

*Paper laid by
the Leader of Majority
on 19/3/2014
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KENYA NATIONAL ASSEMBLY

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ELEVENTH PARLIAMENT – SECOND SESSION

THE DEPARTMENTAL COMMITTEE
ON
FINANCE, PLANNING & TRADE

REPORT ON THE CONSIDERATION OF
THE PETITION TO AMEND THE VAT ACT, 2013 BY KENYA UNION OF DOMESTIC, HOTELS,
EDUCATIONAL INSTITUTIONS AND HOSPITALS (KUDHEIHA) WORKERS

PARLIAMENT BUILDINGS
NAIROBI

MARCH, 2014

1.0 INTRODUCTION

The Departmental Committee on Finance, Planning & Trade is one of the twelve Departmental committees of the National Assembly established under SO 216 and mandated to, inter alia; 'to study and review all legislations referred to it;

Specifically, the Committee deals with *Public finance, monetary policies, public debt, financial institutions, investment and divestiture policies, pricing policies, banking, insurance, population, revenue policies, planning, national development, trade, tourism promotion and management, commerce and industry.*

Standing Order 227 also empowers Departmental Committees to consider petitions that are presented to the National Assembly under the Petition to Parliament (procedure) Act, 2012. It reads inter alia;

"Whenever a Petition is committed to a Departmental Committee, the Committee shall, in not more than sixty calendar days from the time of reading the prayer, respond to the petitioner by way of a report addressed to the petitioner or petitioners and laid on the Table of the House and no debate on or in relation to the report shall be allowed, but the Speaker may, in exceptional circumstances, allow comments or observations in relation to the Petitions for not more than twenty Minutes."

COMMITTEE'S MEMBERSHIP

The committee comprises of the following members:-

1. Hon. Benjamin Langat, MP (Chairman)
2. Hon. Nelson Gaichuhie, MP (vice Chairman)
3. Hon. Jones M Mlolwa, MP
4. Hon. Anyanga, Andrew Toboso, MP
5. Hon. Timothy M .E. Bosire, MP
6. Hon. Shakeel Shabbir Ahmed, MP
7. Hon. Joash Olum, MP
8. Hon. Dr. Oburu Oginga, MP
9. Hon. Patrick Makau King'ola, MP
10. Hon. Abdullswamad Sheriff, MP
11. Hon. Sumra Irshadali, MP
12. Hon. Ogendo Rose Nyamunga, MP
13. Hon. Iringo Cyprian Kubai, MP
14. Hon. Dennis Waweru, MP
15. Hon. Tiras N. Ngahu, MP
16. Hon. Sakaja Johnson, MP
17. Hon. Jimmy Nuru Angwenyi, MP
18. Hon. Ronald Tonui, MP

19. Hon. Mary Emase, MP
20. Hon. Joseph Limo, MP
21. Hon. Lati Lelelit, MP
22. Hon. Kirwa Stephen Bitok, MP
23. Hon. Sammy Mwaita, MP
24. Hon. Daniel E. Nanok, MP
25. Hon. Eng. Shadrack Manga, MP
26. Hon. Abdul Rahim Dawood, MP
27. Hon. Sakwa John Bunyasi, MP
28. Hon. Alfred W. Sambu, MP
29. Hon. Sammy Koech, MP

2.0 PRESENTATION OF THE PETITION AND HISTORICAL BACKGROUND

i. Presentation of the Petition to Parliament

The Petition by the Kenya Union of Domestic, Hotels, Educational Institutions and Hospitals (KUDHEIHA) workers was presented to the National Assembly Pursuant to Standing Order 225(2) and the Petition to Parliament (procedure) Act, 2012. The petition was dated 11th November, 2013 and signed by one hundred and forty nine (149) citizens praying that Parliament amends Section 13, (7) of the Value Added Tax Act, 2013.

In his communication from the Chair on 14th November, 2013, the Speaker of the National Assembly referred the Petition to the Departmental Committee on Finance, Planning and Trade for consideration pursuant to Standing Order 227 of the National Assembly. He further advised that the Committee may consider the Petition alongside the Value Added Tax (Amendment) Bill, 2013 that was awaiting publication as of that time.

ii. Provisions of Section 13(7) of the Value Added Tax Act, 2013

The Value added Tax Act, 2013 was Assented to on 14th August, 2013 and became operational in early September, 2013. The Process of enacting this piece of legislation had followed the due process as contained in the Constitution and the Standing Orders in so far as processing Money Bills is concerned. Stakeholders were widely consulted for input both before and when the Bill was before Parliament Pursuant to Article 118, 114 and Standing Order 127. The process of overhauling the VAT Act had began in the 10th Parliament with an objective to simplify tax administration, and increase government revenue among others.

Section 13(7) of the Value Added Tax, 2013 provides that “The consideration for a supply of accommodation or restaurant services shall not include the Tourism Levy imposed on the supply under the Tourism Act; or”. This provision therefore subjects the supply of accommodation and restaurant services (commonly known as service charge) to 16% tax. These services were exempt in the repealed VAT Act.

3.0 CONSIDERATION OF THE PETITION

On 2nd December, 2013, the Committee met with Kenya Union of Domestic, Hotels, Educational Institutions and Hospitals (KUDHEIHA) workers who presented their prayers to the Committee. In their submission, they prayed that Parliament Amend Section 13(7) of the VAT Act, 2013 to exempt any service charge, tips, and gratuity from any form of Value Added tax to avoid double taxation as was provided for in Section 9(4) of the repealed Value Added Tax Act, Cap 476 laws of Kenya. The Union further indicated that its efforts to have the matter addressed by the Cabinet Secretary for responsible for Finance have been futile. It further submitted that the matter in question was not in Court and therefore not subjudice. In its prayers, the Union gave the following reasons to warrant amendment of Section 13(7) of the Value Added Tax Act, 2013:-

- i. Service charge is included in the employees' total earnings and taxed P.A.Y.E at gross income therefore if this amount is subjected again to VAT, it is double taxation.
- ii. Service charge is a collective bargaining issue negotiated and agreed between the employees and the employers and has been in existence since 1968.
- iii. Service charge is not a professional service provided as a commodity. It is paid in respect of employee employer relationship. Therefore it cannot be surcharged VAT.
- iv. The deduction of VAT on the said service charge is contrary to Convention 144 of ILO where workers were not consulted.
- v. Since the enactment of the VAT Act in 2004 the service charge has been exempted from VAT

4.0 COMMITTEE OBSERVATIONS

On analysis of the petition, the Committee made the following observations:

- i. Service charge is generally defined as a fee for some service rendered that is in addition to the amount already paid for a particular good or service. This type of a charge is common with banks, hotels, travel agents, telecommunication service providers, and tourism among others. Banks for example may charge a monthly service charge for customers, to use an ATM that does not belong to the bank, or if people overdraw their account. Hotels and restaurants may charge a set percentage of the bill as a service fee in lieu of a tip.
- ii. A service charge for hotel and tourism industry in Kenya is provided for under Collective Bargaining Agreements (CBA) signed between a trade union of employers and a trade union of employees as a fee in lieu of a tip. According to the Memorandum of Agreement signed between KUDHEIHA Workers on behalf of unionisable employees and the Union of Kenya Hotelkeepers and Caterers Association on behalf of its members, every employer is required to operate a service on accommodation and on food sales covering all food outlets. The minimum service charge percentage to be levied by employers is 7% on accommodation and food sales; 5.5% on beverages; and 1% on game drives and bus drives. The money collected through service charge is distributed equally to all unionisable employees (except management staff).

- iii. In other jurisdictions like Tanzania, South Africa, European Union and United States of America among others, Service charge is taxable. In the United States of America, the existence of a union contract or other agreement regarding gratuities does not determine the taxability of mandatory gratuities.
- iv. Valued Added Tax (VAT) on the service charge does not amount to double taxation since the charge once billed to a client accrues directly to the employer and not the employee. The burden of the tax is on the employer and not the employee.
- v. The fact that service charge has been in existence since the year 1968 does not make it exempt under the new law. The exemption which was under the repealed VAT Act cap 476 is null and void since the said law was repealed by a new Act which was passed in the year 2013 after extensive consultation with the public as stipulated in Article 118 of Constitution.

5.0 COMMITTEE'S RECOMMENDATIONS

After careful assessment of the key provisions of the petition, the Committee considers that the Petition does not warrant amendment of Section 13(7) of the Value Added Tax Act, 2013 to exempt any service charge or tips from any form of Value Added Tax. There is no justification to exempt service charge in the hotel and tourism industry from being charged Value Added Tax.

ACKNOWLEDGEMENTS

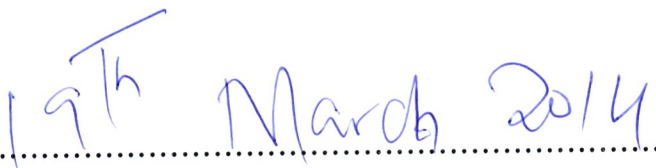
The Committee wishes to thank the Offices of the Speaker and the Clerk of the National Assembly for the support extended to it in the execution of its mandate. It also appreciates the efforts the Petitioners put to ensure that this matter is addressed by Parliament.

It is therefore my pleasant duty and privilege, on behalf of the Departmental Committee on Finance, Planning & Trade to table this report on the Petition by Kenya Union of Domestic, Hotels, Educational Institutions and Hospitals (KUDHEIHA) workers pursuant to the provisions of Standing Order 227.

Signed 

HON. BENJAMIN LANGAT, MP
CHAIRPERSON

DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING AND TRADE

Date: 

MINUTES OF THE 10TH SITTING OF THE DEPARTMENTAL COMMITTEE ON
FINANCE, PLANNING & TRADE HELD ON TUESDAY 4TH MARCH, 2014 IN THE
BOARD ROOM, PROTECTION HOUSE, AT 12.00 P.M

Present

1. Hon. Benjamin Langat, MP - Chairperson
2. Hon. Nelson Gaichuhie, MP - Vice-Chairperson
3. Hon. Sakwa John Bunyasi, MP
4. Hon. Lelelit Lati, MP
5. Hon. Jimmy Nuru Angwenyi, MP
6. Hon. Anyanga Andrew Toboso, MP
7. Hon. Sammy Koech, MP
8. Hon. Ogendo Rose Nyamunga, MP
9. Hon. Timothy Bosire, MP
10. Hon. Shakeel Shabbir Ahmed, MP
11. Hon. Ronald Tonui, MP
12. Hon. Patrick Makau Kingola, MP
13. Hon. Jones Mlolwa, MP
14. Hon. Dr. Oburu Oginga, MP
15. Hon. Daniel Epuyo Nanok, MP

Absent With Apology

1. Hon. Kirwa Stephen Bitok, MP
2. Hon. Abdullswamad Sheriff, MP
3. Hon. Mary Emase, MP
4. Hon. Joseph Limo, MP
5. Hon. Sammy Mwaita, MP
6. Hon. Sakaja Johnson, MP
7. Hon. Tiras Ngahu, MP
8. Hon. Joash Olum, MP
9. Hon. Sumra Irshadali, MP
10. Hon. Iringo Cyprian Kubai, MP
11. Hon. Abdul Rahim Dawood, MP
12. Hon. Dennis Waweru, MP
13. Hon. Eng. Shadrack Manga, MP
14. Hon. Alfred Sambu, MP

In Attendance

Kenya National Assembly

1. Mr. Evans Oanda - First Clerk Assistant
2. Mr. Tobias Opana - Junior Legislative Fellow
3. Mr. Martin Nyaga - Fiscal Analyst
4. Mr. Joash Kosiba - Fiscal Analyst

MIN.NO. DCF/48/2014 PRELIMINARIES

The Chairperson called the meeting to order at 12.00 pm followed by a word of prayer. He then introduced the day's agenda as that of consideration of the VAT (Amendment) Bill, 2013.

MIN.NO. DCF/49/2014 CONSIDERATION OF THE AMENDMENTS TO THE VAT (AMENDMENT) BILL, 2013

The Committee deliberated and adopted the following amendments for introduction in the House at the Committee Stage pending concurrence from the National Treasury:

FIRST SCHEDULE

- (a) Amending First Schedule, Part 1, Section A by deleting the statement "8802.20.00 Aeroplanes and other aircraft, of unladen weight exceeding 2,000 kg" in Paragraph 39, and replacing it with "8802.20.00 Aeroplanes and other aircraft, of unladen weight **not** exceeding 2,000 kg"

Justification

Clarification on tariff codes for exemption of aircraft: VAT Act and East African Community Customs Management Act (EACCMA)

- (b) Inserting the following paragraphs in First Schedule, Part 1, Section A after paragraph 39:
- "8802.30.00 Aeroplanes and other aircraft, of unladen weight exceeding 2,000kg but not exceeding 15,000 kg"
 - "8802.30.00 Aeroplanes and other aircraft, of unladen weight exceeding 15,000 kg"

Justification

Additional categories for the supply or importation of exempt goods and supplies

(c) Amend Part 1, Section A of First Schedule to include:

- 8803.10.00 Propellers and rotors and parts thereof
- 8803.20.00 Undercarriages and parts thereof
- 8803.30.00 Other parts of aeroplanes or helicopters

Justification

Need to exempt aircraft engines and spare parts to reduce cost to aviation sector and also reduce tax refund burden on KRA.

(d) Amend Paragraph 7 of Part 11 (Services) of First Schedule by adding the following new paragraph after paragraph 18:
19. Landing, parking and air navigation services.

Justification

Exemption of landing, parking, and navigation services since these services are internationally zero-rated

(e) Amend First Schedule, Part 1, Section A after paragraph 39 by inserting the following new paragraphs:

"Goods (either procured locally or imported) supplied to Kenyan pharmaceutical manufacturers as approved from time to time by the Cabinet Secretary for National Treasury with consultations with the Cabinet Secretary for Health and the Pharmacy and Poisons Board.

Justification

There need to address high prices of locally produced medicine, and safeguard competitiveness of Kenya's pharmaceutical companies. This will also avoid export of labour that is much needed by the large majority of the youth.

(f) Amending First Schedule, Part 1, Section A to include the following paragraph after paragraph 39:

"Holy books excluding religious materials."

Justification

Imposition of 16% VAT on Bibles and related materials will affect access to Bibles, including those offered through donations.

(g) First Schedule, Part 1, Section A to include the following paragraphs on animal inputs :

- 2301.10.00 Flours, meals and pellets, of meat or meat offal; greaves
- 2301.20.00 Flours, meals and pellets, of fish or of crustaceans, molluscs or other aquatic invertebrates
- 2302.10.00 Bran, sharps and other residues of maize (corn) whether or not in the form of pellets
- 2302.30.00 Bran, sharps and other residues of wheat, whether or not in the form of pellets
- 2302.40.00 Bran, sharps and other residues of other cereals, whether or not in the form of pellets
- 2302.50.00 Bran, sharps and other residues of leguminous plants, whether or not in the form of pellets
- 2307.00.00 Wine lees, argol
- 2303.10.00 Residues of starch manufacture and similar residues kg 10%
- 2303.20.00 Beet-pulp, bagasse and other waste of sugar manufacture kg 10%
- 2303.30.00 Brewing or distilling dregs and waste
- 2304.00.00 Oil-cake and other solid residues, whether or not ground or in the form of pellets, resulting from the extraction of soya-bean oil.
- 2305.00.00 Oil-cake and other solid residues, whether or not ground or in the form of pellets, resulting from the extraction of ground-nut oil
- 2306.10.00 Oil-cake and other residues of cotton seeds whether or not ground or in the form of pellets resulting from the extraction of vegetable fats or oils, other than those of heading 23.04 or 23.05.
- 2306.20.00 Oil-cake and other residues of linseed whether or not ground or in the form of pellets resulting from the extraction of vegetable fats or oils, other than those of heading 23.04 or 23.05
- 2306.30.00 Oil-cake and other residues of sunflower seeds whether or not ground or in the form of pellets resulting from the extraction of vegetable fats or oils, other than those of heading 23.04 or 23.05
- 2306.40.00 Oil-cake and other residues of rape or colza seeds whether or not ground or in the form of pellets resulting from the extraction of vegetable fats or oils, other than those of heading 23.04 or 23.05.

- 2306.41.00 Oil-cake and other residues of low erucic acid rape or colza seeds
- 2306.49.00 Other oil-cake and other residues of rape or colza seeds.
- 2306.50.00 Oil-cake and other residues of coconut or copra whether or not ground or in the form of pellets resulting from the extraction of vegetable fats or oils, other than those of heading 23.04 or 23.05.
- 2306.60.00 Oil-cake and other residues of palm nuts or kernels whether or not ground or in the form of pellets resulting from the extraction of vegetable fats or oils, other than those of heading 23.04 or 23.05.
- 2306.90.00 other Oil-cake and other solid residues whether or not ground or in the form of pellets resulting from the extraction of vegetable fats and oils, other than those of heading 23.04 or 23.05.

Justification

The VAT on farm inputs (e.g. Livestock feeds and supplements) are negatively affecting viability of farming business in Kenya.

- (h) Amend First Schedule on exempt supplies, Part 1 – Goods, Section A by inserting a new paragraph: “1901.10.00 - Preparations for infant use, put up for retail sale.”

Justification

Milk for infant use should be exempted

- (i) Amend First Schedule on exempt supplies, Part 1-Goods, Section A by inserting a new paragraph:

“unprocessed green leaves”

Justification

To provide for adequate returns to the firms who produce tea

- (j) Amend Section 12(2) by including at the end of the paragraph the words “and for metered electricity, the time of supply shall be the approved period of reading the meter by the electricity supplier”

Justification

Harmonize the levying of tax by electricity suppliers at the time of reading a meter

- (k) Amend Part II (Services) of First Schedule to include the following paragraph after paragraph 18:

"19. Supply of travel agency services and other supplies made to travellers by travel agents

Justification

The VAT on travel agency services is leading to diversion of business to travel agencies in the rest of the world. Hurts KATA members and may cause revenue losses too. Lack of harmonization of the exemption regime with Convention on International Civil Aviation

- (l) Amend Part II (Services) of First Schedule to include the following paragraph after paragraph 18:

"19. Tour operation services including hotel, holiday, and other supplies made to travellers but excluding in-house supplies and services provided for commission

Justification

Tourism and tour operators are facing pressure from neighbouring countries due to VAT. The decline of the sector will lead to jobs losses. Revert to the exemption status in the repealed VAT law.

MIN.NO. DCF/50/2014: ANY OTHER BUSINESS

Study Tours

The Committee will meet, at the opportune time, with the Ministry of Industrialization and Enterprise Development to be taken through the report on the study visit to Singapore and UAE on Special Economic Zones. Nominations of Members to foreign trips will be based on attendance of the Members

MIN.NO. DCF/51/2014 ADJOURNMENT

There being no other Business, the Chairperson adjourned the meeting at 1.38 p.m.

Signed.....
Chairperson

Date.....
19th March 2014

MINUTES OF THE 12TH SITTING OF THE DEPARTMENTAL COMMITTEE ON
FINANCE, PLANNING & TRADE HELD ON TUESDAY 11TH MARCH, 2014 IN THE
BOARD ROOM, HARAMBEE PLAZA, AT 10.00 A.M

Present

1. Hon. Jimmy Nuru Angwenyi, MP (chairing)
2. Hon. Anyanga Andrew Toboso, MP
3. Hon. Sakwa John Bunyasi, MP
4. Hon. Lelelit Lati, MP
5. Hon. Timothy Bosire, MP
6. Hon. Ronald Tonui, MP
7. Hon. Dr. Oburu Oginga, MP
8. Hon. Kirwa Stephen Bitok, MP
9. Hon. Mary Emase, MP
10. Hon. Joseph Limo, MP
11. Hon. Patrick Makau Kingola, MP
12. Hon. Sammy Koech, MP
13. Hon. Tiras Ngahu, MP
14. Hon. Joash Olum, MP

Absent With Apology

1. Hon. Benjamin Langat, MP - Chairperson
2. Hon. Nelson Gaichuhie, MP - Vice-Chairperson
3. Hon. Abdullswamad Sheriff, MP
4. Hon. Sammy Mwaita, MP
5. Hon. Jones Mlolwa, MP
6. Hon. Daniel Epuyo Nanok, MP
7. Hon. Abdul Rahim Dawood, MP
8. Hon. Shakeel Shabbir Ahmed, MP
9. Hon. Ogendo Rose Nyamunga, MP
10. Hon. Sakaja Johnson, MP
11. Hon. Sumra Irshadali, MP
12. Hon. Iringo Cyprian Kubai, MP
13. Hon. Dennis Waweru, MP
14. Hon. Eng. Shadrack Manga, MP
15. Hon. Alfred Sambu, MP

Kenya National Assembly

Mr. Martin Masinde	-	Deputy Director, Parliamentary Budget Office
Mr. Benjamin Ngimor	-	Fiscal Analyst
Mr. Evans Oanda	-	First Clerk Assistant
Ms. Esther Nginyo	-	Third Clerk Assistant
Mr. Joash Kosiba	-	Fiscal Analyst

MIN.NO. DCF/56/2014 PRELIMINARIES

The Ag. Chairperson called the meeting to order at 10.20 am followed by a word of prayer.

MIN.NO. DCF/57/2014: ADOPTION OF THE AGENDA

The agenda of the day was adopted after being proposed by the Hon. Anyanga Andrew Toboso, MP and seconded by the Hon. Patrick Makau, MP.

MIN.NO. DCF/58/2014: CONSIDERATION OF THE PETITION BY KUDHEIHA

The Parliamentary Budget Office presented the analysis of the petition highlighting the following:

1. Service charge is generally defined as a fee for some service rendered that is in addition to the amount already paid for a particular good or service. This type of a charge is common with banks, hotels, travel agents, telecommunication service providers, and tourism among others. Banks for example may charge a monthly service charge for customers, to use an ATM that does not belong to the bank, or if people overdraw their account. Hotels and restaurants may charge a set percentage of the bill as a service fee in lieu of a tip.
2. A service charge for hotel and tourism industry in Kenya is provided for under Collective Bargaining Agreements (CBA) signed between a trade union of employers and a trade union of employees as a fee in lieu of a tip. According to the Memorandum of Agreement signed between KUDHEIHA Workers on behalf of unionisable employees and the Union of Kenya Hotelkeepers and Caterers Association on behalf of its members, every employer is required to operate a service charge on accommodation and on food sales covering all food outlets. The minimum service charge percentage to be levied by employers is 7% on accommodation and food sales; 5.5% on beverages; and 1% on game drives and bus

drives. The money collected through service charge is distributed equally to all unionisable employees (except management staff).

II. Prayer of KUDHEIHA Workers Union

3. The union's prayer: **THAT section 13 (7) of the VAT Act, 2013 to be amended to exempt any service charge, tips, gratuity from any form of Value Added Tax to avoid double taxation as was provided in Section 9 (4) of the repealed Value Added Tax Act Cap 476 laws of Kenya.**
4. The Union cites the following reasons as to why the VAT Act , 2013 should be amended to exempt service charge from Value Added Tax:
 - (i.) *Service charge is included in the employees' total earnings and taxed P.A.Y.E at gross income therefore if this amount is subjected again to VAT, it is double taxation.*
 - (ii.) *Service charge is a collective bargaining issue negotiated and agreed between the employees and the employers and has been in existence since 1968.*
 - (iii.) *Service charge is not a professional service provided as a commodity. It is paid in respect of employee employer relationship. Therefore it cannot be surcharged VAT.*
 - (iv.) *The deduction of VAT on the said service charge is contrary to Convention 144 of ILO where workers were not consulted.*
 - (v.) *Since the enactment of the VAT Act in 2004 the service charge has been exempted from VAT*

III. Application of VAT to Service Charge in Other Jurisdictions.

5. Application of Value Added Tax (VAT) on service charge has raised controversy even in other jurisdictions. This is attributable to the fact that service charge relates directly to employee's income and therefore any measure that reduces the amount of service charge available for distribution to employees will always face some form or resistance from the beneficiaries. The following examples illustrates how other jurisdiction treats VAT and service charge:-
 - (i.) **Tanzania:** - In Tanzania, any service charge included in hotel or restaurant bill levied by a hotel establishment is not exempt and therefore attracts valued added tax at the standard rate of 18%.
 - (ii.) **South Africa:-** In South Africa, any service charge included in a hotel or restaurant bill which is levied by the accommodation establishment itself, will attract VAT at the

standard rate of 14% in the normal manner, regardless of whether any amount is later passed on to the establishment's employees or not.

(iii.) **New York (USA):-** The term *gratuity* is used for purposes of sale tax (VAT) to mean money a customer gives a wait person, server, housekeeper, or other person as an expression of appreciation for service rendered, such as a tip at a restaurant or bar. The state classifies gratuities into two types: **(a) Voluntary gratuities:** - are tips that a customer leaves at the table and are not taxable. **(b) Mandatory gratuities:** These are different because they are automatically added onto the bill given to the customer. However, a mandatory gratuity is not subjected to VAT if **all** of these conditions are met: *the charge is shown separately on the bill; the charge is identified as a gratuity; and the business gives the entire separately stated gratuity amount to its employees.* If any of these conditions is not met, the mandatory gratuity is taxable, along with the rest of the bill.

Service charges or other charges not specifically listed as gratuities on a bill or invoice are subject to sales tax. The existence of a union contract or other agreement regarding gratuities does not determine the taxability of mandatory gratuities. However, in situations involving union contracts, businesses must be careful to establish that the conditions stated above have been met. For example, an establishment may impose mandatory gratuities, separately state them on the bill as gratuities and, pursuant to a contract or other agreement, give 100% of the gratuities to the union. In this case, the establishment would also have to substantiate that the union turned over 100% of the gratuities to the employees in order for the gratuities to be exempt from sales tax (VAT). This condition would also be met if the contract or agreement allows the union to apply employees' gratuities to union dues and other union fees that the employees owe, as long as any remaining gratuities are turned over to employees.

(iv.) **European Union (EU) -** Articles 2(1) and 11A(1)(a) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States of European Union relating to turnover taxes - common system of value added tax: uniform basis of assessment states "*A Member State which authorises, under certain conditions, the exclusion from the taxable amount for the purposes of value added tax of the compulsory price supplements claimed by certain taxable persons by way of remuneration for the service provided ('service charges') is in breach of its obligations.*" The total sum demanded from the customer or appearing on the bill presented to him, constitutes in its entirety the consideration for the service supplied to him by the

service provider. That consideration, which includes the service charge, is by definition expressed in money.

In the case between *Commission of the European Communities vs. French Republic*, the European Union Court ruled on 29th March 2001 that the French Republic had failed to fulfill its obligations under Articles 2(1) and 11A (1)(a) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment.

IV. Determination on Whether Service Charge should be charged VAT

6. Service charge is paid (charged) by a client as an appreciation of good service rendered by an employee to a client. Valued Added Tax (VAT) on the service charge does not amount to double taxation since the charge once billed to a client accrues directly to the employer and not the employee. The burden of the tax is on the employer and not the employee.
7. The fact that service charge has been in existence since the year 1968 does not automatically make it exempt under the new law. The exemption which was granted under the repealed VAT Act cap 476 is null and void since the said law was repealed by a new Act which was passed in the year 2013 after extensive consultation with the public as stipulated in the Constitution.

V. Policy Options

8. The following are the policy options with regard to treatment of the petition.

Option	Implication
Option 1: Reject the Petition	The status quo remains and therefore service charge continue to be levied VAT under Value Added Tax Act 2013. There will be no revenue lose to the government but there will be reduction in after tax monthly wage for the concerned category of workers.
Option 2: Accept the Petition.	This will amend VAT Act 2013 and exclude service charge from being levied Value Added Tax. There will be revenue lose to the government
Option 3: Advise the union to	There will be delayed consideration of the petition and

<p>consider amendments to the CBA Agreements to ensure that ALL the necessary conditions for VAT exemptions are met</p>	<p>therefore VAT continue to apply on service charge.</p> <p>The following conditions may be considered as necessary for a service charge to be exempted from VAT:</p> <ol style="list-style-type: none"> 1. The charge is shown separately on the bill; 2. The charge is identified as a gratuity; and 3. The business gives the entire separately stated gratuity amount to its employees <p>The revised CBA agreements should provide a clear and verifiable mechanism to substantiate that the union turned over 100% of the gratuities to the employees in order for the gratuities to be exempt from Value Added Tax.</p>
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Committee resolution

The Committee resolved to reject the petition. There is no double taxation as prayed by the petition since service charge is an additional income over and above the statutory pay an employee gets.

MIN.NO. DCF/59/2014: CONSIDERATION OF THE RETIREMENT BENEFITS (DEPUTY PRESIDENT AND DESIGNATED STATE OFFICERS) BILL, 2013 BY HON. JOHN MBADI, MP

Considering that the National Treasury had presented a legislative proposal to replace the above bill, the Parliamentary Budget Office analyzed the two highlighting the following differences between them:

1. The Bill by the National Treasury proposes to have the Chief Justice as one of the entitled persons for which the bill by Hon. Mbadi has not included
2. The Bill by the National treasury proposes that the entitled should have retired from office any time after 1st January 2008 while the Bill by Hon. John Mbadi proposes the date to be 15th January 2008
3. The Bill by the National Treasury proposes lower terms for monthly pension and lump-sum payment after retirement.
4. The Bill by the National Treasury proposes lesser vehicles be allocated to each entitled person and lengthens the replacement period for each car

5. The Bill by the National Treasury has capped the fuel allowance to a maximum of 20,000 KM while the Bill by Hon. John Mbadi proposes the allowance to be 15% of current monthly salary of the office holder
6. The Bill by the National Treasury proposes lesser number of staff each entitled person
7. The Bill by the National Treasury caps the entitlements to persons who have served in office for more than ten years (for the Chief Justice) while the bill by the Hon. John Mbadi caps the entitlements to persons who have served in office for more than only one term.
8. Summary of the main differences

	Bill by the National Treasury	Bill by Hon. John Mbadi, MP
Entitlements	<ul style="list-style-type: none"> • Prime Minister • Deputy President • Vice president • Speaker of the National Assembly • Speaker of the Senate • Chief Justice 	<ul style="list-style-type: none"> • Prime Minister • Vice President • Deputy President • Speaker of the National Assembly • Speaker of the Senate
Monthly Pension	65% of last monthly salary	80% of last Monthly salary
Lump-sum payment on retirement	One year salary of each term in office	One and half year salary of each term in office
vehicles	DP/PM – one saloon replaceable after 6 years, one four wheel drive replaceable after 8 years	DP/PM – two saloon, one four wheel drive each replaceable after 4 years
Fuel Allowance	Fuel Card for mileage not exceeding 20,000KM per annum	15% of current monthly salary of office holder
Staff	2 drivers, one Personal Assistant, one secretary, one senior support staff	DPIPM- three drivers, one Personal Assistant, one accountant, two secretaries, two house Keepers, two senior support staff, two gardeners, two cooks, two cleaners Speakers- two drivers, one Personal Assistant, One secretary, one housekeeper, one senior support staff, one gardener, one cleaner

Committee observation and resolution

The Committee noted that the Retirement Benefits (Deputy President and designated State Officers) Bill, 2013 sponsored by the Hon. John Mbadi, MP had gone through the due process and was properly before parliament and indeed the Committee pursuant to Standing Order 127. The National Treasury should have therefore prepared amendments to refine the Bill and not to prepare a separate Bill to one that was properly before the House.

The Committee therefore resolved to invite the National Treasury for comments on the bill sponsored by Hon. John Mbadi, MP pursuant to Standing Order 114. The Secretariat was asked to facilitate the meeting.

MIN.NO. DCF/60/2014: PRE-PUBLICATION SCRUTINY OF THE PROPOSED COUNTIES DIVISION REVENUE BILL, 2014

This agenda was differed to a later date.

MIN.NO. DCF/61/2014: CONSIDERATION OF THE PETITION BY COFEK

This agenda was differed to a later date.

MIN.NO. DCF/62/2014 ADJOURNMENT

The Ag. Chairperson adjourned the meeting at 12. 00 p.m.

Signed.....
Chairperson

Date.....

MINUTES OF THE 14TH SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING & TRADE HELD ON TUESDAY 18TH MARCH, 2014 IN THE BOARD ROOM, 2ND FLOOR, PROTECTION HOUSE, AT 10.00 A.M

Present

1. Hon. Benjamin Langat, MP - Chairperson
2. Hon. Nelson Gaichuhie, MP - Vice-Chairperson
3. Hon. Sammy Mwaita, MP
4. Hon. Ogendo Rose Nyamunga, MP
5. Hon. Sakwa John Bunyasi, MP
6. Hon. Patrick Makau King'ola, MP
7. Hon. Abdullswamad Sheriff, MP
8. Hon. Ronald Tonui, MP
9. Hon. Iringo Cyprian Kubai, MP
10. Hon. Daniel Epuyo Nanok, MP
11. Hon. Abdul Rahim Dawood, MP
12. Hon. Timothy Bosire, MP
13. Hon. Joseph Limo, MP
14. Hon. Mary Emase, MP
15. Hon. Joash Olum, MP
16. Hon. Lati Lelelit, MP
17. Hon. Sumra Irshadali, MP
18. Hon. Alfred Sambu, MP
19. Hon. Eng. Shadrack Manga, MP

Absent With Apologies

1. Hon. Jones Mlolwa, MP
2. Hon. Tiras Ngahu, MP
3. Hon. Kirwa Stephen Bitok, MP
4. Hon. Dr. Oburu Oginga, MP
5. Hon. Jimmy Nuru Angwenyi, MP
6. Hon. Anyanga Andrew Toboso, MP
7. Hon. Sammy Koech, MP
8. Hon. Sakaja Johnson, MP
9. Hon. Shakeel Shabbir Ahmed, MP
10. Hon. Dennis Waweru, MP

IN ATTENDANCE

1. Mr. Evans Oanda - First Clerk Assistant
2. Mr. Joash Kosiba - Fiscal Analyst
3. Josphat Motonu - Fiscal Analyst

MIN.NO. DCF/68/2014 PRELIMINARIES

The Chairperson called the meeting to order at 10.30 am followed by a word of prayer.

MIN.NO. DCF/69/2014: CORRESPONDENCES

The Chairman drew the attention of the Committee to the following correspondences that required the Committee's action:

1. Comments on the proposed County Revenue Division Bill from the Kenya Law Reform Commission.
2. Response from the National Treasury on the statement request regarding export of Macademia. The Secretariat was asked to prepare the statement for reading in the House Pursuant to Standing Order 44(2)(c)
3. Proposed retreat with the Commission for Science, Technology and Innovation. The Budget and Appropriations Committee, the Finance, Planning & Trade and the Education Committees were invited to attend the same in Naivasha on 27th and 28th March, 2014. The Secretariat was asked to liase with the other invited Committees and report on their concurrence to attend.

MIN.NO. DCF/70/2014: CONFIRMATION OF MINUTES

Minutes of the previous meetings were confirmed as follows:

1. Minutes of the 1st sitting held on 22nd January, 2014 were confirmed as a true record of the proceedings after being proposed by the Hon. Kubai Iringo, MP and seconded by the Hon. Patrick Makau, MP.
2. Minutes of the 2nd sitting held on 28th January, 2014 were confirmed as a true record of the proceedings after being proposed by the Hon. Sammy Mwaita, MP and seconded by the Hon. Sakwa Bunyasi, MP.
3. Minutes of the 3rd sitting held on 29th January, 2014 were confirmed as a true record of the proceedings after beng proposed by the Hon. Sakwa Bunyasi MP and seconded by the Hon. Alfred Sambu, MP.
4. Minutes of the 4th sitting held on 30th January, 2014 were confirmed as a true record of the proceedings after beng proposed by the Hon. Joash Olum, MP and seconded by the Hon. Lati Lelelit, MP.
5. Minutes of the 5th sitting held on 11th February, 2014 were confirmed as a true record of the proceedings after beng proposed by the Hon. Sumra Irshadali, MP and seconded by the Hon. Kubai Iringo, MP.

6. Minutes of the 6th sitting held on 14th February, 2014 were confirmed as a true record of the proceedings after being proposed by the Hon. Alfred Sambu, MP and seconded by the Hon. Epuyo Nanok, MP.
7. Minutes of the 7th sitting held on 25th February, 2014 were confirmed as a true record of the proceedings after being proposed by the Hon. Epuyo Nanok, MP and seconded by the Hon. Joseph Limo, MP.
8. Minutes of the 8th sitting held on 25th February, 2014 were confirmed as a true record of the proceedings after being proposed by the Hon. Epuyo Nanok, MP and seconded by the Hon. Joseph Limo, MP.
9. Minutes of the 9th sitting held on 27th February, 2014 were confirmed as a true record of the proceedings after being proposed by the Hon. Joash Olum, MP and seconded by the Hon. Rose Nyamunga, MP.
10. Minutes of the 10th sitting held on 4th March, 2014 were confirmed as a true record of the proceedings after being proposed by the Hon. Rose Nyamunga, MP and seconded by the Hon. Epuyo Nanok, MP.
11. Minutes of the 11th sitting held on 6th March, 2014 were confirmed as a true record of the proceedings after being proposed by the Hon. Epuyo Nanok, MP and seconded by the Hon. Nelson Gaichuhie, MP.
12. Minutes of the 13th sitting held on 13th March, 2014 were confirmed as a true record of the proceedings after being proposed by the Hon. Epuyo Nanok, MP and seconded by the Hon. Shadrack Manga, MP.

MIN.NO. DCF/71/2014: MATTERS ARISING

1. Under Min.No.DCF/04/2014, the Committee resolved to revisit the matter in a later date.
2. Under Min.No.DCF/16/2014, the Committee felt that there is need for the Committee on Environment to pursue the matter of water provision in the country with a view to ensuring that proper structures are put in place..
3. Under Min.No.DCF/27/2014, the Committee resolved to seek for information from the Ministry of east African Affairs, Commerce & Tourism on the challenges Kenyan traders are facing in Tanzania. The Secretariat was therefore asked to facilitate.
4. Under Min.No.DCF/37/2014, the Committee resolved to take its rightful role of overseeing revenue generation over and above the expenditure.
5. Under Min.No.DCF/44/2014, the Committee resolved to seek information from the Ministry of Devolution on what is done in the Huduma centers at the opportune time.
6. Under Min.No.DCF/53/2014, the secretariat reported that the Principal Secretary, National Treasury had asked indulgence of the Committee to postpone the meeting meant to discuss retirement benefits to a later date due to unavailability of the pension secretary. The Committee did not buy the idea but resolved to re-invite him to its meeting of Tuesday 25th March, 2014.

MIN.NO. DCF/72/2014: ANY OTHER BUSINESS

1. The Hon. Alfred Sambu , MP requested the Committee to have the Committee Secretary for Industrialization and Enterprise Development to appear before the Committee and address the status of Pan Paper sale and reopening. The Committee resolved to invite the Cabinet Secretary within two weeks.
2. The Hon. Nelson Gaichuhie, MP thanked the Committee for supporting him when he was recently bereaved.

MIN.NO. DCF/73/2014 ADJOURNMENT

The Chairperson adjourned the meeting at 12. 06 p.m.

Signed.....

Chairperson

Date.....