Section/Schedule	Current VAT Act Provisions	VAT Bill 2013	Our comments
Part I: Interpretation: The VAT Act does not include some important definitions which are key to the interpretation of the various provisions			
Business	Any trade, commerce or manufacture, or any concern in the nature of trade, commerce or manufacture;	The definition of business has been expanded to include activities carried on continuously or regularly which involve the supply of goods or services for consideration.	The expanded definition will allow the KRA to bring into the tax bracket activities that were previously not considered business as long as such activities are done regularly and for a consideration.
Importer	In relation to goods, a person who imports taxable goods	In relation to goods, person who owns the goods, or any other person who is, for the time being, in possession of or beneficially interested in the goods at the time of importation;	This will allow the KRA to assess import duty on the agents of the owner of the goods and could potentially be used to demand tax from clearing agents.
Services exported out of Kenya	Defined as a service provided for use or consumption outside Kenya whether the service is performed in Kenya or outside Kenya, or both inside and outside Kenya	Service provided for use or consumption outside Kenya	The inclusion of performance in the definition has created controversy and led to many cases both at the VAT Tribunal and the High Court. The proposed changes make it clear that export of services should be based on the place of consumption which conforms to international VAT standards.
Supply of services	The current definition includes controversial provisions on self supply which the KRA has attempted to enforce but were deemed illegal by the courts.	Self supply provisions have been eliminated from the definition of supply of services.	The changes will remove ambiguities which the KRA has exploited to collect tax from some taxpayers.

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Supply of imported services	Defined as service provided by a person normally resident outside Kenya who is not required to register for tax in Kenya, or a service provided by an export processing zone enterprise for use or for consumption by a person in Kenya	New definition based on three conditions: a) the supply would have been a taxable supply if it had been made in Kenya; b) the supply is made by a person who is not a registered person; and c) the registered person would not have been entitled to a credit for the full amount of input tax payable if the services had been acquired by the person in a taxable supply.	The proposed change will eliminate reverse charge VAT for persons who are currently entitled to a full deduction of the VAT. Taxpayers such as banks and insurance companies which cannot claim a full deduction of input tax will continue to pay reverse charge VAT. This move will ease cash-flows for persons that will be exempted and will also reduce the VAT refund backlogs. Where the taxpayer only claims a portion of the input tax due to exempt supplies, the reverse charge tax payable is limited to the proportion of the exempt supplies over the total supplies.
Part II: Administration of the VAT Act			
Powers and functions of the Commissioner	Appointment of officers to perform the functions of the Commissioner has to be approved by the KRA Board	Appointment powers will be vested on the Commissioner	This will consolidate powers for the implementation of the VAT Act in the Office of the Commissioner

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Part III: Charge to Tax			
VAT Rates	Section 6 provides that the rate of tax shall be as specified in the First Schedule which provides two (2) rates – 16% which is the general rate of tax and 12% which is the rate applicable on electricity, fuel oils and industrial diesel	The VAT Bill 2013 provides for only the 0% and the 16% VAT rates.	The proposed changes will eliminate one of the incentives (12% duty rate) given to the local manufacturing industry to cushion it against the high energy costs. The proposed change is likely to increase the cost of locally manufactured goods especially given the dependence on thermal sources of energy to generate electricity.
Part IV: Place of supply			
Place of supply for services	Services are deemed to be supplied in Kenya if: a) the supplier has established his business in Kenya and the services are physically used or consumed in Kenya regardless of the location of the payer. b) in connection with immovable property, the property is situated in Kenya; or c) in connection with receiving a signal for the supply of television, radio, telephone or any other communication services, the person receiving the signal is in Kenya.	Services are deemed to be supplied in Kenya if the place of business from which the supplier of the services makes the supply is in Kenya.	The VAT Bill defines an export of service to be a service provided for consumption outside Kenya but also provides that if the supplier of the services is based in Kenya, the services will be deemed to have been supplied in Kenya. The KRA is likely to use this contradiction to try and charge VAT on services performed in Kenya even though such services are consumed outside Kenya. This is a potential flashpoint and one of the issues to watch if the VAT Bill is passed.

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Electronic commerce	No provision	If the place of business of the supplier is not in Kenya, the supply of services shall be deemed to be made in Kenya if the recipient of the supply is not a registered person and the services are electronic services delivered to a person in Kenya at the time of supply. Electronic services include web-hosting, remote maintenance of programs and equipment, software and the updating of software, images and information, access to databases, self-education packages, music, films, games including games of chance and all types of broadcasts.	Where a non-resident person is deemed to have made supplies in Kenya, such a person is required to appoint a representative in Kenya to account for tax on behalf of the non-resident person. The changes will capture companies especially those making broadcasts into Kenya, those selling software online and companies that provide distance learning solutions.
Persons carrying on business inside and outside Kenya	No provision	The business carried on in Kenya is to be deemed to be a separate business from that carried on outside Kenya	This will affect transactions between companies and their branches. Such transactions will now be deemed to be between two separate entities even though from a Companies Act perspective the company and its branch are one.
Part V: Taxable Value			
Hire Purchase agreement	Interest charge on hire purchase transactions is exempted from VAT as long as the seller is registered under the Hire Purchase Act	Interest charge on hire purchase transactions is exempted from VAT	The new proposal removes the requirement for the seller to be registered under the Hire Purchase Act.

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Related parties	No definition	New definition of related persons: Person is related to another person if- a) either person participates, directly or indirectly, in the management, control or the capital of the business of the other; b) a third person participates, directly or indirectly, in the management, control or capital of the business of both; or c) an individual who participates in the management, control or capital of the business of one, is associated by marriage, consanguinity or affinity to an individual who participates in the management, control or capital of the business of the other.	Transactions between related parties will have to be at arm's length and agreements between two such companies will not suffice in the absence of additional evidence that the agreements are market based. The main problem with the provision is that it is too broad especially when it expands to cover persons who are associated through affinity.
Credit notes	A credit note is only valid as a credit against the VAT payable if issued within 12 months from the date of the supply	The VAT Bill proposes to reduce the validity period to 6 months.	This is likely to increase the amount of unrecoverable VAT and taxpayers need to be vigilant to ensure that they are not caught out.
Part VI: Deduction of input tax			
Period within which input tax can be claimed	The taxpayer can claim input tax within 12 months from the date of the invoice.	The restriction on deduction of input tax has been reduced to 3 months. However, the VAT Bill allows the deduction of input tax on the basis of certified copies of the invoice.	Taxpayers will have to be very efficient in their documentation otherwise it is likely that significant input tax may be lost on account of delays deducting the input tax.

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Restricted input tax	The list of restricted input tax is contained in the VAT Order and includes passenger vehicles, supplies for use in staff houses, entertainment services	Restricted items now included in the main Act but limited to purchase and maintenance of passenger vehicles and entertainment services.	The restricted items have been reduced but where the passenger vehicles and entertainment services are incurred to generate business, the related input tax should be allowed. However in most countries input tax is not allowed on entertainment services due to the danger of abuse.
Apportionment of input tax between exempt and taxable sales	Provides for the apportionment of total input based on the ratio of taxable sales to total sales, or direct attribution of input to exempt sales, taxable sales and apportionment of the balance. Taxpayers allowed full deduction of input tax if ratio of taxable sales to total sales is over 95%.	Only allows direct attribution and does away with the requirement for annual reconciliation. Where the ratio of taxable sales to total sales is over 90%. The taxpayer is allowed a full deduction of the input tax.	This eliminates the need for many methods which was confusing and is the most tax optimal method from those currently available. Further elimination of the annual reconciliation of input tax will ease the cost of filing the returns The reduction of the threshold for total input tax claim to 90% is a welcome move.
VAT refund	Where a person is in a credit position as a result of making zero-rated supplies, he can apply for a refund of the excess input tax within 12 months from the date of the return. Any application within 13-24 months has to be done upon receiving approval from the Commissioner	No time limit for filing returns.	Removal of the time limits will allow taxpayers to consolidate the VAT refunds especially where the amounts are small. However, the provision has not addressed the issue of the KRA paying taxpayers interest where the refunds are not paid expeditiously.

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Refund for tax paid in error	The taxpayer can apply for a refund within 12 months from the date the tax became due and payable	The taxpayer may apply for a refund within 3 months from the date the tax became due and payable.	Taxpayers will now have to be vigilant to ensure that they do not miss out the refunds where taxes are paid in error.
Part VII: Collection and recovery of tax			
Interest charges during the application for waiver of interest	No Provision and interest is assumed to continue to accrue while the waiver is under consideration	The interest stops accruing when the taxpayer makes an application for waiver of interest. If the interest is not waived in full the balance is payable within 90 days from the date the decision is communicated and any amounts outstanding after this date will start to accrue interest at the rate of 2% per month.	This provision addresses the issue of accumulation of interest during the waiver processing period. Due to the length of time it takes to process the waiver, the additional interest can be massive and this new provision should help taxpayers. It also gives the taxpayers 3 months to pay the interest without worrying about receiving an agency notice from the KRA.
Remission of VAT	Minister has powers to remit tax on capital expenditure above KShs 1m, or taxable supplies for emergency relief, goods for use in oil exploration activities and supplies for use in customs boned warehouses.	No provision for remission of VAT	One of the key drivers for the change in the VAT legislation has been to reduce the number of incentives given to investors. This is largely a cash flow issue since the investors get a deduction for the input tax either way. However, it is likely to increase the investment funding costs since it takes a significant amount of time for investors to recover the input tax on large investment expenditure.

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Collection of tax on imported goods	The Commissioner for Customs had power to collect VAT on imported goods based on the provisions of the VAT Act	The Commissioner for Customs is now allowed to apply the powers under the East Africa Customs Management Act to collect VAT due on imports	This streamlines the collection of tax on imported goods and also ensures that the customs officers who may not be knowledgeable on the VAT provisions operate under legislation they are familiar with.
PART IX – Registration and Deregistration			
Impact of disposal of capital assets or cessation of business on registration threshold	No provision	The disposal of a capital asset or disposal of business on cessation of operation will not be taken into account when determining the registration threshold.	The new provision clarifies the tax treatment in case of one-off transactions which are above the registration threshold.
Voluntary registration	No provision	Taxpayers who do not meet the threshold can register for VAT.	This gives the taxpayers the option to select to operate under turnover tax or to apply VAT and income tax.
Part X: Record keeping			
Record keeping languages	No Provision	Records to be maintained in English and Kiswahili	This is in compliance with the Constitution which recognizes both English and Kiswahili.
Extension of time for filing of tax return	No Provision	Taxpayers can apply to the Commissioner for extension of the return filing deadline.	This is unlikely to be useful in practice as the KRA will likely deny applications for extension.

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Limitations on estimated assessments for failure to file returns	No limitation	The Commissioner cannot issue an estimated assessment after the lapse of five years from the date that the return was due.	There is likely to be an increase in estimated assessments to ensure that the Commissioner is not time-barred under the new provision.
Amendment of self-assessment	No provision	The taxpayer can on application to the Commissioner amend the VAT return as follows: a) in case of willful neglect or fraud at any time; b) any other instances within 5 years from the date the return was due. Upon the receipt of the request for amendment, the Commissioner is required to write to the applicant within 45 days accepting or rejecting the request for amendment. The Commissioner is to provide the applicant with an amended assessment within 30 days.	There is a contradiction in the timelines since the Commissioner is given 45 days to respond to the request for amendment but only 30 days to issue an amended assessment, yet logically the approval should come before the amended assessment. It is not clear whether any additional tax arising from the amendment will be subject to interest, otherwise there is little incentive for the taxpayers to self-declare.
Seizure of documents for purposes of tax audits	The Act allows the Commissioner or an authorized officer to enter a taxpayer's premises and to seize any records that are necessary for purposes of carrying out a tax audit.	In addition to the current provisions, the Finance Bill provides that: a) The Commissioner shall sign for and return the documents within fourteen days but in any case not more than six months unless they are required as evidence in proceedings under the Act; b) The taxpayer is allowed access to the documents while in the KRA's custody.	The additional provisions will help to ensure that the power to seize document is not abused and that the taxpayer has access to the documents should they be required to lodge an objection against any assessment arising out of the KRA investigation.

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PART VIII: Objections			
Timelines for objections	The current legislation provides the timelines within which the taxpayers are required to respond to KRA assessments but do not provide corresponding timelines for the KRA to respond.	The new timelines in assessments are as follows: a) Taxpayers to respond to assessment within 30 days; b) Commissioner to respond to the objection within 30 days from date of objection; c) Where the assessment is to be amended, the Commissioner to serve the taxpayer with the Notice of amendment within 15 days d) Where the Commissioner does not respond to a Notice of Objection within 60 days, he will be deemed to have agreed to the objection	The new timelines will facilitate the completion of assessments in good time and prevent the current scenario where resolution of assessments can take several years.
Part XV: Public and private rulings on application of the VAT Act			
Public rulings	No Provision	The Commissioner can now make public rulings on the application of any provision in the VAT Act through Notice in at least two (2) newspapers with a national circulation. The public ruling is binding on the Commissioner but not on the taxpayers	This will allow uniformity in the application of contentious issues in the VAT Act while allowing taxpayers who do not agree with the Commissioner's interpretation to contest the rulings.

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Private rulings	No Provision	A taxpayer can apply to the Commissioner for a private ruling on the tax implication of a given transaction. The private ruling is binding on the Commissioner. The Commissioner can refuse to give a private ruling in the following instances: a) The issue is covered in a public ruling; b) The issue is the subject of a tax audit or assessment; c) The application is frivolous; d) The proposed transaction has not taken place or is unlikely to take place; e) The Commissioner lacks the resources to provide the required ruling Where the Commissioner refuses to give a ruling, he is expected to serve the applicant with a written notice of the refusal.	Taxpayers have previously requested for rulings from the KRA on various transactions but there has been no legal provision for the applications. The provisions will allow taxpayers to seek advance rulings before they embark on transactions whose tax implication is not clear from the tax legislation. Since the rulings are binding on the Commissioner, the taxpayer is protected should the rulings subsequently be deemed to be in breach of the legislation.
Part XVI: Tax avoidance schemes	No provision	The Commissioner can deem a scheme entered into by a person to have been designed to evade tax if the main purpose of the scheme was to give rise to a tax benefit. A scheme is defined as a course of action, agreement, arrangement, promise, plan,	This provision aligns the VAT legislation with the provisions in the Income Tax Act on tax avoidance. It is likely to give the KRA additional firepower to pursue transaction that it deems purely designed to obtain a tax benefit. However, it ignores the fact that if the tax

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		proposal or undertaking whether legally enforceable or not. A tax benefit includes, reduction in tax liability, increase in input tax entitlement, entitlement to a refund or postponement of tax liability. Where the Commissioner deems a scheme to have been entered solely to obtain a tax benefit, he shall ignore the transaction and assess tax as though the transaction did not happen.	legislation leaves loopholes, then taxpayers are entitled to take advantage of the loopholes to reduce or postpone their tax liability.
First Schedule – Exempt Supplies			
Goods	The VAT Act contains an exemption list with over 400 items.	The following items remain exempt: a) Seeds of various kinds; b) Live animals, fish and birds; c) Unprocessed meats and milk d) Fertilizer; e) Fruits and vegetables; f) Cereals; and g) Plant and machinery. Items not included in exemption: a) Flour b) Newspapers; c) Mobile phones;	Taxpayers who sell exempt supplies are not eligible for a deduction of the input tax they incur on purchases used to make the supplies. The input tax is passed on to the consumers as part of the price. With the removal of the exemption status, the taxpayers will be able to claim the input but will be required to charge VAT at 16% on their sales. Currently, the input tax that most taxpayers incur is on supplies such as electricity and transportation which is minimal. The removal of the exemption status will

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		d) Charcoal; e) Helicopters and airplanes; and f) Guns and military weapons. Petroleum oils and fuels remain exempt under a three (3) year transitional arrangement which can be revoked earlier.	therefore result in a substantial increase in the cost of the supplies.
Services	23 services are currently exempt from tax.	The following services have been deleted from the exempt list: a) Management of unit trusts and collective investment schemes b) Credit Reference Bureau services c) Sanitary and pest control services provided to households; d) Postal services e) Tour operation and agency services f) Airport landing and parking fees	The proposed VAT exempt list is largely in accordance with internationally accepted principles on services that ought to be exempt. However, stakeholders in the airline industry will be affected by the introduction of VAT on airport landing and parking fees while the increase in VAT on postal services will make it accelerate the decline of the Kenya Postal Corporation. The financial services sector will also see increased cost on credit reference services which will be subject to VAT while management of unit trusts and collective investment schemes will also be subject to VAT reducing the attractiveness of these investment vehicles.

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Schedule II: Zero-rated supplies			
Services	The VAT Act has a list of 22 zero-rated supplies including export of goods and services, supply of services to aircraft and ships in transit, and international transportation of passengers, among others.	The following services are now excluded: a) Services supplied by hotels to foreign tourism promoters b) Supply of electricity to households (restricted to 200 kilowatt hours) c) Supply of services to goods in transit d) Supply of water drillings services e) Transportation services in respect of unprocessed agricultural produce f) Supply of taxable services to ships g) Supply of services to film producers	Most of the exemptions were designed to provide incentives to priority sectors such as film production, tourism, water supply and subsidizing electricity supplies to domestic households. With the removal of the incentives, the cost of providing services to the sectors will increase. For domestic households, the price of electricity will increase while persons transporting goods through Kenya will incur an additional cost of 16% on supplies procured locally to facilitate the transport of their goods through Kenya.
Goods	The VAT Act has a list of over 300 zero-rated supplies including pharmaceuticals, Flour, agricultural implements, milk, LPG, Kerosene, sanitary towels, text books, and computers among many others.	No zero-rated goods except the supply of goods on export or the supply of taxable goods to specified privileged persons. The key items affected include: • Pharmaceuticals • Milk • Maize flour • Kerosene and LPG • Animal feeds • Human blood • Photographic films • Insecticides	Many taxpayers dealing in zero-rated sales have had a huge problem with the VAT refund backlog and the introduction of VAT on the goods will address the VAT backlog. However, the move will result in an increase in the cost of the supplies. While protests have been most vocal on basic food items, the impact on pharmaceuticals, farm implements and textbooks is likely to be equally painful for low income groups. While the Government has indicated that it will

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		• Printed materials • Sanitary towels • Tractors and other agricultural implements • Textile machinery • Computers and computer software • Generators • Bicycles and motor cycles • Prime movers and passenger vehicles with a capacity of over 25 persons • Ambulances and medical equipment • Baby nappies • Ordinary bread • Aircraft and aircraft operations parts • Materials for construction of tourist hotels	put in place interventions to cushion vulnerable groups likely to be affected by the change in legislation, it is highly unlikely that the Government will meet the logistical challenges involved in reaching out to all people that will be negatively affected. Due to pressure from civil society groups the Government has agreed to exempt flour and bread from VAT. However, the fight on the taxation of basic commodities is likely to be prolonged and bitterly fought.
Privileged persons	There are over 30 organizations which are allowed to import specified goods without paying VAT.	The following organization have been removed from the list: • The president • The Armed Forces • Charitable organization excluding St Johns Ambulance and Red Cross • Equipment for disable persons • President's Award Scheme • Safari Rally Drivers • Kenya Police, NSIS, Kenya Prisons and Kenya Wildlife Services Rural Electrification Authority	The biggest impact is likely to be on the disabled persons and also on the rural electrification programme which will see an increase of 16% on purchases.