

FINANCE ACT, 2022 PETITIONS OUTCOME

Petition No. E338 of 2022

Alert: The High Court Upholds The Finance Act, 2022 In Its Entirety

February 2023

CONSOLIDATED PETITIONS AGAINST THE FINANCE ACT, 2022

INTRODUCTION

The High Court of Kenya has in a case between five (5) petitioners and four (4) respondents held that the Finance Act, 2022 was founded and implemented legally. In addition, the high court stated that the effective date of the provisions in the Finance Act, 2022 were constitutional contrary to petitioners' claims. The high court dismissed the petitions consolidated to Petition No. E338 of 2022 citing they lacked merit and not deserving of reliefs sought

PETITIONERS' ARGUMENTS, RESPONDENTS' CASE AND COURT DECLARATION

Petitioners' Case

The petitioners argued as follows:

- ▶ The finance Act, 2022 was founded on an illegality
- ▶ The Finance Act, 2022 failed to uphold the principle of public participation
- ▶ Amendment of the First Schedule to the VAT Act will amount to double taxation.
- ▶ Increase in the rates of excise duty on various items imposes an extraordinarily heavy burden on the public and will lead to diminished returns for business owners and manufacturers.
- ▶ The Finance Act, 2022 was unconstitutionally published in the Kenya Gazette after its effective date

Respondents' Case

The respondents argued as follows:

- ▶ The 2022 BPS was properly considered and approved by the relevant committees and parliament after public participation
- ▶ That the orders sought by the petitioners will stifle execution of government operations
- ▶ That the provisions cannot be termed unconstitutional for reason that they are unfair or oppressive
- ▶ The Finance Act, 2022 was passed by a simple majority of members present through voting in parliament
- ▶ That excise duty was increased to maintain the real tax value
- ▶ That the Finance Act, 2022 was published through a Kenya Gazette Supplement before implementation hence constitutional

Court Ruling

The high court held that:

- ▶ The Finance Act, 2022 stipulated definite dates when the provisions in the Act will take effect
- ▶ The power to adjust excise duty to account for inflation lies by the respondents as provided for under the Excise Duty Act 2015
- ▶ The respondents invited the public and relevant stakeholders to submit views thereby constituting public participation
- ▶ The constitution does not disclose how high or low the taxes should be, dismissing claims on high taxation
- ▶ Petitions lacked merit and not deserving of reliefs



OUR VIEWS AND CONCLUSION

The High Court's judgment reaffirms the position of the Finance Act, 2022. In this case, all the provisions in the act stand, whether deemed oppressive or sustainable.

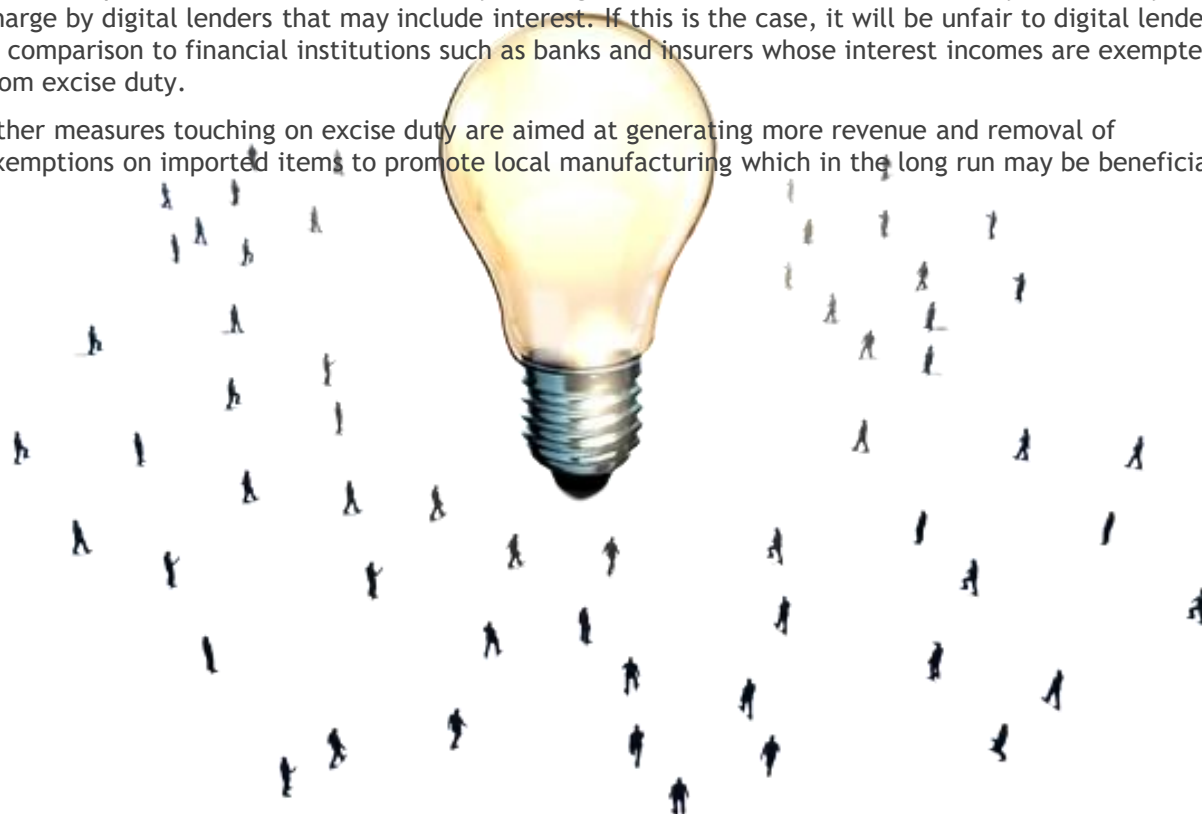
To this end, the increases in excise duty rates for a wide range of products; at KES 50 per imported ready to use SIM card, 20% fees charged to digital lenders and 10% excise duty on articles of plastic in our opinion will affect different parties in the following ways.

As the excise duty on imported ready to use SIM cards may seem oppressive as the excise duty cost will be passed to the consumer, it will encourage personalization of SIM cards resulting in value addition within the country. In an ongoing argument, imported ready to use SIM cards pose security concerns as some are produced with malicious embedded software. This will likely be controlled by this move.

Excise duty on fees charged by digital lenders at 20% will increase the cost of digital lending. The growing sector has previously enjoyed excise duty exemption on fees digital lenders charge. The Central Bank of Kenya in the Central Bank of Kenya (Amendment) Act, 2021, expanded the CBK licensing mandate to include digital credit providers thereby requiring them to charge excise duty on fees charged to their customers. The introduction in the Finance Act, 2022 has introduced a more specific rate to the lenders.

The absence of a clear distinction between 'fees' and 'digital lenders' is a grey area likely to lead to ambiguity in the interpretation of what is subject to excise duty. This is an area that may in the future lead to disputes between the tax authority and digital lenders. In our view, 'fees' may include any charge by digital lenders that may include interest. If this is the case, it will be unfair to digital lenders in comparison to financial institutions such as banks and insurers whose interest incomes are exempted from excise duty.

Other measures touching on excise duty are aimed at generating more revenue and removal of exemptions on imported items to promote local manufacturing which in the long run may be beneficial.



FOR FURTHER INFORMATION, PLEASE CONTACT US:

HENRY SANG
TAX DIRECTOR
E: henry.sang@bdo-ea.com



www.bdo-ea.com

STEVE OKOTH
TAX DIRECTOR
E: henry.sang@bdo-ea.com

 @bdoineastafrica

 BDO in East Africa

NZIOKA MUINDI
SENIOR TAX MANAGER
E: nzioka.muindi@bdo-ea.com

PETER MWANGI
SENIOR TAX MANAGER
E: peter.mwangi@bdo-ea.com

JOHN KOMU
TAX MANAGER
E: john.komu@bdo-ea.com

GLOBAL OFFICES

1,803

COUNTRIES & TERRITORIES

164

GLOBAL STAFF

111,000 +

EAST AFRICA STAFF

300 +

The information contained in this presentation is confidential, privileged and only for the information of the intended recipient and may not be used, published or redistributed without the prior written consent of BDO East Africa Kenya. The opinions expressed are in good faith and while every care has been taken in preparing these documents, BDO East Africa Kenya makes no representations and gives no warranties of whatever nature in respect of these documents, including but not limited to the accuracy or completeness of any information, facts and/or opinions contained therein. BDO East Africa Kenya its subsidiaries, the directors, employees, and agents cannot be held liable for the use of and reliance of the opinions, estimates, forecasts and findings in these documents.

