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REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY

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TWELFTH PARLIAMENT- FIFTH SESSION (2021)

COMMITTEE ON DELEGATED LEGISLATION

REPORT ON THE CONSIDERATION OF THE PETROLEUM DEVELOPMENT
LEVY (AMENDMENT) ORDER, 2021

(Legal Notice No. 77 of 2021)

SEPTEMBER, 2021

The Directorate of Audit, Appropriations & other Select Committees
The National Assembly,
Parliament Buildings,
NAIROBI.


	
THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 29 SEP 2021	DAY: Wednesday
TABLED BY:	V. de-chair person Committee on Delegated legislation
CLERK-AT THE-TABLE:	Getnede arebet

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ABBREVIATIONS

AGO	Automotive Gas Oil
LN	Legal Notice
RMA	Regulatory Making Authority
SO	Standing Order

CHAIRPERSON'S FOREWORD

The Cabinet Secretary for Petroleum and Mining, in exercise of the powers conferred by Section 3(1) of the Petroleum Development Fund Act, 1991, published the Petroleum Development Levy (Amendment), Order, 2021 *vide Legal Notice Number 77 of 2021*.

The Order was published on the 13th May, 2021 and submitted to the Clerk of the National Assembly on the 10th August, 2021 and tabled on the 17th August, 2021, by the Leader of Majority Party and subsequently referred to the Committee on Delegated Legislation for consideration.

The amendment seeks to insert in the Schedule to the Petroleum Development Levy Order, 2020, "AGO (Diesel)" with its rate of Levy being Ksh. 5,400 per 1000 litres at 20° C. The Order seeks to amend LN No. 124 of 2020, which the Committee scrutinized, considered, and approved for operationalisation on the 17th of February 2021.

The regulatory objective and justification of the statutory instrument is to amend the Petroleum Development Levy Order, 2020 by inserting AGO (Diesel) and the respective rate of levy to the First Schedule of the Petroleum Development Levy Order, 2020.

The Ministry indicated in their submissions that they inadvertently omitted **to include AGO (Diesel) in LN No. 124 of 2020**. This was an error of omission on the record in a statutory instrument that ought to have been rectified through publishing a corrigendum and not an amendment Order since an amendment Order invites the Committee to subject it to all the statutory tests set out in the Statutory Instruments Act, 2013 and relevant laws.

The Committee, upon receipt of the Order, scrutinised the Order in accordance with the Constitution of Kenya, the Petroleum Development Fund Act, 1991, the Interpretation and General Provisions Act (*Cap 2*) and the Statutory Instruments Act (*No. 23 of 2013*) which regulate the making, scrutiny and publication of the Order and made various observations which informed the decision to annul in entirety, the submitted instrument.

Statutory Timelines – The Committee established that the submission of the said statutory instrument (Order) to the National Assembly on 10th August, 2021, which was 25th sittings days after publication and its subsequent laying before the Table in the House was done way out of the statutory timelines contrary to section 11(1) and (4) of the Statutory Instruments Act, 2013. Pursuant to section 11 (4) of the Statutory Instrument Act, the Order therefore ceased to have effect on the 17th of June, 2021, by operation of law.

Public participation - Articles 10 and 118 of the Constitution read with sections 5, 5A and the Schedule to the Statutory Instruments Act, 2013, requires a mandatory conduct of Public Participation by all regulation-making authorities before publication of a statutory instrument. The amendment Order is a Statutory Instrument on its own published under a different legal notice (*No.77 of 2021*) and with the implications on the rates of levy chargeable on AGO (Diesel) hence the Ministry ought to have conducted public participation as required under the Constitution and the relevant laws, and not chosen to ride on public participation conducted for LN. No124 of 2020 which did not contain AGO (Diesel) in the schedule.

Having examined the Petroleum Development Levy (Amendment), Order, published *vide Legal Notice Number 77 of 2021* against the Constitution, the Interpretations and General Provisions Act (Cap 2), the Statutory Instruments Act, 2013 (*No. 23 of 2013*), the Petroleum Development Fund Act, 1991, pursuant to which they are made, the Committee resolved to recommend to the House **to annul the amendment Order in entirety** for contravening section 11(1) and (4) of the Statutory Instruments Act, 2013, being out of the statutory timelines set out in section 11(1) and for lack of demonstration of public participation.

I wish to most sincerely thank the Speaker and the Office of the Clerk of the National Assembly for the invaluable support accorded to the Committee in the discharge of its mandate.

On behalf of the Members of the Select Committee on Delegated Legislation and pursuant to Standing Order 210 (4) (b) it is my pleasure and duty to present to the House, the Committee's **Report on the Consideration of the Petroleum Development Levy (Amendment), Order, 2021 (LN No 77 of 2021.)**

HON. WILLIAM KASSAIT KAMKET, M.P.

1. PREFACE

1.1 Establishment and Mandate of the Committee

1. The Select Committee on Delegated Legislation is established pursuant to *Standing Order No. 210* and is mandated to consider statutory instruments submitted to Parliament for consideration. The Committee is expected to consider in respect of any statutory instrument, whether it is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written laws.
2. The Committee is mandated to consider in respect of any statutory instrument, whether it:
 - a) is in accordance with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written laws;
 - b) infringes on fundamental rights and freedoms of the public;
 - c) contains a matter which in the option of the Committee should more properly be dealt with in an Act of the Parliament;
 - d) contains imposition of taxation;
 - e) directly or indirectly bars the jurisdiction of the court;
 - f) gives retrospective effect to any of the provision in respect to which the Constitution does not expressly give any such power;
 - g) it involves expenditure from the consolidated fund or other public revenues;
 - h) is defective in its drafting or for any reason form or part of the statutory instrument calls for any elucidation;
 - i) appears to make some unusual or unexpected use of the power conferred by the Constitution or the Act pursuant to which it is made;
 - j) appears to have had unjustifiable delay in its publication or laying before Parliament;
 - k) makes rights, liberties or obligations unduly dependent upon non-renewable decisions;
 - l) makes rights, liberties or obligations unduly dependent insufficiently defined administrative powers;
 - m) inappropriately delegates legislative powers;
 - n) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
 - o) appears for any reason to infringe on the rule of law;
 - p) inadequately subjects the exercise of legislative power to Parliamentary scrutiny; and
 - q) accords to any other reason that the Committee considers fit to examine.

1.2 Committee Membership

3. The Committee membership comprises –

The Hon. William Kassait Kamket, M.P. (Chairperson)

Tiaty Constituency

KANU

The Hon. Muriuki Njagagua, M.P. (Vice Chairperson)

Mbeere North Constituency

Jubilee Party

COMMITTEE MEMBERS

The Hon. Waihenya Ndirangu, M.P.

Roysambu Constituency

Jubilee Party

Bomet Central Constituency

Jubilee Party

The Hon. William Cheptumo, M.P.

Baringo North Constituency

Jubilee Party

The Hon. William Kamoti, M.P.

Rabai Constituency

Orange Democratic Movement

The Hon. Cecily Mbarire, MGH, M.P.

Nominated

Jubilee Party

The Hon. Martha Wangari, M.P.

Gilgil Constituency

Jubilee Party

The Hon. Alice Wahome, M.P.

Kandara Constituency

Jubilee Party

The Hon. Gideon Mulyungi, M.P.

Mwingi Constituency

Wiper Democratic Movement – Kenya

The Hon. Robert Mbui, M.P.

Kathiani Constituency

Wiper Democratic Movement -Kenya

The Hon. (Dr.) Wilberforce Oundo, M.P.

Funyula Constituency

Orange Democratic Movement

The Hon. Daniel Maanzo, M.P.

Makueni Constituency

Wiper Democratic Movement -Kenya

The Hon. George G. Murugara, M.P.

Tharaka Constituency

Democratic Party

The Hon. Timothy Wanyonyi, M.P.

Westlands Constituency

Orange Democratic Movement

The Hon. Jennifer Shamalla, M.P.

Nominated

Jubilee Party

The Hon. Ronald Tonui, M.P.

The Hon. Munene Wambugu, M.P.

Kirinyaga Central Constituency
Jubilee Party

The Hon. Patrick Mariru, M.P.
Laikipia West Constituency
Jubilee Party

The Hon. Sammy Seroney, M.P.
Nominated
Wiper Democratic Movement – Kenya

The Hon. Robert Gichimu, M.P.
Gichugu Constituency
Jubilee Party

The Hon. Tindi Mwale, M.P.
Butere Constituency
Amani National Congress

The Hon. Edith Nyenze, M.P.
Kitui West Constituency
Wiper Democratic Movement – Kenya

The Hon. Abdi Koropu Tepo, M.P.
Isiolo South Constituency
Kenya Patriots Party

1.3 Committee Secretariat

4. The secretariat facilitating the Committee comprises -

Mr. Mohamed Jimale
Clerk Assistant II (Team Leader)

Ms. Ruth Mwihaki Gakuya
Clerk Assistant II

Mr. Dima Dima
Principal Legal Counsel

Mr. Josphat Motonu
Fiscal Analyst I

Ms. Fiona Musili
Research Assitant II

Ms. Noelle Chelangat
Media Relations Officer II

Mr. Anthony Wamae
Serjeant at Arms

Mr. Charles Ayari
Superintendent of Electronics

Mr. Muriithi Theuri
Parliamentary Intern

2.0 CONSIDERATION OF THE PETROLEUM DEVELOPMENT LEVY (AMENDMENT), ORDER, 2021 (LN NO. 77 OF 2021)

2.1 Introduction

5. The Cabinet Secretary for Petroleum and Mining, in exercise of the powers conferred by Section 3(1) of the Petroleum Development Fund Act, 1991, published the Petroleum Development Levy (Amendment), Order, 2021 *vide Legal Notice Number 77 of 2021* on 13th May, 2021 and submitted the same to the Clerk of the National Assembly on 10th August, 2021 and was tabled on 17th August, 2021 by the Leader of Majority Party and subsequently referred to the Committee on Delegated Legislation for consideration.
6. The Order seeks to amend the Petroleum Development Order, 2020, (LN No. 124 of 2020) with the effect of inserting Automotive Gas Oil (AGO or Diesel) to legally incorporate it in the First Schedule of the Petroleum Development Levy Order, 2020. The justification was that the Order was published and approved in 2020, and it was discovered later that AGO (Diesel) had been erroneously omitted from the First Schedule to the Order. The Ministry now seeks to insert a new row to correct the omission.

2.2 Purpose of the Statutory Instrument

7. The regulatory objective and justification of the Petroleum Development Levy (Amendment), Order, 2021 is to insert Automotive Gas Oil (AGO or Diesel) and the respective rate of levy in the First Schedule of the Order. According to the Ministry, the amendment was published following the detection of the inadvertent omission of AGO (Diesel) from the first Schedule of the Order.

2.3 Legislative Context

8. The Petroleum Development Levy Order, 2020 was published as Legal Notice No. 124 on 10th July, 2020. The Order was considered and approved by the National Assembly's Select Committee on Delegated Legislation at its sitting on 17th February 2021. However, upon approval of the Instrument by the Committee, the Ministry discovered that the AGO (Diesel) was omitted from the First Schedule.
9. According to the Ministry of Petroleum and Mining, the Petroleum Development Levy (Amendment), Order, 2021 rectifies the omission.

2.4 Scrutiny of the Instrument

10. The Committee considered the Amendment Order to check its conformity with the Constitution, the Interpretations and General Provisions Act (*Cap 2*), the Petroleum Development Fund Act, 1991, the Statutory Instruments Act, 2013 (*No. 23 of 2013*), the Petroleum Development Fund Act, 1991 and the Petroleum Development Levy Order, 2021 pursuant to which they are made, which regulate the making, scrutiny and publication of the Regulations.

2.5 Summary of the Petroleum Development Levy (Amendment), Order, 2021

11. The Order seeks to amend the schedule to the Petroleum Development Levy Order, 2020, by inserting a new row immediately after the row containing tariff code 2710.19.29 of the description "other medium oils and preparations," as shown below:

2710.19.31	AGO (Diesel)	5,400 per 1,000 Litres at 20°C
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2710.19.31	AGO (Diesel)	5,400 per 1,000 Litres at 20°C
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3.0 COMMITTEE OBSERVATIONS AND FINDINGS

12. Following comprehensive scrutiny of the Amendment Order, the Committee made the following Observations:–

- 1) **THAT**, the Petroleum Development Levy (Amendment), Order, 2021 were published in the gazette on 13th May, 2021 and submitted to the National Assembly on 10th August, 2021, hence contravenes section 11(1) and (4) of the Statutory Instruments Act, 2013 which provides that –

“... every Cabinet Secretary responsible for a regulation making authority shall within seven sitting days after the publication of a statutory instrument is transmitted to the responsible Clerk for tabling before Parliament” and section 11 (4) of the Statutory Instruments Act, 2013 which provides that -

....that if a copy of a statutory instrument that is required to be laid before Parliament is not laid in accordance with this section, the statutory instrument shall cease to have effect immediately the last day for it to be so laid..

The Order was submitted to the Clerk of the National Assembly on 10th August, 2021 which, was the 25th sitting day. The Order therefore ceased to have effect on 27th May, 2021, by operation of law.

- 2) **THAT**, the Ministry indicated in their submission documents that they inadvertently omitted to include **AGO (Diesel)** in *L.N. No. 124 of 2020*. The error of omission on the record in a statutory instrument ought to have been rectified by way of a corrigendum and not an amendment Order since an amendment Order invites the Committee to subject it to all the statutory tests set out in the relevant laws.
- 3) **THAT**, Articles 10 and 118 of the Constitution and sections 5, 5A of Statutory Instrument Act requires a mandatory conduct of Public Participation by all regulation - making authorities before publication of a statutory instrument. The amendment Order is a Statutory Instrument on its own published under a different legal notice (*No.77 of 2021*) and with the implications on the rates of levy chargeable on AGO (Diesel) hence the Ministry ought to have conducted public participation as required under the Constitution and the relevant laws, and not chosen to ride on public participation conducted for LN. No124 of 2020 which did not contain AGO (Diesel) in the schedule.

Table 1: The New Schedule after inserting a new row		
Tariff code	Description	Rate of levy (KSh.)
2709.00.00	Petroleum oils obtained from bituminous minerals, crude	5,400 per 1,000 litres at 20°C
2710.12.30	Aviation spirit	5,400 per 1,000 litres at 20°C
2710.12.20	Premium motor spirit	5,400 per 1,000 litres at 20°C
2710.12.40	Spirit type jet fuel	5,400 per 1,000 litres at 20°C
2710.12.50	Special boiling point and white Spirit	400 per 1,000 litres at 20°C
2710.12.90	Other light oils and Preparations	400 per 1,000 litres at 20°C
2710.19.21	Kerosene type jet fuel	400 per 1,000 litres at 20°C
2710.19.22	Illuminating kerosene (IK)	400 per 1,000 litres at 20°C
2710.19.29	Other medium oils and Preparations	5,400 per 1,000 litres at 20°C
2710.19.31	AGO (Diesel)	5,400 per 1,000 Litres at 20°C
2710.19.32	Diesel oil (industrial heavy, black for losv speed marine and stationary engines)	5,400 per 1,000 litres at 20°C
2710.19.39	Other gas oils	5,400 per 1,000 litres at 20°C
2710.19.41	Residual fuel oils (marine, furnace and similar fuel oils) of a kinematic viscosity of 125 centistrokes	400 per 1,000 litres at 20°C
2710.19.42	Residual fuel oils (marine, furnace and similar fuel oils) of a kinematic viscosity of 180 centistrokes	400 per 1,000 litres at 20°C
2710.19.43	Residual fuel oils (marine, furnace and similar fuel oils) of a kinematic viscosity of 280 centistrokes	400 per 1,000 litres at 20°C
2710.19.49	Other residual oils	400 per 1,000 litres at 20°C
2711.11.00	Liquefied natural gas	400 per 1,000 litres at 20°C

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2711.12.00	Liquefied propane	400 per 1,000 kg at 20°C
2711.13.00	Liquefied butanes	400 per 1,000 kg at 20°C
2711.14.00	Liquefied ethylene, propylene, butylenes and butadiene	400 per 1,000 kg at 20°C
2711.19.00	Other liquefied petroleum gases	400 per 1,000 kg at 20°C
2711.21.00	Natural gas in gaseous state	400 per 1,000 kg at 20°C
2711.29.00	Other petroleum gases and other gases obtained from bituminous minerals	400 per 1,000 kg at 20°C
2713.20.00	Petroleum bitumen	400 per 1,000 kg at 20°C
2713.90.00	Other residues of petroleum oil or oils obtained from bituminous minerals	400 per 1,000 kg at 20°C
2714.10.00	Bituminous or oil shale and tar Sands	400 per 1,000 kg at 20°C
2714.90.00	Bitumen and asphalt or asphalts 400 per 1,000 kg at and asphaltic rocks	400 per 1,000 kg at 20°C
2715.00.00	Bituminous mixtures	400 per 1,000 kg at 20°C

4.0 COMMITTEE RECOMMENDATION

13. Having examined the **Petroleum Development Levy (Amendment), Order, 2021 (L.N. No. 77 of 2021)** against the Constitution of Kenya, the Interpretations and General Provisions Act (*Cap 2*), the Petroleum Development Fund Act, 1991, the Statutory Instruments Act, 2013 (*No. 23 of 2013*), and the Petroleum Development Levy Order, 2021 pursuant to which they are made **the Committee recommends that the House annuls in entirety the said statutory instrument as it contravenes section 11(1) and 11 (4) of the Statutory Instruments Act, 2013 and for other aforementioned reasons.**

Signed..... *William Kassaif Kamket* Date..... *29/9/2021*

THE HON. WILLIAM KASSAIF KAMKET, M.P.
(CHAIRPERSON)

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