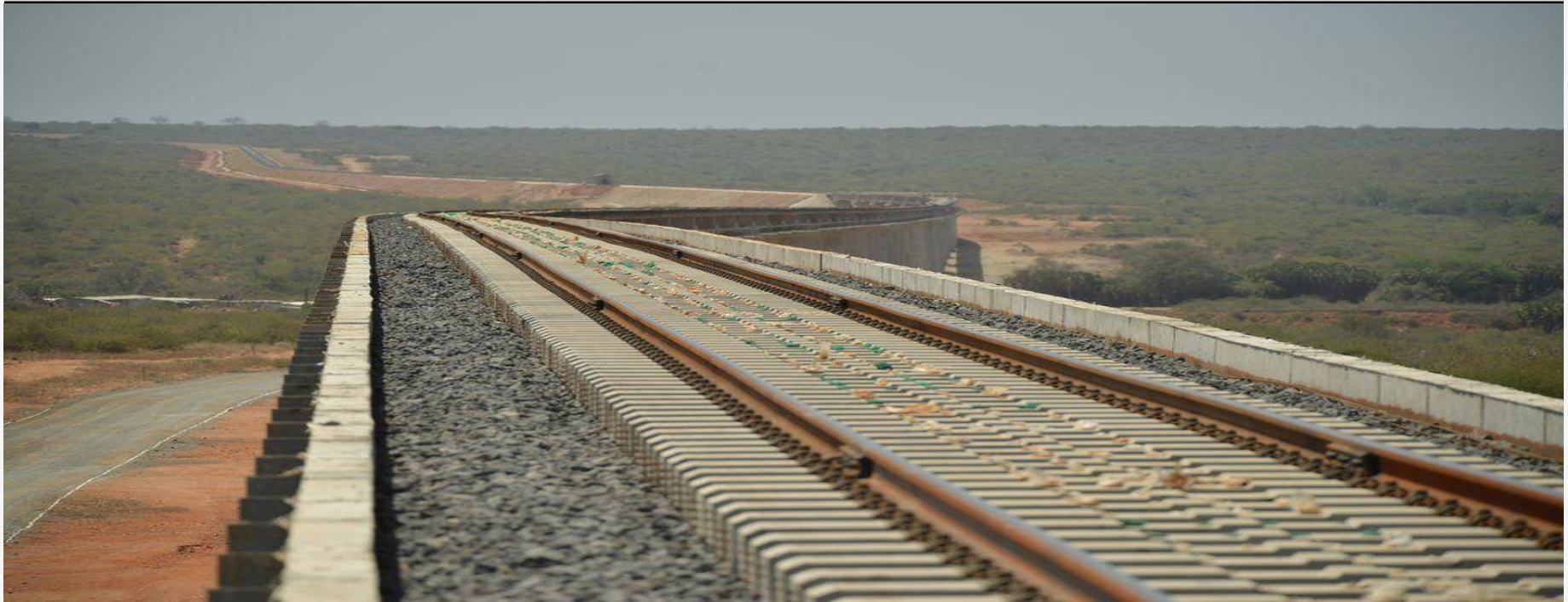
# Other Acts

# Miscellaneous Fees and Levies Act, 2016

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## ❖ Miscellaneous Fees and Levies Act, 2016

- Licensed or registered manufacturer of paint, resin or shoe polish are exempted from RDL.
- A person who has overpaid fees and levies is required to apply to the Commissioner for a refund within 5 years.
- Goods which the CS of National Treasury deems to be of public interest or goods that promote investments and have a value of more than KShs 5 Billion were exempt from IDF and RDL



# Other Acts

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## **Stamp Duty Act**

A registered family trust is exempted from stamp duty.

## **Capital Markets Authority Act**

Tribunal to hear and determine appeals within 90 days

## **Insurance Act**

Introduction of an annual fee for licensed insurers

## **KRA Act**

Reward for identification of unassessed taxes or duties increased from Kshs 100,000 to Kshs 500,000.  
Reward for recovery of unassessed taxes or duties increased from Kshs 2 million to Kshs 5 million

## **Central Depositories Act**

A securities account opened with the Central Depository shall be in the name of a beneficial owner or legal owner or an authorized nominee.



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