ANDERSEN

Finance Bill, 2022 Highlights

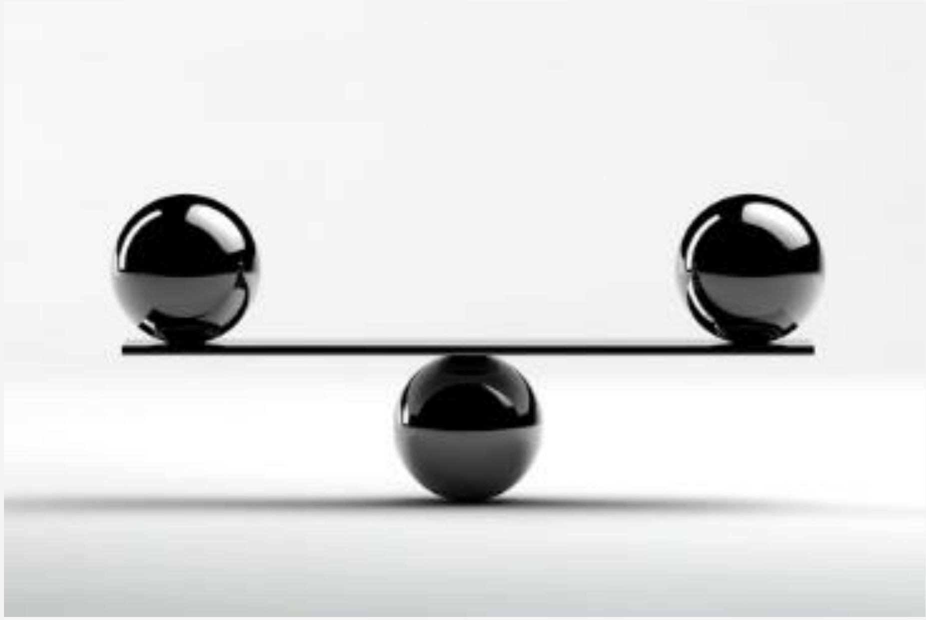
"The Delicate Balance"

On 7 April 2022,the Cabinet Secretary for The National Treasury And Planning, presented the Budget in an unprecedented environment of economic slowdown themed, “*Accelerating Economic Recovery for Improved Livelihood*”.

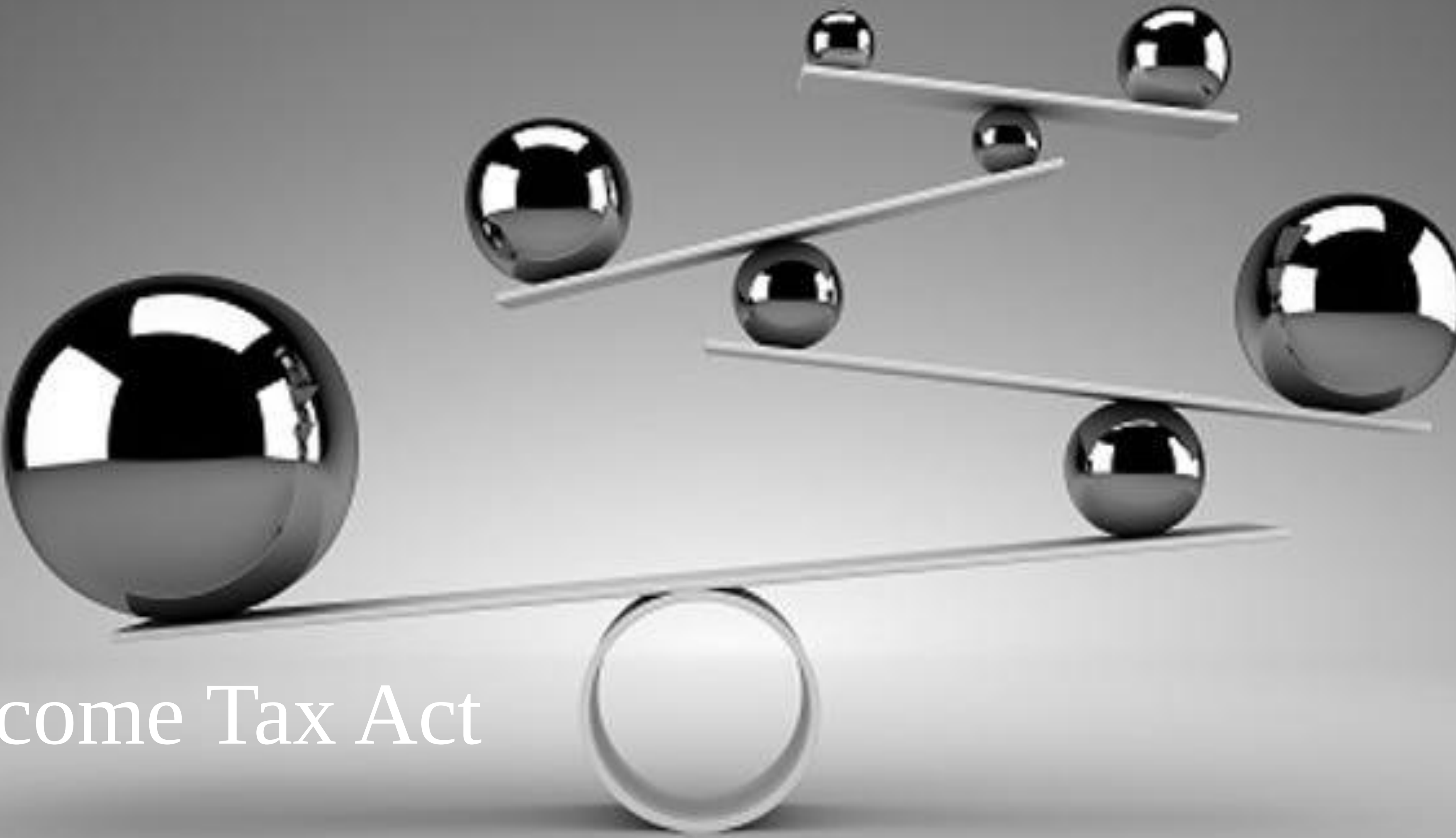
The Budget focused on measures to boost the economy as promised by the Cabinet Secretary. However, as it is said, the 'Devil lies in the details'. In the Finance Bill, several amendments have been proposed which are path breaking and may have far-reaching consequences.

Some structural changes, include restriction of claiming input VAT to to six months from the tax period on which the supply or importation occurred.

Please find below our presentation analyzing threadbare, the proposals of Finance Bill 2022 and their likely impact.



Income Tax Act



Item	Proposed Amendment	Comments
Donations to approved projects	Donations made to any project approved by the Cabinet Secretary responsible for matters relating to finance to be allowable/ deductible for tax purposes.	This is meant to ensure that taxpayers making donations to approved projects enjoy a tax deduction against their chargeable income. Aimed at encouraging taxpayers to contribute to projects that the government consider to be for the greater public good.
Capital allowances – manufacture	The meaning of manufacture has been amended to include the transformation and distribution of electricity.	This is a welcome move, it will allow private entities who generate electricity that does not pass through the national grid to claim capital allowances on equipment and machinery and reduce the cost of power in Kenya
100% Investment deduction	100% investment deduction shall only apply to machinery used for manufacture, hotel buildings and building used for manufacture. The 100% deduction shall not apply to investments which, due to the nature of their business, have to be located in places which are outside Nairobi City county and Mombasa county.	This is a welcome move, it encourages innovation amongst investors and the growth of various sectors Aimed at clarifying the application of the 100% investment deduction
Gains from financial derivatives	The Finance Bill, 2022 has defined "Financial derivative" as a financial instrument the value of which is linked to the value of another instrument underlying the transaction which is to be settled at a future date. Gains from financial derivatives by non-residents shall be subject to 15% withholding tax.	Welcome efforts to widen the tax base
Exemption from thin capitalization restrictions	Microfinance institutions licensed under the Microfinance Act to be excluded from interest restrictions that arise due to thin capitalisation rules.	Should lower the tax burden for Microfinance Institutions and thus increase capital available for lending.

Item	Proposed Amendment	Comments
Treatment of foreign exchange loss for thinly capitalized companies	Proposal on any foreign exchange loss realized by a company whose gross interest paid or payable to related persons and third parties exceeds 30% of EBITDA in any financial year should be deferred.	The proposed amendment aligns with the current interest restrictions provisions.
Taxation of Employee Share Option Plans:- **Benefit& Valuation**	The Finance Bill, 2022 proposes that the taxable benefit shall be the difference between the offer price, per share, at the date the option is granted by the employer, and the market value, per share on the date when the employee exercises the option; The benefits chargeable shall be deemed to have accrued on the date the employee exercises the option.	This helps to ascertain the real value of the share and the benefit considering the time value of the share option. It also provides clarity on the computation of the benefit to be subjected to tax.
Taxation of Registered Trusts	Proposal to delete this provision: *"The following amounts paid out to a beneficiary by a trustee, administrator or executor is excluded from Income Tax:* *i. Payments for exclusive use of education, medical treatment or early adulthood housing;* *ii. Payments cumulatively below KES 10 million in a year;* *iii. Any amounts that may be prescribed by the Commissioner."*	In this regard, any income received by a beneficiary from a trust shall be deemed to be income of the beneficiary and is subject to tax.
Registered family trusts	The income or principal sum of a registered family trust is now chargeable to tax.	

Item	Proposed Amendment	Comments
Digital service Tax	The Finance Bill, 2022 proposes to exclude a non- resident with a permanent establishment in Kenya.	A relief for non-resident companies with a permanent establishment, hence entities will only pay corporate income tax avoiding double taxation.
Digital Services Tax Rate	Proposal to increase the DST rate to 3%	This is a welcome move, ensures non-residents companies can pay their fair share of taxes.
Ascertainment of gains and profits of business in a preferential tax regime. (Expanding the scope of Transfer Pricing)	The Finance Bill, 2022 proposes to expand entities that must adhere to the arm's length principle. A resident person carries on business with; a. A related resident person operating in a preferential tax regime; b. A non-resident person located in a preferential tax regime; c. An associated enterprise of a non-resident person located in a preferential tax regime; d. A permanent establishment of a non-resident person operating in Kenya where the non-resident person is located in a preferential tax regime.	This will increase tax compliance among related entities and also bring into the realm of transfer pricing transactions with non-related parties operating in preferential tax regime.

Item	Proposed Amendment	Comments
Country by Country reporting for multinational enterprises **Filing of master and local files**	▪ A multinational enterprise group or a constituent entity, other than an excluded multinational enterprise group, shall notify the Commissioner, of their legal status not later than the last day of the financial year. ▪ An ultimate parent entity or a constituent entity of a multinational enterprise group shall file a country-by-country report within 12 months after the last day of the financial year to the Commissioner of its financial activities in Kenya and in all other jurisdictions where the group has taxable presence. ▪ An ultimate parent entity or a constituent entity of a multinational enterprise group shall file a master file and a local file to the Commissioner filed not later than six months after the last day of the financial year. ▪ Any multinational entity that fails to comply with these provisions shall be subject to the penalties prescribed under the Tax Procedures Act, 2015.	Efforts to increase transparency of multinationals' operations and curb potential tax avoidance through reporting operations in low-tax jurisdictions or complete non-reporting.
Capital gains	The bill increases the rate of tax to 15%	This is aimed at increasing tax revenue
Permanent home	The Finance Bill has defined "permanent home" as a place where an individual resides or which is available to that individual for residential purposes in Kenya, or where in the opinion of the Commissioner the individual's personal or economic interests are closest	This proposal will expand the tax base, especially in taxing the diaspora group. The hitch with this proposal, it may lead to double taxation of income.
PAYE Certificate	The bill proposes to delete the provision	This is in line with the use of iTax where KRA can easily access the certificate.

Item	Proposed Amendment	Comments
Definition of a Preferential Tax Regime	The Bill defines a preferential tax regime to mean: ▪ any Kenyan legislation, regulation or administrative practice which provides a preferential rate of tax to such income or profit, including reductions in the tax rate or the tax base; or ▪ a foreign jurisdiction which – ➢ does not tax income; ➢ taxes income at a rate that is less than twenty per cent; ➢ does not have a framework for the exchange of information; ➢ does not allow access to banking information; or ➢ lacks transparency on corporate structure, ownership of legal entities located therein, beneficial owners of income or capital, financial disclosure, or regulatory supervision.	The proposal is aimed at aligning Kenya's transfer pricing practice with international best practice and seeks to bring into the realm of transfer pricing transactions between a Kenyan resident person and an unrelated non-resident person operating in a preferential tax regime

VAT

Item	Proposed Amendment	Comments
Claiming of input VAT	Claiming of input VAT to be restricted to six months from the tax period on which the supply or importation occurred	This proposal is aimed at ensuring that if a taxpayer files a tax return later than six months from the date a taxable supply has been made, the input tax relating to that supply will not be eligible for claiming. Section 17 of the VAT Act applies the matching concept whereby input tax on purchases used to make taxable supplies is offset to the extent that such supplies are used to make taxable supplies. In our opinion, this contradicts the entire structure of VAT in which input tax is deducted against output tax and thus passed on to the eventual consumer of the service or the goods.
Documentation for input tax deduction	The Commissioner granted powers to request for any other documentation deemed necessary for purposes of validating input VAT.	The Commissioner is empowered to request for any supplementary documentation to validate the input tax. In our opinion, this proposal leaves the taxpayer at the mercy of the Commissioner with regard to providing supporting documentation. This proposal goes against the principle of certainty in tax because taxpayers will not be certain on what documents the Commissioner will request from them.

Item	Proposed Amendment	Comments
Registration of suppliers of imported digital services	The threshold for VAT registration of five million shillings and above not to apply to suppliers of imported digital services.	This is aimed at ensuring that all suppliers of imported digital services are registered for VAT. It further aims at increasing government revenue.
New items exempt from VAT	The following items to be VAT-exempt: • Plant and machinery imported by manufacturers of pharmaceutical products or investors in the manufacture of pharmaceutical products upon recommendation by the Cabinet Secretary for Health; • Medical oxygen supplied to registered hospitals • Urine bags, adult diapers, artificial breasts, colostomy and ileostomy bags for medical use.	Attempts to reduce the cost of manufacturing pharmaceutical products (medicine), critical consumables in hospitals, and locally manufactured vehicles. Investors are encouraged to invest in plants for manufacture of medicinal products.
	• Inputs and raw materials used in the manufacture of passenger motor vehicles; • Locally manufactured passenger motor vehicles provided that the total value of the vehicle consists at least 30% of parts designed and manufactured in Kenya.	Aimed at raising the profile of Kenya as manufacturing hub for motor vehicles.
	Taxable goods and services for the direct and exclusive use in the construction and equipping of specialized hospitals with a minimum bed capacity of fifty, approved by the CS upon recommendation by the CS responsible for health who may issue guidelines for determining eligibility for the exemption.	This is geared towards generating additional revenue for the government. However, given that one of the government's key agenda is the provision of universal health care, it remains to be seen how the government will achieve this with the increased cost of constructing and equipping specialized hospitals.

Excise Duty

Item	Proposed Amendment		Comments
Annual inflationary adjustments for excise duty	The Commissioner, upon approval by the CS- National Treasury to exempt specified products from inflation adjustment after considering the circumstances prevailing in the economy in that year in respect of such products.		This will give the Commissioner General the freedom to exclude certain products from inflationary adjustment. As such, the Commissioner General will be expected to protect certain sectors from negative economic impacts arising from increased costs of the excisable products.
Items exempt from Excise Duty	(i) Fertilized eggs of imported by hatcheries, upon recommendation by the CS (ii) Neutral spirit imported or purchased locally by registered pharmaceutical manufacturers (iii) Locally manufactured passenger motor vehicles provided that the total value of the vehicle consists at least 30% of parts designed and manufactured in Kenya (iv) Glass bottles for packaging of pharmaceutical products.		The proposal is aimed at promoting the growth of and competitiveness of these industries.
New items subject to excise duty	Ice cream and other edible ice Fees charged on advertisement by television stations, print media, billboards and FM radio stations of alcoholic beverages, betting and gaming	Proposed rate of 15%	This is geared towards generating additional revenue for the government whilst also discouraging consumption of some of these products

Item	Proposed Amendment			Comments
Increase in specific Excisable rates	**Description**	**Previous rate**	**Proposed rate**	This is geared towards generating additional revenue for the government whilst also discouraging consumption of some of these products
	Fruit juices and vegetable juices	KShs 12.17 per litre	KShs 13.30 per litre	
	Cosmetics and Beauty products	10%	15%	
	Bottled or similarly packaged waters and other non-alcoholic beverages	KShs 6.03 per litre	KShs 6.60 per litre	
	Beer, cider, perry, mead, opaque beer and mixtures of fermented beverages with non-alcoholic beverages and spirituous beverages of alcoholic strength not exceeding 6%”	KShs 121.85 per litre	KShs 134 per litre	
	Powdered beer	KShs 121.85 per kg	KShs 134 per kg	
	Wines including fortified wines, and other alcoholic beverages obtained by fermentation of fruits	KShs 208.20 per litre	KShs 229 per litre	
	Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 6%	KShs 278.70 per litre	KShs 335.30 per litre	
	Cigars, cheroots, cigarillos, containing tobacco or tobacco substitutes	KShs 13,906.04 per kg	KShs 13,296 per kg	
	Cigarette with filters (hinge lid and soft cap)	KShs 3447.61 per mille	KShs 3,825.99 per mille	
	Cigarettes without filters (plain cigarettes)”	KShs 2,502.74 per mille	KShs 2,752.97 per mille	

Item		Proposed Amendment		Comments
Increase in specific Excisable rates	**Description**	**Previous rate**	**Proposed rate**	This is geared towards generating additional revenue for the government whilst also discouraging consumption of some of these products.
	Other manufactured tobacco and manufactured tobacco substitutes; “homogenous” and “reconstituted tobacco”; tobacco extracts and essences”	KShs 9,734.45 per Kg	KShs 10,707.88 per Kg	
	Imported motorcycles	KShs 12,185.16 per unit	KShs 13,403.64 per unit	
	Imported sugar confectionary	KShs 36.74 per kg	KShs 40.37 per kg	
	White chocolate, chocolate in blocs, slabs or bars	KShs 200 per kg	KShs 242.29 per kg	
	Jewellery	10%	15%	
	Electronic cigarettes and other nicotine delivery devices		40%	
	Liquid nicotine for electronic cigarettes		KShs 70 per millilitre	
	Amount wagered or staked on gaming	7.5%	20%	
	Amount wagered or staked on betting			
	Winnings from price competition	7.5% of value paid	20% of value paid	
	Winnings from lotteries excluding charitable lotteries			

Tax Procedures Act

Item	Proposed Amendment	Comments
Supply of information upon change of particulars	A trust will be required to notify the Commissioner on any changes with regard to the full identity and address details of trustees and beneficiaries of the trust whether the entity is carrying on business or not	This is aimed at enhancing tax compliance and tax administration by ensuring that changes on the details of trustees and beneficiaries of any trust are reported to the commissioner
Security on property for unpaid tax	Requirement for Registrars of ships, aircrafts, motor vehicles and any other property that may be used as security for unpaid taxes to restrict disposal or transaction of these assets upon directive by the Commissioner General.	This will encroach on the taxpayer's property rights. On the other hand, it will boost revenue collection, by providing the revenue authority with more options to recover taxes.
Offset or refund of overpaid tax	• Commissioner to ascertain and determine an application to offset overpaid tax or refund overpaid within ninety days • If Commissioner fails to refund the overpaid tax within a period of two years, the amount due shall attract interest of one percent for each month in which the amount remains unpaid. • Overpaid instalment tax shall be applied to offset a taxpayer's future instalment tax liability.	The specification of these timelines is a welcome relief for many taxpayers with outstanding applications for refund or offset of overpaid taxes.
Timelines for giving objection decision	Requirement by the Commissioner to issue a decision on objection by a taxpayer within one cycle of 60 days from the date of receiving a valid objection by the taxpayer.	This will expedite dispute resolution thereby easing the time, cost and administrative burden shouldered by the taxpayers engaged in tax disputes.
Transactions for which a PIN is required	Registration of a trust	For one to register a trust, they will be required to have a PIN

Other Acts

Item		Proposed Amendment	Comments
Miscellaneous Fees & Levies Act	Excess Tax Refunds	Insertion of the words 'and levies' immediately after the word fees.	This will serve to remove any ambiguities in the determination of penalties and interests by the Commissioner
		Part I of the First Schedule is amended to include Iron ores and concentrates, including roasted iron pyrites under Tariff No. 2601 and subject to an Export Levy rate of USD 175 per tonne	This will increase revenue collection and discourage the exportation of these iron products
	Rates of Export Levy	Part I of the First Schedule is amended to reduce the Export Levy rate to 50% or USD 0.32 per KG for tariff no.s (Raw hides and skins): 4101.20.00, 4102.21.00, 4102.29.00, 4103.20.00, 4103.30.00, 4103.90.00, 4104.19.00, 4301.60.00, 4101.40.00, 4101.50.00, 4101.90.00, 4102.10.00, 4301.10.00, 4301.80.00, 4301.90.00, 4302.11.00, 4302.19.00, 4302.20.00, and 4302.30.00	Efforts to lower the cost of exporting hides and skins and encourage pastoralist communities to carry on in the trade.
	Inflation Adjustment on the Rates of Export Levy	Part III of the First Schedule of the Act is amended to provide for inflation adjustment of Export Levy on 'a date not later than the 1st October of every financial year'	Aimed at increasing government revenue
	Import Declaration Fees (IDFs), and Railway Development Levy (RDL)	The Bill proposes to exempt the import of inputs and raw materials imported by manufacturers of pharmaceutical products from the payment of IDF and the payment of RDL	Welcome efforts to reduce the cost of manufacturing pharmaceutical products and encourage investors to invest in manufacturing plants.

Item	Proposed Amendment	Comments
Kenya Revenue Authority Act	To rename Kenya Revenue Authority to Kenya Revenue Service.	Expectations that public perception of KRA will change to a service-provider, thus increase tax compliance levels.
Tax Appeals Tribunal Act, 2013	Part III of the Tax Appeals Tribunal Act is amended to require a taxpayer to make a deposit of 50% of the disputed tax amount into a special account at the Central Bank of Kenya, refundable within 30 days of judgement being entered in the taxpayer's favour	Taxpayers ordinarily appeal tax decisions that they strongly feel can be challenged successfully. Having such a taxpayer to look for 50% of the disputed tax before he/ she concludes the appeal process basically amounts to "convicting" him/ her without being fully heard. Taxpayers who are unable to put together the 50% amount, and therefore end up being compelled to settle the entire disputed tax, are bound to feel that they have been denied access to justice, which amounts to breach of a fundamental Constitutional right. In our view, an appropriate means of addressing the concern raised by the CS is to equip or empower the Judiciary such that tax appeals are expedited and decisions rendered as speedily as possible. In addition, if the Government is to hold on to taxpayer funds for an additional 30 days, it may be important to consider repaying with interest.

Item	Proposed Amendment	Comments
The Unclaimed Financial Assets Act, 2011	Waiver of Penalties, Fines, and Audit Fees: The Act is amended to provide for the inclusion of Section 33A authorizing the Cabinet Secretary to waive the payment of any penalties and fines under Section 33, subject to set conditions Voluntary Unclaimed Financial Assets Disclosure Programme: The Act is amended to provide for the establishment of The Voluntary Unclaimed Financial Assets Disclosure Program, which shall be for a period of twelve months from 1st July 2022	This will ensure confidence within taxpayers to willingly come forth and disclose any undeclared assets within their possession without fear of consequences This is a welcome amendment to enable those who hold unclaimed financial assets to disclose them without incurring penalties and interests
Statutory Instruments Act	**Automatic Revocation of Statutory Instruments:** Tax related Regulations that are approaching expiry under the 10-year validity rule to be exempt from automatic expiry.	Positive move to ensure consistency and continuity in administration of tax affairs.

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