International Economic Law Clinic

DOCUMENTATION AND ANALYSIS OF THE EFFECTIVENESS OF IMPOSING TAXES ON TOBACCO PRODUCTS IN KENYA

October, 2023, Nairobi

Submitted by

Florence Atieno

Susan Watila

Esther Omanga

Lydia Maina

TO:

International Institute for Legislative Affairs
P.O. Box 1542-00200, Nairobi, Kenya

Email: info@ilakenya.org

Table of Contents

1. 0 BACKGROUND

1.1 Introduction

The use of tobacco products is a leading cause of Non-Communicable Diseases (NCDs) in the country and globally. NCDs account for half of all hospital admissions, and nearly half of all fatalities (Kenya NCD Strategic Plan 2021/2022-2025/26). Globally, smoking is estimated to cause about 71% of all lung cancer deaths, 42% of chronic respiratory diseases, and nearly 10% of cardiovascular diseases nearly almost[1]. There are about 1.3 billion smokers worldwide, and 8 million deaths annually. About 11% of the Kenyan adult population and 9.9% of youth currently consume different types of tobacco products (Tobacco Atlas).

Given the above situation, several tactics are required to curb the increasing prevalence of tobacco and nicotine products; the key among these is employing fiscal policy measures. Tobacco taxes and consumption are strongly inversely related worldwide. Over 100 studies demonstrate a strong negative relationship between cigarette pricing and consumption[2]. Yet it is the least utilized tactic among several proposed by the Framework Convention on Tobacco Control. As a signatory to the FCTC, Kenya is legally bound to put in place and implement policy and legislative measures to curb the prevalence of tobacco use.

Kenya has embraced fiscal policy via tax legislation in varying forms, either with a purposeful intent to protect health rights or as an indirect result in pursuing other objectives. Given the pendency of this fiscal/tax legislation for over a decade, it behooves tobacco control advocates to analyze the impact and efficacy of said policies and legislation to comprehend the current situation better. This will help devise relevant, effective policy/legislative advocacy mechanisms to mold the tobacco control legal landscape from a fiscal perspective.

[1] Line H et al. Tobacco smoke, indoor air pollution and tuberculosis: a systematic review and meta-analysis. PLoS Medicine, 2007, https://www.who.int/nmh/publications/ncd_report_chapter1.pdf

[2] Chaloupka, Yurekli, and Fong 2012; Jha and Chaloupka 1999; Chapter 10Global Hazards of Tobacco and the Benefits of Smoking Cessation and Tobacco Taxes.

This study seeks to analyze the tax regimes in Kenya since the enactment of the Tobacco Control Act of 2007, the efficacy of these policies/legislation in reducing the access to and consumption of tobacco products, and the recommended way forward on the law regarding taxes or related fiscal policy on tobacco products.

1.2 Research Questions

i. What are Kenya's national and international laws regulating fiscal policy and excise tax?
ii. How have the laws and fiscal policy/tax systems evolved since the coming into force of the 2010 Constitution to date?
iii. What is the efficacy of the said tax legislation/or fiscal policy related to tobacco products; in juxtaposition to similar regulatory systems in other jurisdictions designed to support advancing health rights via curbing tobacco product use?
iv. What are the policy recommendations about relevant international legal frameworks or best practices in other jurisdictions geared towards improving the efficiency of the legal fiscal/tax mechanisms on tobacco products?

1.3 Objectives of the Study

1.3.1 Main objective

The primary purpose of this study is to document and analyze the effectiveness of imposing taxes on tobacco products in Kenya to curb the prevalence of their consumption with the view of protecting public health rights.

1.3.2 Specific Objectives

i. To identify national and international laws regulating Kenya's fiscal policy and excise tax regulation.
ii. To trace the evolution of said laws and fiscal policy/tax systems since the coming into force of the new constitution to date.

iii. To analyze the efficacy of said tax legislation or fiscal policy related to tobacco products; in juxtaposition to similar regulatory systems in other jurisdictions designed to support advancing health rights via curbing tobacco product use.

iv. To formulate policy recommendations about relevant international legal frameworks or best practices in other jurisdictions geared toward improving the efficiency of the legal fiscal/tax mechanisms on tobacco products.

2.0 LEGAL FRAMEWORK ON REGULATION OF FISCAL POLICY AND EXCISE TAX IN KENYA

2.1 WHO Framework Convention on Tobacco Control (WHO FCTC)

Its objective is to protect the present and future generations from the repercussions of tobacco consumption to the health, economy, and the environment by adopting measures and mandating its signatories to also adopt and maintain these measures. Kenya signed, ratified, and adopted this Convention on 25th June 2004. As a signatory, Kenya is mandated to develop and maintain measures designed to reduce the demand for tobacco. These measures are tax and price measures and non-price measures, including public awareness, regulation of tobacco content, advertisement, and labeling and packaging measures.

Besides being obligated to come up with and maintain tax and price measures, states must appreciate their importance in reducing tobacco consumption, especially among the young population.[3] In establishing these measures, states should consider public health objectives.[4] The states are also mandated to provide the rates of tobacco product taxation and the statistics of its consumption in their reports to the Conference.[5] There are also non-price measures aimed at reducing the demand for tobacco listed in the Convention, which states are supposed to implement. States should implement legislative, administrative, or executive measures that protect persons from exposure to tobacco smoke.[6] For instance, states shall treat tobacco dependence by

[3] Article 6(1) of WHO FCTC.
[4] Article 6 (2)(a) and (b) of WHO FCTC.
[5] Article 6 (3) of WHO FCTC.
[6] Article 8 of WHO FCTC.

establishing rehabilitation centers. Although Kenya appears to have a large number of rehabilitation centers, only 34 NACADA-accredited drug misuse treatment centers are equipped to address tobacco dependency, and most of them are private establishments.[7] This brings up concerns about pricing and accessibility to these establishments because a majority of tobacco addicts cannot afford to pay to private institutions. Another critical measure is education, training, and public awareness of the health risks like being addicted and exposure to its smoke.[8]

Other measures include the ban on the advertisement and promotion of tobacco, prohibition of the labeling of tobacco products in such a way as to mislead the consumer that they are less harmful, and regulation of the contents of tobacco through measuring and testing.[9]

The Convention also mandates states to curb the illicit trade of tobacco that is counterfeiting, smuggling, and illegal manufacturing.[10] This is by coming up with legislative, executive, and administrative measures. It is recognized that selling tobacco to minors is an illegal activity, so states should adopt all the measures necessary to curtail this behavior.[11]

2.2 The East African Community Common External Tariff 2022 version

Tobacco use regulation within the East African Community can be discussed in the view of one of the community's major integration pillars, the Customs Union.[12] Within this pillar, internal tariffs and non-tariff barriers that could hinder trade between the EAC Partner States were to be eliminated to facilitate the formation of one large single market and investment area.[13] Similarly, policies relating to trade between the Partner States and other countries, such as external tariffs, were to be harmonized.[14]

Subject to the powers conferred upon the EAC Council of Ministers by Articles 12 (2) and (3) and 39(1) (c) of the Protocol,[15] the Council of Ministers reviewed and adopted a four-band standard

---

[7] Tobacco Control Data Initiative 'Tobacco Cessation in in Kenya' accessed at <https://kenya.tobaccocontroldata.org/en/home/cessation/>

[8] Article 12 of WHO FCTC.

[9] Article 9 of WHO FCTC.

[10] Article 15 of WHO FCTC.

[11] Article 16 of WHO FCTC.

[12] Article 2 of the Treaty for the Establishment of the East African Community.

[13] Article 10 of the Protocol on the Establishment of East African Community Customs Union.

[14] Ibid Article 12

15 Articles 12(3 and (3) & 39(1) (C) of the Protocol on the Establishment of the EAC Customs Union.

external tariff structure for the Community 2022. This structure has a minimum rate of 0 percent, rates of 10 percent, 25 percent, and a maximum rate of 35 percent for all products imported into the Community. It commenced on the 1st day of July 2022.[16]

Chapter 24 of this version CET Version is fundamental to regulating tobacco imports. The tobacco and tobacco products are rated at 35% per kilogram and include un-manufactured tobacco and tobacco refuse which are not stemmed/stripped, tobacco, partly or wholly derived/stripped, cigars, cheroots, cigarillos, and cigarettes, of tobacco or tobacco substitutes, Cigarettes containing tobacco of a length not exceeding 72 mm in length including the filter tip, Smoking tobacco, Water pipe tobacco, Products containing tobacco, reconstituted tobacco, nicotine, or tobacco or nicotine substitutes, intended for inhalation without combustion, other nicotine-containing products intended for the intake of nicotine into the human body and lastly products containing nicotine for oral application and transdermal application.[17]

Noteworthy, the EAC CET regulation is geared towards the reduction of imports to protect the EAC Common Market not rather than necessarily the reduction of Tobacco Consumption within the community. The elimination of the internal tariffs facilitates the consumption of tobacco and its products produced by the EAC Partner states in Kenya.

2.3 The Constitution of Kenya 2010

The promulgation of the Constitution of Kenya 2010 saw the guarantee and expansion of human rights to include human dignity, healthcare, consumer rights, and the right to a clean environment which has given new meaning to fundamental human rights. In the ambit of protecting these rights, the Constitution controls tobacco use for various reasons. As mentioned in the introductory part of this study, the use of tobacco causes the most significant number of deaths and diseases in the world today that could be prevented. Consequently, it increases the risk of having a range of fatal conditions, including cardiovascular attacks, coronary heart disease, cancer and asthma, reproductive health risks, and respiratory tract infections. All these risks have threatened the right to the highest attainable health standards as guaranteed under Article 43 of the Constitution.[18] The

16 Ibid.

[17] EAC Common External Tariff 2022 Version.

[18] Article 43 of the Constitution of Kenya 2010.

freedom to a clean and healthy environment,[19] including a tobacco-free atmosphere, is also threatened by the adverse effects experienced in tobacco growing areas as well as the use of tobacco products. Curing tobacco itself has also led to deforestation, soil erosion, and other environmental hazards. The curing plants (barns) have exposed farmers to tobacco smoke, thus increasing the chances of suffering from tobacco-related diseases.

The need for the realization and full enjoyment of these rights, coupled with the need for the government to raise revenue, has led to the enactment of fiscal policies and legislation relating to the taxation of tobacco products in Kenya. In this regard, Article 209 of the Constitution empowers the National Assembly to impose Value Added Tax, Customs duties on imports and exports, excise duty tax, and entertainment taxes.[20]

It is based on this constitutional provision that the legislation relating to tobacco taxation after 2010 was enacted or reviewed. Being the supreme law of the land, Constitutional conditions dictate the contents of all tax legislation relating to tobacco use.

2.4 Tobacco Control Act (2007)

This Act was established to give effect to the WHO FCTC. This Act aims to control the manufacture, production, promotion, labeling, selling, and sponsorship of tobacco products in Kenya.[21] Its end goal is to protect the health of its citizens, protect the right of non-users to a smoke-free environment, inform the public of the risks of using tobacco and being exposed to its smoke, protect minors' health by preventing their access to the products and protection of consumers from misleading statements by sellers to lure them into purchasing these products.[22]

The Act mandates the government to promote awareness of the repercussions of consuming tobacco, such as addiction, disease, and death, to the public through authorities, ministries, and various agencies.[23] The ministry is responsible for education to integrate the teaching of the effects of tobacco consumption at all levels of learning in both public and private institutions.[24]

---

[19] Article 42 of the Constitution of Kenya 2010.
[20] Article 209 of the Constitution of Kenya 2010.
[21] Section 3 of the Tobacco Control Act.
[22] Section 3 of the Tobacco Control Act.
[23] Section 9 of the Tobacco Control Act.
[24] Section 10 of the Tobacco Control Act.

The Act makes provisions for tax and price policies as a legislative measure. The minister for finance has the responsibility of implementing tax policies and price policies to contribute to the objectives of this Act.[25] The Minister is also in charge of restricting intercontinental travelers' importation or sale of tax-free tobacco travelers.[26]

2.5 Value Added Tax Act

This Act provides a framework for imposing VAT on supplies made or imported to Kenya. Tobacco products fall under this ambit because they are made in Kenya, and some are imported into Kenya.

Value-added tax (VAT) is paid when a person consumes taxable goods. This tax is typically in the price of goods, and it is hard for a consumer to notice they have been deducted VAT. It is currently at 16%[27] and goods the seller of goods does remittance. VAT is charged on taxable goods imported to Kenya, taxable supplies made by a registered person in Kenya, and supplies of imported taxable goods.[28] Tobacco products in Kenya are also subjected to VAT at the rate of 16% on imports, exports, and those sold in the country.

Tobacco product consumers bear the tax burden because of the high prices. Consumers of tobacco products are primarily addicted to the products making the demand for the products inelastic.[29] This way, they bear the most tax burden; thus the supplier can shift the tax burden through higher prices.[30]

2.6 The Excise Duty Act (2015)

The Excise Duty Act of Kenya governs the taxation of various goods and services in the country, including tobacco and tobacco products. The Act outlines the rates and rules for the imposition of excise duty on these products. This Act introduced inflation adjustment on specific rates of excisable goods in 2015. The Act gives power to the minister to adjust specific tax rates every year based on the previous year’s average inflation rate.

---

[25] Section 12(a) of the Tobacco Control Act.
[26] Section 12 of the Tobacco Control Act.
[27] Section 5(2)(b) of the Value Added Tax.
[28] Section 5(1) of the Value Added Tax.
[29] Elasticity and tax revenue (article) | Khan Academy.
[30] Ibid 28.

Regarding tobacco and tobacco products, the Act imposes specific rates of excise duty based on the type of product, the product's weight or volume, and the production method. For instance, Cigars, cheroots, and cigarillos, containing tobacco or tobacco substitutes attract a specific excise duty rate of Shs 15,296 per kilogram.[31] Similarly, Cigarettes with filters (hinge lid and soft cap) attract an excise duty rate of Shs.3825.99 per milliliter, while Cigarettes without filters (plain cigarettes) attract 2,752.97 per milliliter.[32] Other manufactured and manufactured tobacco substitutes including homogenous and reconstituted tobacco extracts and essences, attract an excise duty of Shs.10, 707.88 per kg.[33]

This Legislation also penalizes the manufacture, distribution, or sale of tobacco products without the appropriate excise duty payment or licenses.[34] Failure to comply with the regulations may result in fines, imprisonment, or both.[35]

These measures specifically aim to generate revenue for the government and discourage tobacco product consumption in the country.

3.0 EVOLUTION OF TOBACCO CONTROL FISCAL LAWS

Rates of excise duty on tobacco and tobacco products 2008-2023

The taxation of tobacco products has had different tax structures over the years. Before 2008, there was no tiered structure; only one rate was applied to all tobacco products since there was no specific floor. The rate of 130% on the product's value is applied to all tobacco products. The Minister for Finance proposed the amendment of the tax structures to the one based on packaging characteristics from Retail Sales Price (RSP via the Finance Bill 2007. This bill was rejected. Instead, the earlier structure based on RSP was maintained. In 2008, the Treasury amended the tax structure from pure RSP to a hybrid system that included both RSP and packaging characteristics. This was the basis for the introduction of the Finance Act 2008. The Finance Act 2008 introduced a tier system by amending Part II of the 5th Schedule to the Customs and Excise Act, Cap 472. This was because before 2008, there was yet to be a tiered structure, yet there was a need for one

[31] The First Schedule, Part 1 of the Excise Duty Act No.23 of 2015.
[32] Ibid.
[33] Ibid.
[34] Section 38 of the Excise Duty Act No. 23 of 2015.
[35] Ibid.

to have a specific floor of taxes. The rate of 130% on the product's value is applied to all tobacco products. The introduced rates were; Plain cigarettes or plain cigarettes of RSP of up to Kshs. 2,500, the rate per milliliter was KES. 700. Soft cap cigarettes of 72mm or less or soft cap cigarettes of 72mm or less with RSP of Kshs. 2,501-3,500, rate per milliliter was KES. 1,000. Soft cap cigarettes of more than 72mm or soft cap cigarettes of more than 72mm of RSP of Kshs. 3,501-4,500, rate per milliliter was KES. 1,500. Hinge lid cigarettes or hinge lid cigarettes of RSP of more than Kshs. 4,500, rate per milliliter was KES. 2,500.

In the Finance Act 2010, the parliament amended the tax structure of cigarettes by reverting to the RSP structure. In addition, a 30% import duty on the cost and freight (CIF) value of the products imported beyond the East African Community (EAC) and a 16% VAT on the producer price was applied. The excise duty on other manufactured tobacco products was charged 130 percent of the ex-factory price. In addition to these taxes, all imports attracted an import declaration fee of 2.25 percent irrespective of the origin.

There was a need by the government to introduce a simplified tax structure; thus in 2012, a Finance Bill sponsored by Robinson Githae the minister for finance, was tabled in parliament. The bill proposed introducing a single-tier tax system to adjust to inflation. This, therefore, ushered in the Finance Act of 2012. The Finance Act 2015 introduced a single-tier system by amending Part II of the 5th Schedule to provide for the rate of KES. 1,200 per milliliter or 35% of RSP, whichever is higher. This was an increase in the price. Adjustment of the tax rates led to an increase in the nominal price; the real price per pack of cigarettes fell from KShs. 142 in 2006 to KShs. 92 in 2013. One reason for lowering the real price is the large proportion of purchases in the form of sticks rather than packs. In Kenya, the ITC Kenya Survey shows that in 2012, 64% of total sales were in stick form, and the average price of 20 sticks or a pack in stick purchase was KShs. 93, whereas the average price of 20 sticks in a pack purchase was KShs. 103. The widespread allowance of cigarette purchase in stick form thus makes cigarettes more affordable. More stringent adherence to the current legislation banning stick sales would help prevent increased affordability from purchasing single cigarettes. [36]

[36] "Research: Cigarette Taxation in Kenya at the Crossroads: Evidence and Policy Implications" (*Tobacconomics*) <https://tobacconomics.org/research/cigarette-taxation-in-kenya-at-the-crossroads-evidence-and-policy-implications/>

In 2015, the EDA was enacted, introducing new rates at Part I of the First Schedule. This Act introduced inflation adjustment on specific rates of excisable goods which gave power to the minister to adjust specific tax rates every year based on the previous year's average inflation rate. The rate was KES.10,000 per kg for cigars, cheroots, cigarillos, and tobacco substitutes. For electronic cigarettes, KES. 3,000 per unit. For cartridges for use in electronic cigarettes, KES. 2,000 per unit. For cigarettes containing tobacco or tobacco substitutes, KES. 2,500 per milliliter. Finally, other manufactured and manufactured tobacco substitutes: "homogenous" and "reconstituted tobacco"; tobacco extracts and essences KES. 7,000 per kg.

The Finance Act, of 2017, deleted the description "cigarettes containing tobacco or tobacco substitutes" and the corresponding rate and introduced the following rates: Cigarette with filters (Hinge lid and soft cap) KES. 2,500 per milliliter and Cigarettes without filters (plain cigarettes) KES. 1,800 per milliliter. This was made to the EDA.

The Finance Act 2019 increased the rates to the following prices: Cigars, cheroots, cigarillos, containing tobacco or substitutes to KES. 12,624 per kg, electronic cigarettes to KES. 3,787 per unit, cartridge for use in electronic cigarettes to KES. To KES. 2,525 per unit, cigarettes with filters (Hinge lid and soft cap). 3,157 per milliliter, cigarettes without filters (plain cigarettes) to KES. 2,272 per mille and other manufactured tobacco and manufactured tobacco substitutes: "homogenous" and "reconstituted tobacco"; tobacco extracts and essences to KES. 8,837 per kg.

In 2020, Legal Notice 194 2020 provided an inflationary adjustment (4.94%) to reflect new rates. Cigars, cheroots, and cigarillos, containing tobacco or tobacco substitutes from KES. 12,624 per kg to KES. 13,247.63 per kg. Cartridge for use in electronic cigarettes from KES. 2,525 per unit to KES. 2,649.74 per unit. Electronic cigarettes from KES. 3,787 per unit to KES. 3,974.08 per unit. Cigarettes with filters (Hinge lid and soft cap) KES. 3,157 per mille to KES. 3,312.96 per mille. Cigarettes without filters (plain cigarettes) from KES. 2,272 per mille to KES. 2,384.24 per mille. Other manufactured and manufactured tobacco substitutes: "homogenous" and "reconstituted tobacco"; tobacco extracts and essences from KES. 8,837 per kg to KES. 9,273.55 per kg.

The Finance Act of 2021 introduced a new category of excisable products to be taxed at KES.1, 200 per kg. Products containing nicotine or nicotine substitutes intended for inhalation without combustion or oral application but excluding medicinal products approved by the Cabinet

Secretary responsible for matters relating to health and other manufactured tobacco and manufactured tobacco substitutes that have been homogenized and reconstituted tobacco, tobacco extracts, and essences. An example of an oral application product is LYFT (marketed as a product that helps with nicotine addiction but is reported to be even worse). This product was banned in 2020 by Mutahi Kagwe, the former Health Cabinet Secretary for being illegally registered by the Pharmacy and Poisons Board.[37]

Later, Legal Notice 217 of 2021 provided an inflationary adjustment (4.94%). Cigars, cheroots, and cigarillos, containing tobacco or tobacco substitutes were adjusted from KES. 13,247.63 per kg to KES. 13,906.04 per kg. Electronic cigarettes KES. 3,974.08 per unit to KES. 4,171.59 per unit. Cartridge for use in electronic cigarettes from KES. 2,649.74 per unit to KES. 2,781.43 per unit. Cigarettes with filters (Hinge lid and soft cap) from KES.. 3,312.96 per mille to KES. 3,477.61 per mille. Cigarettes without filters (plain cigarettes) from KES. 2,384.24 per mille to KES. 2,502.74 per mille. Other manufactured and manufactured tobacco substitutes: “homogenous” and “reconstituted tobacco”; tobacco extracts and essences from KES. 9,273.55 per kg to KES. 9,734.45 per kg.

The Finance Act of 2022 also increased the rates of cigarettes. In October 2022, an inflation adjustment of 6.3% was applied to these excise rates. Cigars, cheroots, and cigarillos containing tobacco or tobacco substitutes were grown from KES. 13,906.04 per kg to KES. 15,296.60 per kg. Electronic cigarettes were KES. 4,171.59 per unit and the new rate was deleted and replaced with a new provision. The cartridge for use in electronic cigarettes was KES. 2,781.43 per unit to the new one, which was deleted and replaced with a new condition. Cigarettes with filters (Hinge lid and soft cap) from KES. 3,477.61 per mille to KES.. 3,825 per mille. Cigarettes without filters (plain cigarettes) from KES. 2,502.74 per mille to KES. 2,752.97 per mille. Other manufactured and manufactured tobacco substitutes: “homogenous” and “reconstituted tobacco”; tobacco extracts and essences from KES. 9,734.45 per kg to KES. 10,707.88 per kg. Products containing nicotine from KES. 1,200 per kg to KES. 1,500 per kg.

The Act also provided that electronic cigarettes and other nicotine delivery devices (replacing Electronic cigarettes) be at 40% and liquid nicotine for electronic cigarettes (returning cartridges for use in electronic cigarettes) be at KES, 70 per milliliter.

[37] Margaret Wanjiru ‘Nicotine Pouches back in Kenyan Market after Ban’ The Star 18th November 2022.

The tax rates as seen from the above keep changing thus the complexity of these tax structures creates a barrier for taxation to achieve public health objectives and lower tobacco consumption prevalence.[38] Tax evolution in Kenya has been summarised in the tables below:

*Rates of excise dutyon tobacco and tobacco products (*2008-2022)
2008-Introduced by Finance Act, 2008

This table was introduced to Part II of the 5th Schedule to the Customs and Excise Act, Cap 472

category	*Description*	*Rate (all per mille) (a mille is a thousand)*
A	Plain cigarettes or plain cigarettes of RSP of up to Kshs.2,500	KES. 700
B	Soft cap cigarettes of 72mm or less or soft cap cigarettesof 72mm or less with RSP of Kshs. 2,501-3,500	KES. 1,000
C	Soft cap cigarettes of more than 72mm or soft cap cigarettes of more than 72mm of RSP of Kshs. 3,501-4,500	KES. 1,500
D	Hinge lid cigarettes or hinge lid cigarettes of RSP of more than Kshs. 4,500	KES. 2,500

2015- The EDA was enacted introducing newrates at Part I of the First Schedule

Description	***Rate***
Cigars, cheroots, and cigarillos, containing tobacco or tobacco substitutes	KES. 10,000 per kg
Electronic cigarettes	KES. 3,000 per unit
Cartridge for use in electronic cigarettes	KES. 2,000 per unit
Cigarettes containing tobacco or tobacco substitutes	KES. 2,500 per mille
Other manufactured tobacco and manufactured tobacco	

[38] NTA 'Study on effects of tobacco taxation on tobacco consumption in Kenya' Hush creative ke (221) 11

substitutes: "homogenous" and "reconstituted tobacco"; tobacco extracts and essences	KES. 7,000 per kg

2017- Amendment of Part I of the FirstSchedule to the EDA

The Finance Act, of 2017, deleted the description "cigarettes containing tobacco or tobacco substitutes" and the corresponding rate and introduced the following rates in its place:

Description	***Rate***
Cigarette with filters (Hinge lid and soft cap)	KES. 2,500 per mille
Cigarettes without filters (plain cigarettes)	KES. 1,800 per mille

Notably, the other rates remained the same.

2019- Finance Act, 2019, increases rates

Description	***Rate***
Cigars, cheroots, and cigarillos, containing tobacco or tobaccosubstitutes	KES. 12,624 per kg
Electronic cigarettes	KES. 3,787 per unit
Cartridge for use in electronic cigarettes	KES. 2,525 per unit
Cigarettes with filters (Hinge lid and soft cap)	KES. 3,157 per mille
Cigarettes without filters (plain cigarettes)	KES. 2,272 per mille
Other manufactured tobacco and manufactured tobacco substitutes: "homogenous" and "reconstituted tobacco"; tobacco extracts and essences	KES. 8,837 per kg

2020- Legal Notice 194 of 2020
(Inflationary adjustment (4.94%)

Description	***Old Rate***	***New Rate***

Cigars, cheroots, and cigarillos, containing tobacco or tobacco substitutes	KES. 12,624 per kg	KES. 13,247.63 per kg
Electronic cigarettes	KES. 3,787 per unit	KES. 3,974.08 per unit
Cartridge for use in electronic cigarettes	KES. 2,525 per unit	KES. 2,649.74 per unit
Cigarettes with filters (Hinge lid and soft cap)	KES. 3,157 per mille	KES. 3,312.96 per mille
Cigarettes without filters (plain cigarettes)	KES. 2,272 per mille	KES. 2,384.24 per mille
Other manufactured tobacco and manufactured tobacco substitutes: "homogenous" and "reconstituted tobacco"; tobacco extracts and Essences	KES. 8,837 per kg	KES. 9,273.55 per kg

2021- Legal Notice 217 of 2021
(Inflationary adjustment (4.94%)

Description	***Old Rate***	***New Rate***
Cigars, cheroots, and cigarillos, containing tobacco ortobacco substitutes	KES. 13,247.63 per kg	KES. 13,906.04 per kg
Electronic cigarettes	KES. 3,974.08 per unit	KES. 4,171.59 per unit
Cartridge for use in electronic cigarettes	KES. 2,649.74 per unit	KES. 2,781.43 per unit
Cigarettes with filters (Hinge lid and soft cap)	KES. 3,312.96 per mille	KES. 3,477.61 per mille
Cigarettes without filters	KES. 2,384.24 per mille	KES. 2,502.74 per mille

(plain cigarettes)		
Other manufactured tobacco and manufactured tobacco substitutes: “homogenous” and “reconstituted tobacco”; tobacco extracts and essences	KES. 9,273.55 per kg	KES. 9,734.45 per kg

2022- Finance Act, 2022

Description	***Old Rate***	***New Rate***
Cigars, cheroots, and cigarillos, containing tobacco ortobacco substitutes	KES. 13,906.04 per kg	KES. 15,296.60 per kg
Electronic ci;2garettes	KES. 4,171.59 per unit	*Deleted and replaced with A new provision*
Cartridge for use in electronic cigarettes	KES. 2,781.43 per unit	*Deleted and replaced with A new provision*
Cigarettes with filters (Hinge lid and soft cap)	KES. 3,477.61 per mille	KES. 3,825 per mille
Cigarettes without filters (plain cigarettes)	KES. 2,502.74 per mille	KES. 2,752.97 per mille
Other manufactured tobacco and manufactured tobacco substitutes: “homogenous” and “Reconstituted tobacco”; tobacco extracts and Essences	KES. 9,734.45 per kg	KES. 10,707.88 per kg
Products containing nicotine…….	KES. 1,200 per kg	KES. 1,500 per kg

2022- Finance Act, 2022

Description	***Rate***

Electronic cigarettes and other nicotine deliverydevices (*replacing electronic cigarettes*)	40%
Liquid nicotine for electronic cigarettes (*replacingCartridges for use in electronic cigarettes*)	KES, 70 per millilitre

4.0 THE EFFICACY OF THE TAX LEGISLATION AND FISCAL POLICY RELATED TO TOBACCO PRODUCTS; IN JUXTAPOSITION TO SIMILAR REGULATORY SYSTEMS IN OTHER JURISDICTIONS DESIGNED TO SUPPORT THE ADVANCEMENT OF HEALTH RIGHTS VIA CURBING TOBACCO PRODUCT USE

4.1 Whether the tax regime is sufficient to curb tobacco use

Tobacco excise taxation has been hailed as the most powerful tool for improving health and a reliable source of government revenues. Significantly increasing tobacco excise taxes encourages current tobacco users to stop using, prevents potential users from using tobacco, and reduces consumption among those who continue to use. The greatest most significant impact is on the young and the poor. Studies have shown that smoking can be perceived as a form of desired luxury, with advertisements and films promoting the narrative that smoking is attractive. Smoking is often associated with maturity and glamour in these films, advertisements, and promotions.[39]

As a result, higher tobacco excise taxes effectively reduce early death, disease, and economic costs caused by tobacco use. The positive health impact is even more significant when some of the revenues generated by tobacco tax increases support tobacco control, health promotion, and/or other health-related activities and programs.[40]

Taxation on tobacco products is, therefore by far the most effective and cost-effective public health measure to reduce tobacco consumption.[41] The tobacco industry has consequently a vested interest in undermining tax measures.

[39] Chapman S, Smokers: Why do they start and continue? World Health Forum 1995. Mauricio J, Tobacco smoking: from ‘glamour’ to ‘stigma’: A comprehensive review, Psychiatry and Clinical Neurosciences, 2015

[40] Maximizing the Effectiveness of Tobacco Excise Taxes.
by smokefreestjoe | Aug 3, 2018 <https://www.smokefreestjoe.org/maximizing-effectiveness-tobacco-taxes/>

[41] World Health Organization, The economic and health benefits of tobacco taxation, July 2015.

4.1.1 Tax Impact Avoidance by Tobacco Companies

Price Versus Taxes

For taxes to reduce tobacco consumption, the resultant prices passed to consumers must be high. However, tobacco companies employ price marketing strategies to undermine the effectiveness of taxation on tobacco consumption.[42] These strategies include;

Differential Shifting of Taxes

Instead of fully passing on the taxes on tobacco products to consumers, the industry may decide to shift taxes to different brands or different tobacco products: it comprises of shifting where the tobacco industry increases the price of products above that required by the tax increase. The burden of the tax increase (and more) falls entirely on the consumers rather than the producers.

Undershifting on the other hand occurs when the industry absorbs tax increases (to some extent), thus delaying or preventing the intended tobacco price rises. In this scenario, the producers bear at least part of the cost of the tax increase. This is one of the most frequently employed pricing strategies in the industry and has been identified in multiple countries worldwide.

TI persistently increases tobacco prices by over-shifting tax increases on premium products (those at the higher end of the market) but under-shifting on 'budget' products (in the lowest price segments) to keep their prices low.[43] This results in an increasing price gap between premium and budget products.

Introducing new brands, segments, or products

It has been observed that in Kenya, where multiple types of tobacco products are available, the increase in taxes on one product can encourage consumers to substitute or down-trade to cheaper alternative products, such as roll-your-own. A result of the tobacco industry's launch of cheaper

---

[42] A. Ajmal, V.I. U, Tobacco tax and the illicit trade in tobacco products in New Zealand, *Australian and New Zealand Journal of Public Health*, Apr 2015;39(2):116-20, doi:10.1111/1753-6405.12389.

[43] "How Tobacco Industry Keeps Smokers Hooked in The Wake of Increasing Taxes | NACADA -National Authority for the Campaign Against Alcohol and Drug Abuse" <https://nacada.go.ke/how-tobacco-industry-keeps-smokers-hooked-wake-increasing-taxes>

substitutes including cheaper variants of existing products and new price segments increases the opportunities for smokers to down-trade instead of quitting.[44]

Price smoothing

Following tax increases, tobacco companies 'smooth' prices by implementing price rises throughout the year by employing smaller, more frequent increases. This ensures that smokers never face a sudden, large, price increase, which could encourage quitting. Therefore, this effectively minimizes the public health impact of tax increases.[45]

4.2 Is there a need for uniform rates?

In 2015, there was the Excise Duty Act 2015 bill changed the tax regime from a hybrid system to a uniform specific tax system where the rate was set to ksh 2500 per 1000 cigarettes. The previous system was a tiered system before 2012. Studies have shown that the new 2015 enactment has simplified the tobacco tax regime making administration easier and more effective. This is in line with Article 6 of WHO FCTC.[46]

Many studies showed that the previous tiered regime was flawed and was not meeting its objective. For example, a study done by the National Taxpayers Association, an independent and non-partisan organization noted that the tiered tax regime was not beneficial in reducing tobacco consumption in Kenya.[47] Another study done by Nargis et al in 2015, came to the same conclusion that the tier tax system imposed on tobacco is not effective in reducing tobacco consumption. Nargis et al provided a solution which was to simplify the excise system to a uniform system.[48] Furthermore, the International Institute for Legislative Affairs (ILA) in 2011 found that the excise system in Kenya at the time posed a challenge because of the constant changes between specific

[44] "Emerging & Alternative Forms of Tobacco" (*HealthyChildren.org*) <https://www.healthychildren.org/English/health-issues/conditions/tobacco/Pages/Alternative-Forms-of-Tobacco.aspx>

[45] Gilmore A, Hiscock R, Tobacco industry strategies to keep tobacco prices low: evidence from industry data, Tobacco Induced Diseases, 16(1), 115. https://doi.org/10.18332/tid/84000

[46] Nargis N., Stoklosa M., Ikamari L., et al, Cigarette Taxation in Kenya at the Crossroads: Evidence and Policy Implications. University of Waterloo, Ontario, Canada, 2015

[47] National Taxpayers Association, Study on effects of tobacco taxation on tobacco consumption in Kenya.

[48] Nargis N, Cigarette Taxation in Kenya at the Crossroads, 2015

and ad valorem excise. As such, it was difficult for the tax regime to have a significant impact on tobacco consumption in Kenya.[49]

A policy brief drafted by the National Taxpayers Association has shown that the uniform tax regime has many benefits such as an increase in prices for the low-end tobacco products thus reducing tobacco consumption, especially among the youth and low-income households.[50]

What is the actual result of the uniform tax regime on tobacco consumption? In 2019, the tax structure of cigarettes was differentiated between cigarettes with filters which were taxed at a rate of ksh 2500 per 1000 cigarettes. Cigarettes without filters were taxed at ksh 1800 per 1000 cigarettes in 2017 and 2018 this rate increased to ksh 1895. This rate was applied until a Legal Notice that was published in 2019 was enacted. It is interesting to note that cigarettes with filters, are taxed at a higher rate than cigarettes without filters yet are less harmful.[51]

4.3 Is there a structure in place for the introduction of new products that hit the market?

The tobacco industry has found new ways of making their products to attract more buyers and to escape the provisions of the Tobacco Control Act.[52] These new products that these industries claim are non-tobacco are e-cigarettes and oral nicotine pouches which are made with new flavors. An example of an oral application product- is Lyft (marketed as a product that helps with nicotine addiction but is reported to be even worse).[53] This tobacco product, Lyft, was banned from the market by Mutahi Kagwe, the cabinet secretary of health in October 2020 because the Pharmacy and Poisons Board had illegally registered it but it is now back using the brand name Velo.[54]

The introduction of these products has led to an increase in consumption among the youth and women, unlike traditional tobacco products, which are consumed mainly by men.[55] According to a WHO study in 2020, the consumption rate was at 11%, and the majority were men.[56]

---

[49] International Institute for Legislative Affairs (ILA), Tobacco taxation in Kenya, 2011

[50] Policy brief, Tobacco Tax https://www.nta.or.ke/Resources/Reports/Policy%20Brief%20Tobacco%20Tax.pdf

[51] Schulz M, Are filter tipped cigarettes still less harmful than non-filter cigarettes? A laser Spectometric Particulate Matter Analysis from the Non-smokers point of view, International Journal of Environmental Research and Public health, 13(4), 2016.

[52]Otiato Opali 'Kenya anti-smoking activists face new challenge in tobacco substitutes' *China Daily* 21 February 2023 2

[53] W B Max & Others 'Modelling the impact of a new tobacco product: review of Philip Morris Internationals Population Health Impact Model as applied to the IQOS heated tobacco product' (2018) *BMJ*

[54] George Kebaso 'Tobacco pouches back only 2 years after ban' *People Daily* 2nd September 2022 1

[55] Ibid 1.

[56] Ibid 1.

Tobacco industries posit that these new products are less harmful to human health and are meant to reduce nicotine addiction while the intention is to increase their consumption to make it a norm. Research by WHO has shown that these products are indeed very harmful to human health.[57] The introduction of these products poses a challenge to the attempts of different groups of people, such as the Kenya Tobacco Control Alliance (KETCA), the International Institute for Legislative Affairs (IILA), and the Consumer Information Network (CIN) in fighting consumption of tobacco because tobacco industries are acting in utter violation of the Act and regulations. This is so because Tobacco Industries argue that the nicotine porches are tobacco-free so they cannot be regulated under the Tobacco Control Act. On 10th August 2023 Hon. Moses Kuria, the Cabinet Secretary Ministry of Investments, Trade and Industry made a tweet stating that BAT was in the process of opening a 2.5B factory in Kenya for the manufacturing of tobacco-free oral nicotine pouches that will be a great boost to the Kenyan economy.[58] This now poses regulation challenges for the new product Velo.

The Tobacco Control Act restricts the promotion of tobacco products and their advertisement. The Act has been effective to some extent. In addition to this, the internet, online outlets, social media platforms, etc, have greatly enabled the industry and promoters of these products to violate tobacco advertisement, promotion, and sponsorship prohibitions. Influencers have been greatly used to promote the use of Velo using TikTok, Instagram, Twitter, Facebook, and other social media platforms. Tobacco industries are profit-making entities and thus are not concerned about the health risks posed by consumption of oral nicotine; thus they do anything to increase tobacco demand in the market.[59] They have interfered with the regulation of oral nicotine in various ways, such as the irregular registration of LYFT as a pharmaceutical product, a campaign by BAT for tax relief on its oral Nicotine pouch manufacturing plant, industry's drive for lesser excise taxes on these products within the budget process, bribery attempts targeting young non-smokers as potential customers for their new products and tries to pass standards covering the manufacture, distribution, and sale of oral nicotine products via a front group.[60]

---

[57] Ibid 39.

[58] https://twitter.com/HonMosesKuria/status/1689632313456660481?s=20.

[59] KETCA, CIN & IILA *Assessment of the tobacco industry interference in the regulation of novel tobacco products in Kenya* (2022) 2.

[60] KETCA, CIN & IILA *Assessment of the tobacco industry interference in the regulation of novel tobacco products in Kenya* (2022) 2-3

These products are equally harmful, just like traditional products. Even though WHO has not done a substantive study on their effects, it is said that nicotine being the bedrock constituent in nicotine pouches is very harmful.[61] Consumers have confirmed different identified effects like nausea, headache, dizziness, nicotine addiction, increased risk of relapse to tobacco products, gum irritation and disease, and sore mouth.[62] This was said by Samuel Ochieng, who is the CIN Executive Director. These new products are far more dangerous as they are marketed as healthier alternatives, but, are not. The label 'healthier alternative' increases tobacco consumption instead of reducing it. Scientific studies have shown that the adverse effects of some new products, such as e-cigarettes, outweigh any possible benefit even though they are considered 'healthier'.[63]
that even though the Tobacco Control Act has yet to be revised to include oral nicotine pouches and e-cigarettes, it should be appreciated that the Finance Act of 2021 introduced tax rates of new excisable products to be taxed at the rate of Kshs. 1,200 per kg. The products listed in the Act are nicotine and its substances intended to be inhaled or taken orally, except the ones used for medicinal purposes and tobacco substitutes with homogenized tobacco essences and extracts. The Finance Act of 2022 incorporates a tax structure for electronic cigarettes. These Acts, however only offer low tax rates for these new products, which means that they are cheaper, making them readily available to consumers. Studies have shown that these products are also cross-subsidized by under-shifting the tax on these new products.[64] This then derails the efforts of activists in an attempt to fight the consumption of tobacco, thus putting the health of the consumer at risk.

4.4 Are all organizations engaged in enacting finance acts, or does the National Assembly Departmental Committee only engage tobacco manufacturers and importers?

There is little or no evidence indicating that all relevant organizations and persons are usually involved in the amendments brought about by the finance acts. The contrary cannot be that true either because none of these organizations has filed a case claiming that they were not involved in the tobacco taxation legislative process as required by the constitution.

---

[61] George Kebaso 'Tobacco pouches back only 2 years after ban' *People Daily* 2nd September 2022 1
[62] George Kebaso 'Tobacco pouches back only 2 years after ban' *People Daily* 2nd September 2022 1
[63] Giovacchini CX, Electronic Cigarettes: A pro-con review of the Current literature, 10(11), PMID, 2022.
[64] Marsh L, The impact of an increase in excise tax on the retail price of tobacco in New Zealand, 25(4), Tob Control, 2015. doi: 10.1136/tobaccocontrol-2015-052259.

4.5 Are the rates low or high when compared with other countries?

In Kenya, there is a distribution of cigarette prices which allows smokers to switch to a cheaper brand. Even though the uniform excise tax is effective to some extent. There needs to be slight variation between cigarette brands so people are forced to quit altogether.

The situation is different in Uganda and Tanzania, which are in the East African Community with Kenya and have similar economic conditions. These three countries have also ratified the WHO Framework Convention on Tobacco Control. Tanzania is the world's 15th-largest tobacco leaf producer and the 4th-largest in Africa. Uganda and Tanzania have tiered specific tax systems. Uganda's tiered system differentiates between cigarettes packaged in soft cap packs (soft caps 1 and 2) and cigarettes packaged in hinge-lid packs. The excise tax on soft cap cigarettes was 640 Ugandan Shillings (23.68 Kenyan shillings) -per 20 cigarettes on soft cap one cigarettes. Then 2700 Ugandan shillings (99.90 Kenyan Shillings) on soft cap two cigarettes. Finally, 1380 Ugandan shillings (51.60 Kenyan shillings) on hinge lids.[65]

In Tanzania, there is a three-tier system. In their system, the distinction lies between cigarettes with filters, those without filters, and a third category termed 'other cigarettes'. Filtered cigarettes are subjected to an excise tax of 588 Tanzanian Shillings (34.70 Kenyan shillings) per 20 cigarettes. The ones without filters are subjected to an excise tax of 249 Tanzanian Shillings (14.70 Kenyan Shillings). The last category is subjected to an excise tax of 1065 Tanzanian shillings(62.80 Kenyan Shillings). Studies done surrounding the tax regime in these two countries conclude that this kind of structure is not ideal to achieve the public health goal. These systems experience numerous price variabilities, which makes them less effective.[66]

An interesting country to look at would be Botswana since it applies a similar regime to Kenya. Additionally, Kenya and Botswana have ratified the WHO Framework Convention on Tobacco Control. Botswana's cigarette tax policy is considered a high performer globally since it employs a uniform specific tax structure. It is a high performer because it has high tobacco taxation. This

---

[65] Obwona M, Wasswa F, Nabwaayo V, Taxation of the tobacco industry in Uganda; The case for excise duty on cigarettes, Economic Policy Research Center https://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASH806d/3c743719/e9e485b9/e7.dir/EPRCseries44.pdf

[66] Kidane A, Mduma J, Naho A, The demand for cigarettes in Tanzania and Implications for Tobacco Taxation policy, International Organisation for Research and Development – IORD, 2015

is understandable since a study showed that Botswana is one of the countries with the highest tobacco consumption. The difference between Kenya and Botswana appears in the application of the regimes. As of 2018, Botswana used a mixed system, a hybrid between ad valorem and specific excise tax. This composite system has its disadvantages. For example, Botswana experiences high price variability like countries that adopt the tier structure system. Botswana is also part of the Economic Community of Western Africa States (ECOWAS), which before 2017, imposed an excise tax directive on its members that was flawed and not as effective in achieving the goal of public health. The order was revised, making it slightly more effective in meeting the public health objective. The new directive increased the ad valorem rate from 15% to 50% and added a specific tax on tobacco and its products.[67]

On the other hand, Gambia is a low-income country from the Economic Community of Western Africa States (ECOWAS) with a population of 1.91 million people. Gambia has ratified the WHO Framework Convention on Tobacco Control (WHO FCTC). The Gambia, as of 2018, used a uniform specific excise tax regime. This was at a rate of 12 Gambian dalasis (27.84 Kenyan Shillings) per 20-pack sticks of cigarettes. At the time of the ECOWAS directive, Gambia stood out because it imposed a specific excise tax on tobacco products. The specific excise tax that was set gradually increased at intervals during the years 2003 to 2013. A 2013 study showed that there was a conflict between excise tax rates set for cigarettes and those put in place for other tobacco products. This discrepancy allowed smokers to switch to other more affordable products, so in turn, people did not resort to quitting, which was essentially the goal as per Article 6 of the WHO FCTC guidelines. However, Botswana tried to rectify this issue by streamlining the tax rates between tobacco products discouraging people from switching to cheaper products. The Gambia serves as a good study because it employs the best taxation practices to lower tobacco consumption.[68]

South Africa

[67] https://tobaccocontrol.bmj.com/content/tobaccocontrol/early/2022/08/05/tc-2022-057414.full.pdf

[68] Nargis N et al, How effective has tobacco tax increase been in The Gambia? A case study of tobacco control, 6(8), National Library of Medicine, 2016.

Before the 1990s, tobacco control was not a priority in South Africa. There was much lobbying by the National Council Against Smoking and the medical profession; the first tobacco control legislation was passed in 1993. It introduced health warnings and prohibited smoking on public transport. There is an ongoing process to repeal the South African legislation on tobacco.

Chaloupka and Warner stated that the most critical determinant of cigarette consumption is the price. In fact, for every 10 percent in developed countries and 8 percent in developing countries. This being the case, it follows that rapid increases in the excise tax will have a pronounced effect on tobacco consumption.[69]

The Minister of Finance announced in the 2022 Budget on 23 February 2022 that excise duty on vaping tobacco products would be introduced. Nicotine and nicotine-substitute solutions in vaping products will be included in the tax net with a flat excise duty rate of R2.90/ml from 1st June 2023. The Forms DA260 Excise Account for Tobacco Products, in which the vaping products will be accounted for excise duty purposes, were also amended.

South Africa's tobacco control strategy is based on two main pillars; rapidly increasing excise taxes on tobacco and; comprehensive legislation, of which the most essential features are banning all tobacco advertising and sponsorship and prohibition of smoking in public and workplaces. As a result of the excise tax increases, the real price of cigarettes increased by 115% between 1993 and 2003. Aggregate cigarette consumption has decreased by about a third, and per capita consumption has reduced by about 40% since 1993. Despite the decrease in cigarette consumption, actual government revenue from tobacco excise taxes increased by nearly 150% between 1993 and 2003. Some important lessons can be drawn from South Africa. Firstly, intense and consistent lobbying was required to persuade the government to implement an effective tobacco control strategy.[70]

Secondly, increasing excise duty will increase the price of tobacco products such as cigarettes, reducing tobacco consumption. Thirdly, having effective tobacco control legislation is critical.

---

[69] The international literature indicates that the youth's responsiveness to price increases (i.e the price elasticity) is much higher than that of older people (Lewit and Coate, 1982 and Chaloupka and Grossman, 1996). Given that the youth is such an important focus group in tobacco control, this is a good result.

[70] Van Walbeek C. Le controlee du tobac en Afrique du Sud [Tobacco control in South Africa]. Promotion & education, Suppl 4, 25-57.
https://doi.org/10.1177/10253823050120040107

4.6 What about the risk of dumping and counterfeit goods?

The WHO FCTC mandates states to curb the illicit trade of tobacco that is counterfeiting, smuggling, and illegal manufacturing.[71] This is by coming up with legislative, executive, and administrative measures. Kenya is a signatory to the Protocol to Eliminate Illicit Trade in Tobacco Products. It signed the protocol in 2014 and ratified it in May 2020. The country was already implementing a track and trace method considered effective globally, through the Excisable Goods Management System (EGMS), established by the EGMS Regulations to the Excise Duty Act. So the country already has some measures to curb illicit trade in tobacco products, though there could be gaps in effective enforcement, and hence there could be a need to strengthen this and commence full implementation of the ITP. To reduce the demand and consumption of tobacco products, Kenya has adopted and maintained tax and price policies in various law instruments. These instruments are the Excise Duty Act 2015, Value Added Tax 2013, and the Finance Act to amend the fiscal laws of the country. As seen from the evolution of tax laws in Kenya, there has been an increase in the tax rates of the tax structure over the years. The argument is that when taxes are increased, the ultimate price also increases, reducing consumers' purchasing power with the ultimate goal of curtailing tobacco consumption.

There is a claim that an increase in taxes results in manufacturers engaging in illicit trade like smuggling and counterfeiting. Naturally, when taxes increase, the price of goods also increases, making consumers purchase fewer goods or not purchase the goods at all. This was used by tax legislators on cigarettes aiming at reducing the consumption of tobacco products. Counterfeit and smuggled goods are normally typically sold at lower prices than the original goods which lures consumers to purchase them.

On the other hand, increasing taxes does not increase illicit trade because illicit trading has always existed before even the legislators decided to raise the taxes. In addition, increased taxes are not the only reason tobacco industries result in illicit trade. Corruption and weak penalties for trade crimes are said to be other causes. It is said that for a country to reduce illegal trade in tobacco products, it does not have to lower the taxes but to have more stringent sanctions for crime and good governance.[72] In Kenya, the Anti-Counterfeit Authority (ACA), established under the Anti-

---

[71] Article 15 of WHO FCTC.

[72] World Bank. 2019. Confronting Illicit Tobacco Trade: a Global Review of Country Experiences: Confronting Illicit Tobacco Trade WBG Global Tobacco Control Program. Washington, D.C.: World Bank Group

Counterfeit Act, is to curb counterfeiting in the country. ACA, in coordination with other bodies like KEBS and the Competition Authority, works to curb counterfeiting in Kenya. Dealing with counterfeit products has been listed as an offense in the Act.[73] The penalty is imprisonment for a term not exceeding five years or a fine worth three times the value of the product's market price or both for a first-time offender. For a subsequent offender, the penalty is imprisonment not exceeding fifteen years or a fine equivalent to five times the value of the product or both.[74] Kenya has yet to be there in terms of curbing counterfeit tobacco products because they still exist in our market. Kenya should establish an effective tax regime to discourage illegal tobacco trade.[75]

The significance of increasing taxes in most countries has been positive because it reduces consumption even in countries with illicit trade.[76] It has the impact that it reduces the demand for tobacco products, thus protecting public health.

5.0 POLICY RECOMMENDATIONS

From the above analysis, it can be concluded that there is still much to be done to the Kenyan laws and policies on the regulation of tobacco products to protect public health. The following recommendations are made:

5.1 Amendment of the laws

It is evident from the above analysis that tobacco taxes are low even up to this point in time. As seen from the evolution of tax laws over the years, there is no significant change in retail prices. As a result of this, the effect of the increase in taxes is not felt. Raising the taxation rates of tobacco products under the Excise Duty Act will increase their retail prices, thus reducing their demand among the Kenyan population. This will ultimately protect the health of the Kenyan citizens. Moreover, the WHO's rationale for prescribing measures to reduce tobacco consumption is for

[73] Section 32 of the Anti-Counterfeit Act (2008)
[74] Section 35(1)(b) of the Anti-Counterfeit Act (2008)
[75] "British American Tobacco Kenya - Illegal Tobacco Trade"
<https://www.batkenya.com/group/sites/BAT_B4ALXZ.nsf/vwPagesWebLive/DO9T5KJU>

76 "Campaign for Tobacco-Free Kids" Taxation and Price: Countering Industry Arguments (July 2020)
https://www.tobaccofreekids.org/assets/global/pdfs/en/TAX_countering_industry_claims_en.pdf

public health purposes. As such, there should be a specific provision in the Excise Duty Act increasing specific tax rates on tobacco products for public health reasons. As seen from the evolution of fiscal policies and laws, the year-to-year increase in tax rates has always been informed by inflation rates. While this is allowed by section 10 of the Act, it has concluded that all the tobacco tax changes and increases have been tailored to help raise government revenue.
The Tobacco Control Act should be amended to include new products, like e-cigarettes and oral nicotine. Oral nicotine is not included anywhere in the Act, making tobacco industries consider it a non-tobacco product, yet it is. This makes the tobacco industries act in complete violation of the Tobacco Control Act because they know that they will go unpunished. Every time a new product comes to the market, legislators should act vigilantly and amend the Tobacco Control Act to include them.

5.2 Implementation of WHO uniform tax best practice.

The government, through the National Treasury and Planning Ministry, should reform the tax structure to conform to best practices by introducing a uniform tax rate that gradually moves the country to achieve a 70 percent share of tax in the total retail price of cigarettes. This may be achieved by adopting best practices from countries that have adopted and implemented this WHO recommendation. For instance, the Australian Liberal government announced a new budget in May 2016. This budget contained 12.5% annual increases in tobacco excise up to the year 2020.[77] This move placed Australia as one of the countries with high tax rates and, consequently high tobacco prices.[78] Even though not all people would quit tobacco consumption, this move has been widely praised by public health experts claiming that it leads to decreased use.[79] Policymakers in Kenya should thus consider adopting this practice to attain the best tax practice as recommended by WHO.

5.3 Abolition of several complex tax amendments to allow effective tax administration

In a related vein, the government, through the National Treasury and Planning Ministry creates a simple system that deters tax avoidance or evasion. A simple tax system would have few taxes and

[77] Hirono KT, Smith KE. Australia's $40 per pack cigarette tax plans: the need to consider equity *Tobacco Control* 2018; **27:229**-233 accessed at https://tobaccocontrol.bmj.com/content/27/2/229

[78] Ibid 76.
[79] Ibid 76.

a limited number of rates per tax.[80] Additionally, it would have limited exemptions. This system would be easier to administer and would result in higher compliance levels than a complex tax system. As discussed above, Kenya can achieve this by following in the footsteps of countries with simplified tax system systems, such as South Africa.

5.4 Conducting Research on new products

Scientific research and medical research on new products on the effects of new products on human health should be done by both the government and tobacco advocates. This will make tax increments possible as advocacy for an increase in tax for new products will be justified.

[80] Baer K and Silvani C, "Designing a Tax Administration Reform Strategy: Experiences and Guidelines" (1997) 97 IMF Working Papers 1 accessed at <https://doi.org/10.5089/9781451980394.001>