VOLUME II

PKF TAXATION SERVICES LTD

PKF

MEMORANDA FROM STAKEHOLD
ON THE FINANCE BILL, 202

Our Ref: PKFTAX/NA-1/2021/mkm/jm

26 May 2021

The Chairman
The Departmental Committee on Finance and National Planning
Main Parliament Building - Parliament Road
Nairobi

ATTENTION:

Mr. Michael R. Sialai, Clerk to the National Assembly

Dear Sir/Madam,

SUBMISSION OF MEMORANDUM ON THE FINANCE BILL, 2021 (NATIONAL ASSEMBLY BILLS NO. 18 OF 2021)

We refer to the above subject matter and thank the Committee for inviting us to make our submissions.

Pursuant to article 118(1) (b) of the Constitution of Kenya and Standing Order No. 127(3) of the Kenya National Assembly, the Departmental Committee on Finance and Planning is considering the Finance Bill, 2021, and we once again request you to take into consideration our proposals contained in the attached memorandum.

Our memorandum highlights various tax proposals contained in the Finance Bill, 2021 that we call upon your Committee to scrutinize. At the onset, we would like to emphasize on the proposed **thin capitalisation** thresholds that would seek to punish both local and foreign entities for being highly geared. The proposal would have adverse effects on the banking industry which highly relies on loans from Small and Medium Enterprises whilst discouraging local entrepreneurs from investing or divesting due to the high costs of financing resulting from the proposed thin capitalisation measure. Given the current economic times and against all odds during a pandemic, we implore you to protect indebted Taxpayers whose businesses are on the verge of collapsing due to poor performance.

We thank you most sincerely for the opportunity to engage with the Committee on this matter and we are happy to appear before the Committee to explain our proposals.

Yours faithfully,
For and on behalf of: PKF Taxation Services Limited

THE NATIONAL ASSEMBLY
PAPERS LAID
DAY
DATE: 22 JUN 2021
TABLED BY:
CLERK AT THE TABLE:

Michael Mburugu
Partner

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APPENDIX: SUBMISSION OF MEMORANDUM ON THE FINANCE BILL, 2021

A. Proposed Income Tax Changes

	Proposed Change in the Bill	Our proposal
1	**Section 2 of the Income Tax Act (ITA)** The Bill proposes to expand the definition of 'control' and instances that give rise to control. The Bill proposes to reduce the threshold of control from ownership of shares or voting rights of 25% to 20%. The Bill also proposes to introduce various scenarios that would give rise to control.	This proposal will have a significant impact on Transfer Pricing arrangements and should be amended to exclude instances that out rightly involve transactions between unrelated/third parties. If the proposal is maintained, we will see major distortions in business arrangements that in the past have been considered to be conducted at market price. This proposal should not be retained.
2	**Section 2 of the ITA** The Bill seeks to radically redefine instances that result in creation of a 'Permanent Establishment' (PE) in Kenya.	The proposal for a fixed place of business lacks a timeline on how long the fixed place should have existed in Kenya. The current provision in the Income Tax Act, CAP 470 (ITA) provides that a fixed place of business should have existed for a period of 6 months for it to create a PE. The absence of a specific timeline is ambiguous and will be subject to numerous disputes. Whilst the intention of this proposed amendment is to make sure that persons doing business in Kenya pay their fair share of taxes, it will have a negative impact on infrastructure and energy projects since these are highly specialized areas that require expertise from abroad. Foreign persons might be deterred from participating in these projects because of increased tax costs on the income they derive from Kenya.

	Proposed Change in the Bill	Our proposal
3.	**Section 16(2)(j) of the ITA** The Bill proposes to overhaul Section 16(2) (j) of the ITA which covers thin capitalization provisions with the following notable changes: a) Restricting interest expense deductibility to 30% of Earnings Before Interest, Tax, Depreciation and Amortization (EBITDA); b) Restricting interest expense to 30% of EBITDA on all loans; c) Expanding the scope of interest to include payments that are economically equivalent to interest and expenses incurred in connection with raising loans.	a) Restricting the deductibility of interest expenses to 30% of EBITDA is retrogressive in the sense that it will discourage investments that are highly geared. b) The restriction is also retrogressive for start-ups as it restricts claimability of interest on all loans particularly during earlier periods when returns are naturally expected to be low. c) The proposal is also detrimental to loss making companies as they will not claim any interest expense. d) Further, the proposal is punitive to companies operating in the extractive, infrastructure and energy sectors since operations in these sectors are highly geared with no immediate revenues. The proposal should be amended to cover only foreign loans and should be restricted to companies that are foreign controlled. The current debt to equity ratio of 3:1 should be maintained and used to determine if a company that is foreign controlled should be subject to thin capitalization provisions. The intention of this proposal is to prevent repatriation of profits through excessive interest charges but it should not punish highly geared locally owned companies. The current debt to equity ratio of 2:1 for companies in the extractive industry are foreign controlled should be changed to 3:1. This is in light of the huge investments required in the industry with no immediate revenues. The current provisions around deemed interest should also be removed. Kenya needs an influx of foreign direct investment (FDI) to grow our economy and the provisions of deemed interest are counter-productive.

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	Proposed Change in the Bill	Our proposal
4	**Section 18B of the ITA** The Bill proposes to introduce a new Section 18B to the ITA that introduces Country by Country reporting for ultimate parent entities of Multinational Enterprises (MNEs) Resident in Kenya.	The proposed amendment is a welcome move as it would introduce transparency in operations of MNEs that are tax resident in Kenya to ensure they pay their rightful share of taxes. The proposal should however be amended to include the threshold of gross turnover that the MNEs should meet to comply with the regulation so as to create certainty on compliance with the regulation.
5.	**Amendments to the 2nd and 9th Schedules to the ITA** The Bill proposes to amend the 2nd and 9th Schedules to the ITA with the following notable proposed amendments: a) Changing Investment Allowance deduction criteria from reducing balance to equal instalment basis in the 2nd Schedule; b) Aligning the depreciation rates and deduction method for machinery used to undertake operations under a prospecting right and machinery used to undertake exploration operations in the 9th Schedule with the 2nd Schedule to the ITA; c) Increasing the withholding tax on service fee paid by a contractor from 5.625% to 10%; d) Increasing the withholding tax on service fee paid by a licensee from 5.625% to 10%; e) Reducing the withholding tax rate on management, training or professional fee paid by a contractor from 12.5% to 10%; and	The proposed change of basis in the 2nd Schedule from reducing balance to equal instalment basis is welcome. Whilst the proposed reduction of withholding tax rate on management, training or professional fee paid by a contractor is a welcome move, the proposed increase in withholding tax rates should be dropped before assent of the Bill, as it will discourage investments in the extractive industry. The proposal to align deductibility of interest expense in the extractive sector to the proposed change to Section 16(2)(j) should be dropped.

	Proposed Change in the Bill	Our proposal
	f) Aligning the deductibility of interest expense for companies in the extractive sector with Section 16(2)(j) of the ITA.	
6	**Section 12D of the ITA** Minimum tax	Whilst this is not a proposal in the Bill, the implications of minimum tax are adverse to businesses in Kenya. The case on constitutionality and legality of minimum tax provisions is already at the High Court.

B. Proposed Value Added Tax Changes

	Proposed Change in the Bill	Our comments
1	**Section 67 (2) of the Value Added Tax Act, 2013 (VAT Act)** The Bill proposes to give the CS National Treasury wide latitude of powers in gazetting VAT Regulations without seeking the approval of the National Assembly. Currently, the CS is required to seek the approval of the National Assembly before gazetting any VAT Regulations.	The proposed change is retrogressive in the sense that it leaves a wide un-checked latitude of powers to the Executive, which can be exercised whimsically and insensitively. The principle of separation of powers will be negated if this provision is passed, leaving taxpayers at the mercy of the Executive. There is no rationale or justification why the Government would want to avoid approval by the National Assembly for such important Regulations which could have far-reaching implications to the business community and consumers generally.

	Proposed Change in the Bill	Our comments
2	The First Schedule, Part I (Exempt Supplies) of VAT Act is proposed to be amended as follows: **Good proposed to be moved to VATABLE category:** • Disposable plastic syringes of tariff no. 9018.31.10 • Other syringes with or without needles of tariff no. 9018.31.90. • 0402.99.10 Milk, specifically prepared for infants • 0402.91.10 Other not containing added sugar or other sweetening matters specially prepared for infants. • Airlid paper without super absorbent polymer 180gsm/67 of tariff number 48.03.00.0 • Airlid paper without super absorbent polymer 80gsm/67 of tariff number 48.03.00.0 • Plain polythene film/PE of tariff number 39.20.10.10 • PE white 25-40gsm/release paper of tariff number 48.10.99.00 • 12-16 gsm spun bound piyropo nonwoven cover stock/15gsm spun bound PP non-woven SSMMS hydrophobic leg cuffs of tariff number 56.03.1190.	**Disposable syringes and other syringes** Whilst the government is expecting to vaccinate massively in the near future, the imposition of VAT on the above goods is most likely going to increase the costs of vaccination further burdening the already heavily indebted government. The proposal to introduce VAT on syringes should be dropped. In addition to our above proposal, the National Assembly should consider dropping the proposed introduction of VAT on milk specifically prepared for infants since this will make it costly for a vast majority of the public.
3	**The Second Schedule, Part A (Zero rated Supplies) of VAT Act is proposed to be amended as follows:** **Good proposed to be moved to VAT Exempt category:** Exportation of taxable services	The proposal to exempt exported taxable services from VAT is ill advised and is aimed at limiting VAT refund claims by taxpayers providing services to non-resident persons.

	Proposed Change in the Bill	Our comments
		Exempting taxable services from VAT would be against the canon of equity given that goods exported out of Kenya are zero- rated whilst importation of taxable services attracts reverse charge VAT in certain circumstances. The proposal is against international best practice as recommended by the Organization for Economic Co-operation and Development on applicability of VAT on cross-border transactions where exports are zero-rated for VAT purpose globally.
4	**The Second Schedule, Part C (Zero rated Supplies) of VAT Act is proposed to be amended as follows:** Ordinary bread is proposed to be subjected to VAT at the standard rate of 16%.	This proposal should be dropped because it will result in the increase of the price of bread, which is consumed by all Kenyans regardless of their social status. A majority of the consumption of bread is by the wananchi who are already struggling with the negative current economic climate as a result of the Covid-19 pandemic.
5	**Services proposed to be moved to VAT Exempt category from standard rate of 16%** The transfer of assets and other transactions related to the transfer of assets into real estate investment trusts and asset-backed securities.	The Bill proposes to exempt from VAT transfer of assets and other transactions related to the transfer of assets into real estate investment trusts and asset backed securities. Currently, this is standard rated. This is aimed at making it cheaper for persons to establish Real Estate Investment Trusts (REITs) hence spurring growth in the real estate sector. The proposed change should be retained.

C. Proposed Excise Duty Changes

	Proposed Change in the Bill	Our proposals
1	**First Schedule to the Excise Duty Act:** The Bill proposes to introduce excise duty on locally manufactured sugar confectionary and white chocolate in blocs, slabs or bars.	The Finance Act 2018 introduced excise duty on sugar confectionery (including white chocolate) of tariff heading 17.04, chocolate in blocks, slabs or bars of tariff Nos. 1806.31.00, 1806.32.00,1806.90.00. However, in order to promote local manufacturing, protect the industry from cheap imports and spur local investment in the sector, the Finance Act 2019 amended the Excise Duty Act to exempt local manufacturers from excise duty. The re-introduction of excise duty on locally manufactured products will reverse the Government's efforts to revive the industry in light of the exit of some of the players in the industry and greatly affect the competitiveness of local sugar confectionery and chocolate products in the market as both imported and locally manufactured products will attract excise duty. This proposal should be dropped in order to promote and protect the local industry since the benefits to be realized outweigh the negative effects of killing this sector.
2	**First Schedule to the Excise Duty Act:** The Bill proposes to re-introduce excise duty on betting at a rate of 20% on the amount wagered or staked.	Excise duty on betting at a rate of 20% on the amount wagered or staked was first introduced through the Finance Act, 2019 and abolished subsequently in the Finance Act, 2020 after an outcry by the industry players. The re-introduction of excise duty will deal a huge blow to the players in the industry and may lead to additional companies exiting the market.

D. **Proposed Tax Procedures Act Changes**

	Proposed Change in the Bill	Our proposals
1	**Section 23 and 31 of the Tax Procedure Act, 2015** Amendment of assessment period from 5 years to 7 years.	The proposal will make it onerous for taxpayers since KRA will have the mandate to conduct audits for longer a period of. Taxpayers will therefore be required to maintain records for a longer period. We propose that the time limit be retained at 5 years.
2	**Section 42 (A) of the Tax Procedure Act, 2015** Withholding VAT exemptions	The Bill proposes to scrap the powers that the Commissioner has in exempting certain persons from Withholding VAT provisions. We propose that the exemptions are retained since the VAT refund backlogs will make it difficult for businesses that would be benefitted from the exemption in the first place.

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16 May 2021

National Assembly
Departmental Committee of Finance and National Planning
Clerk@parliament.go.ke
Leahwanjiru4@gmail.com

Dear Sir,
Submission Of Memorandum
THE FINANCE BILL, 2021
Please find my memorandum for items for consideration.

Yours faithfully,

Ernest Muguku Muriu
Partner

Clause	Proposed Amendment and Reason
Short title and commencement.	**Clause 1** Delete Section 1(b) and replace with "all other sections, the later of on the 1st July, 2021 and on the date of assent"
	PART II—INCOME TAX
Amendment of section 2 of Cap. 470.	**Clause 2** In the definition of control article (a) delete the words "twenty per cent" and replace with "twenty-five percent" For purposes of the proposed definition of control, Amend the 4th Schedule to expand the definition financial institution to add: 1. a person licensed under the Central Bank of Kenya Act 2. A savings and credit co-operative society licensed under the Sacco Societies Act No. 14 of 2008. 3. A person licensed under the Microfinance Act, No. 19 of 2006. 4. A person licensed under the Capital Markets Act. 5. A person licenced under the retirement benefits act 6. A Venture Capital Enterprise In the proposed definition of control add the below proviso Provided: The definition of control shall not apply in the definition of the term "contract of service in in section 2" In the proposed definition of control Delete proposed article (h) For purposes of the new definition of control in section 15(2)(r) (iv) delete the words "and in this subparagraph "control" has the meaning assigned to it in paragraph 32 of the Second Schedule" For purposes of the new definition of control in section 18(4)(a) delete the words "a controlling interest therein, in excess of five percent of the total income of that company" and replace with "controls the company"
	Clause 2 In the definition of permanent establishment paragraph (b), add the following words after the words "one hundred and eighty-three days" in that year of income or withing the preceding 12-month period.
Amendment of section 3 of Cap. 470.	**Clause 3** Delete the proposed definition of digital market place and replace as follows (ba) "digital marketplace" means a platform (including an online or electronic platform) which enables users, buyers, sellers, recipients or providers to sell or provide, receive services, goods or other property to other users, buyers, sellers, recipients or providers . replace the term users with the terms "users, buyers, sellers, recipients or providers" to enable the amendment achieve its objective. Not everybody is a user. No definition is provided in the Finance Bill as to what constitutes an 'online' and this introduces significant ambiguity to the DST regime. Please

Clause	Proposed Amendment and Reason
	propose one.
Amendment of section 12E of Cap. 470.	**Clause 5** By deleting the proposed clause 5(a) and replacing it with the following new clause 5 (a) (a) deleting subsection 1 and its proviso and replacing it therefor with **12E.** (1) Notwithstanding any other provision of this Act, a tax to be known as digital service tax shall be payable by a nonresident person whose income is derived or accrues in accordance with Section 3(2)(ca) To capture the nonresident part and to have section 12E consistent with the amendments to section 3 on digital taxes.
Amendment of section 15 of Cap. 470.	**Clause 6** At the end of the proposed section 6(4) add the words "and, insofar as that deficit has not already been deducted"
Amendment of section 16 of Cap. 470.	**Clause 7** In the proposed section 16(2)(j) replace the word "thirty" with the word "fifty" In the proviso of the proposed section 16(2)(j) add the following paragraphs (iii) "all loans" means loans, overdrafts, ordinary trade debts, overdrawn current accounts or any other form of indebtedness for which the company is paying a financial charge, interest, discount or premium In the proposed section 16(2)(ja) delete the words "alone or together with not more than four other persons" (iv) this paragraph shall not apply to financial institutions
Insertion of new section in Cap. 470.	**Clause 8** In the definition of ultimate parent entity in item (a) delete the words "is resident" and replace with "is **not** resident" In the proposed section 18B(2) replace with words "financial activities" with "business or financial activities" In the proposed section 18B(3), add the words, "in addition to its transfer pricing documentation" after the words "jurisdiction in which the group operates"
	PART III—VALUE ADDED TAX
Amendment of section 2 of No. 35 of 2013	**Clause 14** Further amend the **definition of the term "supply of imported services** in paragraph (a) to add the words "or by a person whom section 5(7) does not apply" after the words "not a registered person" The paragraph (a) will therefore read as follows (a) the supply is made by a person who is not a registered person or by a person whom section 5(7) does not apply, to any person. This is because, digital service providers are required to charge VAT the same a registered persons.
Amendment of section 5 of No. 35 o f 2013	**Clause 15** In the proposed subsection 9 In the definition of digital marketplace delete the term "users' as it appears and replace with "users, buyers, sellers, recipients or providers" to enable the amendment achieve its objective. Not everybody is a user.

Clause	Proposed Amendment and Reason
Amendment of section 67 of No. 35 of 2013.	**Clause 20** This proposal may be superfluous / or unnecessary as the Statutory Instruments Act still requires, all statutory instruments shall within seven (7) sitting days after the publication be transmitted to the responsible Clerk for tabling before the relevant House of Parliament, otherwise, it shall.
Amendment of Second Schedule to No. 35 of 2013	**Clause 22** Delete the proposed removal from zero rating of exportation of taxable services and ordinary bread. Its unfair to tax bread and leave milk as zero rated. Kenya needs to encourage Kenyans to export services, not making exports expensive by removing ability to claim input VAT. This may encourage invoicing for services from other countries, leading to capital flight, or make the country unfavorable to investors looking to be a regional hub and expose the country to the risk of investors leaving to more favorable jurisdictions.
	PART IV—EXCISE DUTY
Amendment of section 14 of No. 23 of 2015	**Clause 24** This proposed provision should be extended to the provision of goods ie operate an input output system, instead of a refund system. **Insert new subsection as follows:** A licensed person under this Act, may, in computing the of excise duty payable in respect of excisable goods removed from a manufacturer's factory during a calendar month or supply of the services during a calendar month, deduct any excise duty paid in respect of inputs used manufacturer to excisable goods or used to make excisable services, but only to the extent that the supply or importation was acquired to make those excisable goods or services. This includes for export of excisable goods.
Amendment of the First Schedule to No. 23 of 2015	**Clause 25** Delete the proposed item (c) ie in Part III, in the definition of "other fees", by deleting the words "fees or commissions earned in respect of a loan" In the current definition of "other fees" includes any fees, charges or commissions charged by financial institutions relating to their licensed activities, *but does not include interest on loan or return on loan or fees or commissions earned in respect of a loan or any share of profit or an insurance premium or premium based or related commissions specified in the Insurance Act or regulations made thereunder;* *Therefore other fees does not include interest on loan or return on loan. Its important to note, "fees or commissions earned in respect of a loan" is a return on a loan. As such, the proposed deletion of* "fees or commissions earned in respect of a loan" *Will not make such fees excisable.* Further, with no prejudice to the above, seeking to Tax fees or commissions earned in respect of a loan – will make loans more exorbitant during this period when companies need financing to survive. Its instructive to note, government already introduced a The Credit Guarantee Scheme meant to give relief for struggling small-businesses in the country. As such, this proposed tax is therefore counterintuitive.

Clause	Proposed Amendment and Reason
	Impose excise duty on plastic, single use bottles, to encourage use of glass, reusable bottles.
	PART V—TAX PROCEDURES
Amendment of section 3 of No. 29 of 2015	**Clause 26** Include the Betting, Lotteries and Gaming Act under the TPA
Insertion of new sections in No. 29 of 2015	**Clause 27** Amend proposed section 6A by inserting new subsection 1A The Cabinet Secretary shall cause a copy of any agreement made under subsection(1) to be laid, without delay, before the National Assembly in accordance with the provisions of the Statutory Instruments Act
Amendment of section 23 of No. 29 of 2015	**Clause 28** Delete the proposed clause 28(a) and 28(c) Amendment of section 23 Increasing the audit period to 7 years will make it very cumbersome for businesses to effectively respond to queries from KRA, there is loss of institutional memory over effluxion of time due to staff turnover, passage of time etc. The United States has the period set at 3 years. KRA should be encouraged to do more timely and frequent audits, which are more helpful to the tax authority and the tax payer.
Amendment of section 31 of No. 29 of 2015	**Clause 29** Delete the proposed Amendment of section 31 for reasons in Clause 28
Amendment of section 42A of No. 29 of 2015	**Clause 32** Delete proposed Amendment of section 42A This will hurt companies that would be in continuous credit position and result in cash flow implications on taxpayers given that VAT refund claim payments are a tedious and time consuming process, which is also subject to availability of funding to KRA.
Insertion of new section **108A.** in No.29 of 2015.	**Clause 40** Delete the proposed section 108A This may disenfranchise a person who has to attend the two cases concurrently. The provision raises concerns relating to the violation of a taxpayer rights especially in light of Section 80 of the TPA which provides that a person shall not be subject to both the imposition of a penalty and the prosecution of an offence in respect of the same act or omission in relation to a tax law. Further, section 80(2) provides that the KRA must elect between a penalty or prosecution of an offence where a person commits an act or omission that may be liable under a tax law to both the imposition of penalty and the prosecution of an offence.

Clause	Proposed Amendment and Reason
	This provision may be contrary to article 50(2)(p) of Kenya Constitution (2) Every accused person has the right to a fair trial, which includes the right— (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;
Amendment of the First Schedule to No. 29 of 2015	**Clause 42** Delete the proposed clause 42 and replace with 14. Carrying out business over the internet or an electronic network including through a digital marketplace; This is more consistent with the proposed clause 3 amending the income tax act

Other Proposals for matters not in the bill

Income Tax Act		In the proviso to Paragraph 3(q) of Third Schedule Head B Replace the word "citizens" with the words "citizens or residents"
Value Added Tax	To insert a new provision to clearly state when a service is deemed to be consumed in Kenya and is therefore not an export To insert a new provision to clearly state when a service is deemed to be consumed in Kenya and is therefore not an export –On when to apply destination principal are clarified.	Insert a new section 8A Place of use or consumption of services. 8A. services supplied is used or consumed in Kenya include: (a) the services are physically performed in Kenya by a person who is in Kenya at the time of supply to a person who is physically in Kenya at the time of supply irrespective of who is making payment for the services; or (b) the services are directly related to movable or immovable property in Kenya; or (c) the services are directly related to goods physically in Kenya at the time of supply; (d) a supply that is made in relation to rights if rights are for use in Kenya irrespective of who is making payment for the services or irrespective of whether the supply was made to a to a recipient who was not physically in Kenya (e) the services are radio or television broadcasting services received at an address in Kenya, or (f) the effective use or enjoyment of the services takes

		place in Kenya irrespective of who is making payment for the services or irrespective of whether the supply was made to a to a recipient who was not physically in Kenya.

The Institute of Certified Public Accountants of Kenya

SUBMISSIONS ON

THE FINANCE BILL 2021

JUNE 2021

INTRODUCTION

The Institute of Certified Public Accountants of Kenya (ICPAK) is a statutory body of accountants established under the Accountants Act of 1978, and as repealed under the Accountants Act Number 15 of 2008, mandated to develop and regulate the Accountancy Profession in Kenya. It is also a member of the International Federation of Accountants (IFAC), the global umbrella body for the accountancy profession and Pan Africa Federation of Accountants (PAFA), the continental body of Accountants.

PROPOSALS ON THE BUDGET FY 2021/2022

The Institute has reviewed the Finance Bill and has developed the following submissions for consideration:

NO.	CLAUSE	PROPOSED AMENDMENT	JUSTIFICATION
A.	**INCOME TAX**		
1.	**Clause 2(a)** (b) a loan advanced by the person to another person constitutes at least seventy per cent of the book value of the total assets of the other person excluding a loan from a financial institution that is not associated with the person advancing the loan; (c) a guarantee by the person for any form of indebtedness of another person constitutes at least seventy per cent of the total indebtedness of the other person excluding a guarantee from a financial institution that is not associated with the guarantor; (f) the person or a person designated by that person—	We propose the following amendments: **Delete items (b), (c), (f), (g) and (h) under clause 2(a)(f) of the Bill.**	The Bill proposes to provide a very broad definition of the term control. Whereas we agree with the legal definition of control to be a person who holds at least 20% of the voting rights in a company, the economic definition is too wide and is likely to lead to truly independent parties being considered as related. Examples include: i. Where a loan advanced constitutes at least 70% of the book value of the total assets. – Some businesses are capital intensive e.g. power, oil and gas sectors etc. and it is likely that an independent institution such as a Development Financial Institution would advance a loan that is between 70% and 75% of the book value of the assets. Such a transaction between independent parties should not be subject to the same treatment as related parties. ii. Where an entity supplies at least ninety per cent of the supply of the purchases of another person. This does

NO.	CLAUSE	PROPOSED AMENDMENT	JUSTIFICATION
	(i) supplies at least ninety per cent of the supply of the purchases of another person; or (ii) in the opinion of the Commissioner, influences the prices or other conditions relating to the supply of the purchases of another person; (g) the person purchases or designates a person— (i) to purchase at least ninety per cent of the sales of another person; or (ii) in the opinion of the Commissioner, influences the price or any other condition of the sales of another person; (h) the person has any other relationship, dealing or practice with another person which the Commissioner may deem to constitute control;		not mean that the entities are related parties and therefore subject to the definition of control. Taxpayers should not be penalized for having few customers/suppliers. Further, we note that the definition gives the Commissioner power to determine transactions that would fall within the control of the other entity. This is likely to lead to abuse and also protracted disputes between the revenue authority and taxpayers. The proposal will eliminate instances of independent parties being considered to be related for tax purposes. Further, the Commissioner should not be given unlimited powers to determine control between parties since this may lead to abuse of power and protracted disputes between the taxpayers and the revenue authority.
2.	**Clause 7(a)** Section 16 of the Income Tax Act is amended in subsection (2) by— a) deleting paragraph (j) and substituting therefor the following new paragraph— (j) gross interest paid or payable to related persons and third parties in excess of thirty per cent of earnings before interest, taxes, depreciation and amortization of the borrower in any financial year: Provided that— (i) any income which is exempt from tax	The clause should be amended to read as follows in line with the international best practice. *gross interest paid or payable to* ***non-resident*** *related persons ~~and third parties~~ in excess of thirty per cent of earnings before interest, taxes, depreciation and amortization of the borrower in any financial*	The Bill proposes to change the interest restriction ratio from a fixed ratio of 3(debt):1(equity) to 30% of earnings before interest, tax, depreciation and amortization. We note that the proposal is heavily borrowed from the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) Action 4. The aim is to limit base erosion through the use of interest expense to achieve excessive interest deduction between related parties. Although we welcome the move to be aligned with the international best practice, we note that our proposed law is not only focusing on related party loans but rather any loans

NO.	CLAUSE	PROPOSED AMENDMENT	JUSTIFICATION
	shall be excluded from the calculation of earnings before interest, taxes, depreciation and amortization; and (ii) this paragraph shall apply to— (A) interest on all loans; (B) payments that are economically equivalent to interest; and (C) expenses incurred in connection with raising the finance.	*year:* We also recommend the introduction of the following proviso to exclude financial institutions from interest restriction: *This paragraph shall not apply to a financial institution specified under the Fourth Schedule to the Act*	that taxpayers may have. We also note that the proposal does not exclude financial institutions. This anomaly would stifle the growth of businesses in Kenya and would lead to an economic downturn especially now in the wake of the Covid – 19 Pandemic. Base erosion and profit shifting only applies to related non-resident parties. The proposal will align Kenya's law to the international best practice.
3.	**Clause 8(2)** An ultimate parent entity of a multinational enterprise group shall submit to the Commissioner a return describing the group's financial activities in Kenya, where its gross turnover exceeds the prescribed threshold, and in all other jurisdictions where the group has taxable presence, not later than twelve months after the last day of the reporting financial year of the group.	Amend clause 8 (2) to read as follows: ~~*An ultimate parent entity of*~~ *All multinational enterprises* ~~*group*~~ *shall submit to the Commissioner a return describing the group's financial activities in Kenya, where its gross turnover exceeds the prescribed threshold, and in all other jurisdictions where the group has taxable presence, not later than twelve months after the last day of the reporting financial year of the group.*	An ultimate parent entity of a multinational enterprise group will be required to submit to the Commissioner a return describing the group's financial activities in Kenya, where its gross turnover exceeds the prescribed threshold, and in all other jurisdictions where the group has taxable presence. This is a welcome move since the filing of such returns will increase transparency in the activities of Kenyan headquartered MNEs and the information obtained will assist KRA in conducting transfer pricing audits. However, we note that the proposed provisions in the Bill only capture MNEs that are headquartered in Kenya hence most international corporations that have subsidiaries in Kenya will not be impacted by the proposed amendment. This appears contrary to the purpose of BEPS Action 13 which would be to provide the Kenya Revenue Authority visibility of MNEs that are headquartered outside of Kenya. The proposal will encourage transparency for all multinational enterprises operating in Kenya.

NO.	CLAUSE	PROPOSED AMENDMENT	JUSTIFICATION
B.	**VAT**		
4.	**Clause 21(b) and 22(a)** The First Schedule to the Value Added Tax Act, 2013 is amended— (b) in Part II, by adding the following new paragraphs immediately after paragraph 31— 32. The exportation of taxable services. 33. The transfer of assets and other transactions related to the transfer of assets into real estate investment trusts and asset-backed securities. 22. The Second Schedule to the Value Added Tax Act, 2013 is amended— (a) in paragraph 1 of Part A, by deleting the words "or taxable services";	**Delete Clause 21(b) paragraph 32** **Delete Clause 22(a)**	The provision proposes to introduce "exportation of taxable services" as a VAT exempt supply. By categorizing exported services as VAT exempt, suppliers of such services cannot claim input VAT as a result of making exempt supplies. Consequently, such service providers' cost will be high, leading to higher cost of their services, making them less competitive internationally. This will have a negative economic impact especially given Kenya's ICT hub/Business Process Outsourcing status. The proposed amendment also contradicts the international best practice, including the destination principle which has been adopted by the Tax Appeals Tribunal and High Court in respect of exported services. Categorizing exported services as VAT exempt supplies will make Kenya an uncompetitive BPO destination • Taking into account that the world is becoming a global service economy, the change of exported services from being zero rated to exempt is discriminatory as exported goods are zero-rate from tax purposes. • The proposed change will also be in conflict with International Best Practice (The destination principle) and even a review of the region, most countries zero-rate the exportation of both goods and services.
5.	**Clause 22(b)** The Second Schedule to the Value Added	Delete Clause 22(b) of the Finance Bill, 2021	The proposed amendment removes ordinary bread from VAT zero rated status, effectively making bread subject to

NO.	CLAUSE	PROPOSED AMENDMENT	JUSTIFICATION
	Tax Act, 2013 is amended— (b) by deleting paragraph 13A.		16% VAT. Subjecting ordinary bread to 16% VAT will make the product expensive and inaccessible to many Kenyans. It is useful to recall that in a bid to make bread accessible to most Kenyans, the industry reduced the weight of bread from 500gms to 400gms to retain the cost. Subjecting bread to 16% VAT also runs counter to the government's big 4 agenda pillar on food security.
C.	**EXCISE DUTY**		
6.	**Clause 25(b)** The First Schedule to the Excise Duty Act, 2015 is amended— in Part II by inserting the following new paragraph immediately after paragraph 4— 4A. Excise duty on betting shall be twenty per cent of the amount wagered or staked.	**Delete the new paragraph 4A in Clause 25(b)**	The Finance Bill, 2021 proposes to re-introduce 20% excise duty on amounts wagered or staked. The betting industry is one of the most heavily taxed sectors in Kenya. Bookmakers pay 15% Gross Gaming Revenue, 30% corporation tax and in most cases, 20% winnings tax. Imposing 20% excise duty on amounts staked will effectively kill the formal industry and lead to: a) Informal, underground or black-market betting with losses to government revenue; and b) A massive shift to online and offshore betting which does not generate any revenues for the Exchequer. When 20% excise duty was introduced in 2018/19, the bookmakers recorded a significant dip in taxes remitted to the Exchequer as a direct result of the reduced activity owing to the heavy taxation visited on this sector. Loss of revenue to the government as a result of the complete failure of the sector.

NO.	CLAUSE	PROPOSED AMENDMENT	JUSTIFICATION
			Black-market and illegal gambling with disastrous consequences for society and the country.
7.	**Clause 25(c)** The First Schedule to the Excise Duty Act, 2015 is amended— (c) in Part III, in the definition of "other fees", by deleting the words "fees or commissions earned in respect of a loan".	**Delete Clause 25(c)**	Deleting the words "fees or commissions earned in respect of a loan" will subject these fees and commissions charged by lenders, to 20% excise duty. This will make the loans more expensive and inaccessible to borrowers, especially the MSMEs that are in dire cash flow constraints, compounded by delayed payments by both levels of government. In addition, the deletion will likely lead to disputes between KRA and taxpayers especially on whether such "fees or commissions earned in respect of a loan" are in fact a "***return on loan***" which is exempt from excise duty. If retained, this provision will make the loans more expensive and inaccessible to borrowers, especially the MSMEs that are in dire cashflow constraints, compounded by delayed payments by both levels of government. In addition, the new definition of "other fees" will likely lead to disputes between KRA and taxpayers especially on whether such "fees or commissions earned in respect of a loan" are in fact a "***return on loan***" which is exempt from excise duty.

NO.	CLAUSE	PROPOSED AMENDMENT	JUSTIFICATION
D.	**TAX PROCEDURES ACT**		
8.	**Clause 28 and 29** Section 23 of the Tax Procedures Act, 2015 is amended— (a) in subsection (1)(c), by deleting the words "five years" and substituting therefor the words "seven years"; (b) by inserting the following new subsections immediately after subsection (2)— (2A) Despite subsection (2), the unit of currency in books of account, records, paper registers, tax returns or tax invoices in respect of a non-resident person carrying on business through a digital marketplace shall be in convertible foreign currency as may be approved by the Commissioner. (2B) The provisions of subsection (2) shall not apply to a non-resident person who files returns and makes payments through a resident tax representative or non-resident person with a permanent establishment. (c) in subsection (3)(b), by deleting the words "five years" and substituting therefor the words "seven years". **29.** Section 31 of the Tax Procedures Act, 2015 is amended—	**The proposals should be deleted from the Bill.**	The Bill proposes to increase the period within which assessments may be issued/ amended by the Commissioner from five years to seven years. In addition, it also proposes to increase the document retention period from five years to seven years. The proposal will take us back in history where taxpayers were subjected to never ending tax audits. From 2015 when the statute of limitation was reduced to 5 years, a lot of progress has been made by the revenue authority to conclude audits within reasonable time. The increased time period may erode the administrative efficiency of KRA by reducing the incentive to audit taxpayers in a timely manner. KRA should be encouraged to move with the times and embrace digital techniques to audit taxpayers within the shortest time possible. For multinational enterprises, KRA can leverage on the exchange of information with the revenue authorities where the multinational has a taxable presence. Taxpayers should not be penalized for KRA's lack of efficiency by creating taxpayers' uncertainty for an additional 2 years.

NO.	CLAUSE	PROPOSED AMENDMENT	JUSTIFICATION
	(a) in subsection (4)(b), by deleting the words "five years" and substituting therefor the words "seven years"; (b) in subsection (6)(a), by deleting the words "five years" and substituting therefor the words "seven years".		
9.	**Clause 33** Section 47 of the Tax Procedures Act, 2015 is amended by inserting the following new subsections immediately after subsection (4)— (4A) Where the Commissioner notifies a taxpayer that an application for a refund has been ascertained in accordance with subsection (3), and applies the refund to the payment of an outstanding tax in accordance with subsection (4)(a) or (b), interest or penalties shall not accrue on the amount applied to the payment of the outstanding tax from the date of the notification. (4B) For the avoidance of doubt, where the Commissioner has applied a refund to the payment of an outstanding tax under subsection (4A), if there is any outstanding tax after such application, the outstanding tax shall accrue interest and penalties in accordance with this Act.	The proposal should be amended to read as follows: "*Where the Commissioner notifies a taxpayer that an application for a refund has been ascertained in accordance with subsection (3), and applies the refund to the payment of an outstanding tax in accordance with subsection (4)(a) or (b), interest or penalties shall not accrue on the amount applied to the payment of the outstanding tax from the date ~~of the notification~~* ***the overpayment arose****."*	The Bill proposes to include a provision where an overpayment when applied in accordance with Section 47(4)(a) and (b), interest and penalties will not accrue on the amount applied to the payment of outstanding tax from the date of notification of the ascertainment that tax was overpaid. Where a taxpayer makes an overpayment in say year 1 then KRA verifies the overpayment in say year 5, the taxpayer will be subject to penalties and interest for the years 1-5 although there was a tax overpayment. The proposal suggests that taxpayers should not be subject to penalties and interest from year 5 when KRA confirms the overpayment, notwithstanding that the overpayment arose in year 1. The proposal is against the principles of natural justice. Regardless of when KRA verifies the overpayment, taxpayers should not be subject to penalties and interest from the date the overpayment arose. The taxpayers are not in control of when KRA will verify the overpayment and should therefore not be penalized for KRA's inefficiencies of verifying the overpayments.

KENYA BANKERS
ASSOCIATION

31st May 2021

The Clerk of the National Assembly

Parliament Buildings

Parliament Road

PO Box 41842 – 00100

Nairobi

Dear Sir,

RE: KENYA BANKERS ASSOCIATION'S MEMORANDUM FOR CONSIDERATION BY THE NATIONAL ASSEMBLY IN THE MATTER OF THE FINANCE BILL, 2021

We refer to the above subject and to the invitation for public comments on the Finance Bill 2021. On behalf of the banking industry, the Kenya Bankers Association (KBA) is delighted to submit it proposals for the National Assembly's consideration during its deliberations on the Finance Bill, 2021.

The proposals highlighted in this submission will go a long way in strengthening the banking sector and enhance the ease of doing business which is critical in attracting investment into Kenya. These issues are also critical in making the tax system simple, administratively efficient and equitable.

Our submissions include our representations on the proposals in the Finance Bill, 2021 as well as proposals which are not part of the Finance Bill, 2021 but will help the country achieve desired economic growth.

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Telephone: (+254 20) 2221704/2217757/2224014/2224015 Mobile: (+254) 0733812770/0711562910
Fax: (+254 20) 2219520/2221792 Email: ceo@kba.co.ke

The detailed submissions including the proposed wording of the requested changes are included as an appendix to this letter

Conclusion

We would be delighted to provide any clarifications that you may require regarding our submissions even as we strive to collaborate in coming up with implementable tax policies that will positively impact the economy.

Yours sincerely,



Dr Habil Olaka

CHIEF EXECUTIVE OFFICER

Appendix I(a): Memoranda on changes in the Finance Bill 2021

Item	Clause	Issue with the clause	Proposed amendment	Justification
1.	Request to exempt fees and commissions earned on loans from Excise Duty **Section 25(c) of the Finance Bill:** **Proposed taxation of fee and commission earned in respect of a loan**	The Finance Bill proposes to amend the definition of 'other fees' as provided for in the Excise Duty Act (EDA) under part III of the interpretation schedule by deleting the words '*fees or commissions earned in respect of a loan.*' As it currently stands, other fees are defined to include any fees, charges or commissions charged by financial institutions relating to their licensed activities but does not include interest on loan or return on loan or fees or commissions earned in respect of a loan. Effectively this means that fees and commission earned on loans are not within the purview of excise duty.	We propose deletion of the proposed change to part III of the interpretation schedule to the Excise duty Act	The definition of "other fees" as contained in the EDA was amended in 2019 to exclude fees or commissions earned in respect of a loan from the ambit of fees subject to excise duty. The amendment was meant to provide clarity on the type of fees that are subject to excise duty following several disputes between the KRA and taxpayers. The effect of the amendment was to explicitly exclude fees such as loan processing and commitment fees were not subject to excise duty. The proposed deletion of the words *"fees or commissions earned in respect of a loan"* will bring back ambiguity given that the EDA does not define interest, which has forced the courts and Tax Appeals Tribunal to adopt the definition in the Income Tax Act (ITA). In the ITA, interest is defined to include all charges levied on a loan which would include the charges that the Finance Bill seeks to delete. The imposition of excise duty on fees and commissions earned on loans will lead to an increase in the cost of borrowing, which is

Item	Clause	Issue with the clause	Proposed amendment	Justification
				likely to affect access to credit.
2.	Request to exclude banks and financial institutions licensed under the Banking Act from the provisions of the proposed Section 16 (2) (j) which restricts the amount of interest that taxpayers can deduct when computing their tax liability. **Section 7(a) of the Finance Bill:** **Proposed change to interest deduction**	The Finance Bill proposes to amend the Income Tax Act by deleting the current provision which restricts the deductibility of interest payments to the highest amount of all loans held by the company and which exceed the greater of three times the sum of the revenue reserves and the issued and paid up capital of all classes of shares of the company. The current provision recognizes the unique nature of the banking business and has specifically excluded the banks from the interest restriction. The proposed change limits interest deduction to 30% of earnings before interest, taxes, depreciation and amortization (EBITDA). However, there is no exclusion for banks even though the interest expense makes up approximately 60% of the total bank expenses.	We propose an amendment to the proposed change to Section 16(2)(j) of the income Tax Act (ITA) and include a sub-paragraph (iii) as follows: *(iii) this section shall not apply to banks or financial institutions licensed under the Banking Act.*	Banks perform an intermediation role through use of customer deposits to give loans on which they earn interest. The banks pay interest on the customer deposits, with the expense comprising over 60% of the bank expenses. The proposed restriction will severely impact the operations of banks, diluting the banking sector's role in economic growth. It also appears that the inclusion of banks in the provision is an oversight given the provision in the immediate section 7(b) which deals with deemed interest and proposes the following change to Section 16(2)(ja): *An amount of deemed interest where the person is controlled by a non-resident person alone or together with not more than four other persons and* ***where the company is not a bank, or a financial institution licensed under the Banking Act.*** We request that Section 16(2)(j) be amended to exclude banks similar to the provision under the current provision and also under Section 16(2)(ja).
3.	Request to retain the time for record keeping under the Tax Procedures Act 2015. **Section 28(a) of the Finance Bill:**	The Finance Bill proposes to increase the period that taxpayers are required to maintain documents from the current five years to seven years. This also increases the period that the KRA can audit back years from five to seven years. The increase in the number of years that are open for audit substantially increases uncertainty for businesses.	We propose that the provision in the Finance Bill 2021 to amend Section 23 of the Tax Procedures Act be deleted.	Increasing period for record keeping from 5 years to 7 years has an implication of cost to the taxpayers during these difficulty times. This proposal will reduce uncertainty for taxpayers and encourage the KRA to better utilize the investments that it has made in technology and data analytics.

Item	Clause	Issue with the clause	Proposed amendment	Justification
	Proposed change of time for record keeping	This change is inconsistent with the investments that the KRA has made in technology which allow it to spot inconsistencies in taxpayer filings immediately they occur.		In the Finance Act, 2020 the Government introduced a Voluntary Tax Disclosure Programme (VTDP) encouraging taxpayers to self-declare all tax arrears going back five years from 1 July 2020. Under the program, persons who make a self-disclosure and pay the principal tax liability receive a waiver of the penalties and interest. The five years period was chosen to coincide with the statute of limitation under the current legislation. Extension of the statute of limitations creates a situation where some years could fall outside the VTDP program, exposing taxpayers to penalties and interest.
4.	Request to clarify the scope of the applicability of income tax on businesses conducted over electronic networks **Section 3(a) of the Finance Bill:** **Proposed taxation on business conducted through electronic networks**	The proposed change to Section 3 (2) (ca)of ITA provides for the taxation of income accruing from a business carried out over the internet or on electronic network including through a digital marketplace. The provision seeks to widen tax bracket to include other online business that would not constitute a digital marketplace. However, it has not provided for a clarification as to which businesses would be exempt from the charging of tax on the income provided through electronic networks and through the digital marketplace. This contradicts with the Income Tax (Digital Service Tax) Regulations 2020 which clearly sets out which businesses are exempt from the application of Digital Service Tax (DST).	We propose an introduction of a new subsection 3 (2) (cb) under the ITA as follows: '*The following services shall not be deemed to be digital services or services provided through an electronic marketplace for purposes of Section 3 (2) (cb)* *(a) online services which facilitate payments, lending or trading of financial instruments, commodities or foreign exchange carried out by:* *(i) a financial institution specified under the Fourth Schedule to the Act; or* *(ii) a financial service provider authorized or approved by the Central Bank of Kenya; and*	It is important for the ITA to specifically set out the exemption of the financial institutions from DST as set out in the Income Tax (Digital Service Tax) Regulations 2020 in order to avoid any misunderstanding as to the taxability of the services provided by the banks.

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<tr><th>Item</th><th>Clause</th><th>Issue with the clause</th><th>Proposed amendment</th><th>Justification</th></tr>
<tr><td></td><td></td><td></td><td>(b) online services provided by Government institutions.'</td><td></td></tr>
<tr><td>5.</td><td>Request to rescind the change proposing to delete taxable services from the list of zero-rated supplies.

Section 20(b) of the Finance Bill:

Proposed change of VAT status for export of service from zero rated to exempt</td><td>The Finance Bill, 2021 proposes to transfer the export of taxable services from the zero-rated to tax exempt category. Following this change, exporters of services will continue not to charge VAT to their customers. But will now not be entitled to claim the input VAT they incur to provide their services. Further, the exporters will be exposed to reverse VAT on services they procure from other countries to make their supplies.

Many international organisations which have made Nairobi the regional centre for their Africa operations operate under a cost-plus model where they invoice for their services based on the full cost of their operations plus a mark-up determined in accordance with the Kenya transfer pricing provisions.

Under the current VAT provisions, these organisations are allowed a deduction of input VAT incurred to make the supplies. Under the proposed changes, they will be forced to absorb the input VAT into their cost base. Further for the services they procure from outside Kenya they will be forced to account for reverse VAT which they are not allowed a deduction since their services are exempt.

Below is an example of the implications of the change, using an example of a regional business that imports services from outside Kenya to deliver an engagement that covers multiple jurisdictions. Assume a cost base of KES 1,000,000 and mark-up of 10%.

<table><tr><th></th><th>Current regime</th><th>Proposed regime</th></tr></table></td><td>Propose to delete the following proposals in the Finance Bill 2021:

a) Under Section 21(b), delete the proposed introduction of a paragraph 32 – The exportation of taxable services. This section introduces export of services under the exempt supplies category

b) Delete Section 22(a), this section removes the exportation of taxable supplies from the zero-rated supplies category

The above changes will retain the export of services as a zero-rated supply.</td><td>Kenya has struggled over many years on the application of the zero-rating to exported services. This lack of clarity has led to numerous disputes between taxpayers and the KRA with the issue still to be conclusively resolved.

The Finance Bill 2021 proposal to transfer export of services from the zero-rated not only fails to provide the much-needed clarity but also negatively impacts Kenya's aim of being the undisputed regional hub for services.

Our proposal to retain the export of services under the zero-rated category is important if Kenya is to be able to compete with other African Countries for Services Exports and retain its position as a regional hub for the following reasons:

a) It ensures that the Kenyan VAT legislation is consistent with international norms on taxation of internationally traded services. One of the important tenets of VAT is the principle of neutrality. This provides that businesses should not bear the cost of VAT. To ensure that this happens, the export of services is zero-rated to allow businesses to claim the input VAT they incur to make the supplies. The effect of the above is that the ultimate consumer bears the full cost of VAT and that it is only applied once at the end of a supply chain.</td></tr>
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<tr><th>Item</th><th>Clause</th><th>Issue with the clause</th><th>Proposed amendment</th><th>Justification</th></tr>
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<table>
<tr><td>Cost base</td><td>1,000,000</td><td>1,000,000</td></tr>
<tr><td>Reverse VAT</td><td>-</td><td>160,000</td></tr>
<tr><td>Cost base</td><td>1,100,000</td><td>1,160,000</td></tr>
<tr><td>Deduct claimable VAT</td><td>-</td><td>-</td></tr>
<tr><td>Cost base</td><td>1,000,000</td><td>1,160,000</td></tr>
<tr><td>10% Mark-up</td><td>100,000</td><td>116,000</td></tr>
<tr><td>Revenue</td><td>1,100,000</td><td>1,276,000</td></tr>
<tr><td>Less costs</td><td>(1,000,000)</td><td>(1,160,000)</td></tr>
<tr><td>Taxable profit</td><td>100,000</td><td>116,000</td></tr>
<tr><td>30%</td><td>30,000</td><td>34,800</td></tr>
</table>
Summary of incremental cost:
<table>
<tr><th>Cost item</th><th>KES</th></tr>
<tr><td>Non-deductible input VAT</td><td>160,000</td></tr>
<tr><td>Impact on non-deductible VAT on mark-up</td><td>16,000</td></tr>
<tr><td>Incremental corporation tax</td><td>4,800</td></tr>
<tr><td>Total</td><td>180,800</td></tr>
<tr><td>As a percentage of original cost</td><td>18.1%</td></tr>
</table>
The proposed change will lead to an 18% increase in the cost of doing business in Kenya.
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<td>
b) The proposed change will increase the cost of doing business for services businesses based in Nairobi to service international clients by over 18%. These organizations include regional service centres, business process outsourcing organisations (BPOs), consultants, translators etc. This is likely to drive such businesses out of the country which contradicts the stated government policy of seeking to establish Nairobi as a regional service centre.

c) The proposed changes conflicts with international best practice both globally and regionally. It will make Kenya the only country in the region that exempts from VAT, rather than zero-rates export of services. Tanzania, Uganda, Rwanda and even South Africa which are competing with Kenya to be regional service centres zero-rate the export of taxable services.

d) Kenya exports both goods and services. Under the VAT Act, the export of goods will remain zero-rated with the exporters eligible for refund of their input VAT, in addition to a waiver of the requirement to account for reverse VAT. The Finance Bill proposal to transfer services to the exempt category is discriminatory especially taking into account the fact that Kenya does not have substantial exports of goods and seeking to grow its export muscle through the growth of the services industry.

Should the proposals be confirmed into law, the consequences are likely to be:
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Item	Clause	Issue with the clause	Proposed amendment	Justification
		The above example would also apply to services that the organisations procure locally for their regional business.		a) A reduction in the budget for the regional service organizations to reduce the impact of VAT; or b) Increased contracting from outside the country; or c) Shifting of operations out of Kenya; or d) Transfer of operations to Special Economic Zones. The net impact of the above movements will be a reduction in employment opportunities and tax contributions in form of PAYE and corporation tax. In the long term, Kenya's position has a regional hub will be severely damaged.

Appendix I(b): Memoranda on new proposals for inclusion in the Finance Bill 2021

Item	Clause	Issue with the current provision	Proposed amendment	Justification
1.	Proposal to amend the definition of Management and Professional fees and Royalty under Section 2 of the Income Tax Act to exclude interchange and scheme fees. **Section 2 of the Income Tax Act: Definition of Management and professional fees**	Credit and debit cards are an important component of commerce due to the security associated with carrying a card rather than cash and the ease of transacting digitally including accessing government services through portals such as e-Citizen. To issue cards, banks make investments in terms of automated teller machines and point of sale (PoS) systems. They also subscribe to memberships in the card company networks that facilitate global card transaction. The three prominent card companies are VISA, MasterCard and American Express (AmEx). When a person makes a purchase at a merchant, a small deduction is made from the purchase price and shared among the bank that issued the card, that which issued the PoS and the card companies. The deduction helps to ensure that the three parties continue to invest to make the network secure. The sharing of the deduction among the banks is an interchange fee while the payment to the card company is a scheme fee. A recent court ruling deemed these payments to be management/professional fees and royalty payment respectively. This interpretation exposes the deduction to tax which will increase the cost of transacting using cards. We propose a change to the definition of professional/management fees and royalties to exclude interchange fees and scheme fees respectively.	We request an amendment Section 2 of the Income Tax Act on the definition of management or professional fees and royalties to include the words in italics: **"management or professional fee"** means any payment made to any person, other than a payment made to an employee by his employer, as consideration for any managerial, technical, agency, contractual, professional or consultancy services however calculated. ***This shall not include interchange and card transaction fees arising from card transactions, money transfer, payments and or any dealing with money by whatever means.*** **Royalty** Include the following proviso at the end of the definition of royalty. ***"provided that royalty shall not include scheme and subscriptions fees paid to card clearing companies."***	While cards are one of many payment channels, increased taxation of this payment channel has made it very expensive especially because banks have been forced to shoulder the tax burden. This has negatively impacted the investments by banks to increase the use of the cards as a payment channel. Increasingly banks are moving to other online channels some of which are still not compatible with global electronic commerce. Removal of the cards from the exposure to both withholding tax and VAT will align the treatment of card transactions to other payment channels and retain the commercial rationale for continued investment in card infrastructure.

Item	Clause	Issue with the current provision	Proposed amendment	Justification
2.	Request to rescind the provision on charging VAT on insurance agency, brokerage and securities brokerage reinsurance businesses **First Schedule to Value Added Tax Act, 2013** **VAT on Insurance Agency, brokerage and securities reinsurance**	The Tax Law Amendment Act, 2020 provided for the charging of VAT at the rate of 16% on insurance agency, brokerage and reinsurance business.	We request that the Finance Bill 2021 be amended by making the following proposed change by adding to Part I of the First Schedule to VAT Act: *'insurance agency, brokerage and reinsurance business'*	Insurance cover is becoming a necessity in this country as such charging of VAT on the insurance business will have an impact increasing cost on insurance during these tough times. Further, it is important to note that insurance penetration in Kenya is below 3% and any additional tax load on premiums would stifle the growth of this sector and push the insurance firms deeper into loses due to the low uptake from the populace.
3.	Request to amend the period within which the Commissioner is required to render an objection decision **Section 51(11) of the Tax Procedures Act, 2015**	Section 51(11) of the TPA provides that the Commissioner may make an objection decision within sixty days from the date of receipt of the notice of objection or any further information the Commissioner may require from the taxpayer. Linking the objection decision to the receipt of information that the Commissioner may require provides a loophole that can be used to extend the period indefinitely. For instance, if the commissioner requests for information on the fifty-ninth day, the period resets and the 60-day count starts again. This process can go on indefinitely delaying the resolution of disputes.	We propose the Finance Bill 2021 be amended by adding a new Section 51(11) to the TPA as follows: *The Commissioner shall make the objection decision within sixty days from the date of receipt of the notice of objection failure to which the objection shall be deemed to be allowed.* *Provided that prior to the expiry of the sixty days, the Commissioner may by writing to the taxpayer extend the period by an additional thirty days where there are ongoing discussions between the taxpayer and the Commissioner to resolve the tax dispute.*	Taxpayers are entitled to service that is expeditious, efficient, lawful, reasonable and procedurally fair. The proposed amendment will protect the taxpayers from extended tax audits while making provision for genuine instances where there are ongoing discussions between the taxpayer and the KRA. Further, before issuing an assessment the Commissioner has an unlimited time to go through the taxpayer documents which when added to the sixty days for review of the objection makes the additional time unnecessary.

Item	Clause	Issue with the current provision	Proposed amendment	Justification
4.	Request to reduce the Withholding Tax (WHT) rate on dividends paid to non-residents. **Paragraph 3(d) of the Third Schedule to the Income Tax Act, Cap 470**	The Finance Act 2020 increased the WHT rate on dividends paid to non-residents from 10% to 15%. The increase was a counter action to the reduction of the local Corporate Income Tax (CIT) rate from 30% to 25% to help local businesses during the Covid-19 pandemic. Even though, the CIT has been reinstated to 30% with effect from 1 January 2021, the WHT rate has remained at the higher rate of 15%.	We propose amendment of Paragraph 3(d) of the Third Schedule to the ITA by substituting *"fifteen" with the word "ten."*	Kenya competes with other countries in the region for foreign Direct Investments and it is in the interest of the country that businesses set up locally to provide employment and markets for local businesses. The change of the withholding tax adopted earlier in the year has made it less attractive for businesses to set up locally. This situation is aggravated by the coming into force of the Africa Continental Free Trade Area which will make it easier for companies to set up in countries with favourable income tax regime but have access to markets across Africa. In order to order to attract companies that will seek to diversify from the traditional manufacturing hubs of Asia, a review of the WHT rate is important in order to attract such businesses to set up in Kenya.

Item	Clause	Issue with the current provision	Proposed amendment	Justification
5	Request to rescind provision on charging VAT on transfer of businesses **First Schedule to Value Added Tax Act, 2013** **VAT on transfer of business as a going concern**	The Tax Law Amendment Act, 2020 provided for the charging VAT at the rate of 16% on the transfer of business as a going concern. This has significantly increased the cost of restructuring businesses.	We propose that transfer of business as a going concern be listed under Part I of the First Schedule to VAT Act as an exempt supply.	This will help businesses which will likely suffer the consequences of COVID-19 and require to restructure their businesses in the post-COVID period.

Memorandum submitted by the Kenya Private Sector Alliance (KEPSA) on the Finance Bill, 2021 to the National Assembly Departmental Committee on Finance and National Submitted on 1st June, 2021

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
		INCOME TAX ACT	
Section 2(a)	The Bill has re-introduced the definition of **control** which is much more comprehensive, and also in line with the proposal in the Income Tax Bill. **Control** in relation to a person now includes: i) A person holding at least 20% voting rights in a company, directly or indirectly; ii) A loan advanced constituting at least 70% of the book value of the total assets of the entity, excluding a loan from a financial institution not associated with the person advancing the loan; iii) A guarantee by a person for any form of indebtedness constituting at least 70% of the total indebtedness of the entity, excluding a guarantee from a	The amended definition should read as follows: "**Control"** in relation to a person now includes: i) A person holding at least 20% voting rights in a company, directly or indirectly; ii) A loan advanced constituting at least 70% of the book value of the total assets of the entity, from i) a director of the entity; ii) a shareholder of the entity who holds any shareholding directly or indirectly; or iii) any associate of the director or shareholder of the entity; iii) A guarantee by a person for any form of indebtedness constituting at least 70% of the total indebtedness of the entity	There are a number of provisions in this that make Kenya uncompetitive for business: i) "Control" in its literal sense means the ability to influence or direct the operating and financial policies of an entity; and the definition should not be extended to bringing market based third-party transactions into the ambit of control. ii) In a number of third-party agency agreement, the supply terms are agreed between independent third-parties. The supply of goods or services, without the ability to exercise control over the financial

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	financial institution not associated with that guarantor; iv) The power to appoint more than half of the board of directors of the entity, or at least one director or executive member of the governing board of that entity; v) A person who has exclusive rights over the know-how (includes patent, copyright, trademark, license, franchise, and any other business or commercial right) on which the entity is wholly dependent for the manufacture or processing of goods or articles or business carried on by the other person; vi) The person or another person designated by him supplies at least 90% of the purchases of the entity; or in the opinion of the Commissioner, influences the price or other conditions relating to the supply of the purchases of the entity; vii) The person or another person designated by him purchases	from i) a director of the entity; ii) a shareholder of the entity who holds any shareholding directly or indirectly; or iii) any associate of the director or shareholder of the entity; iv) The power to appoint more than half of the board of directors of the entity, or v) The powers, under an agreement, to influence or direct the financial and operating policies of the entity or the ability to control the board;	and operating policies, does not constitute control. iii) An overarching power to determine control by the Commissioner is unconstitutional. A provision of law has to be specific with no provision for board interpretation, as the imposition of any unilateral power could be subject to abuse.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	90% of the sales of the entity; or in the opinion of the Commissioner, influences the price or any other conditions of sales of the entity; or viii) Any other relationship, dealing or practice that the Commissioner may deem to constitute control.		
Section 2(b)	The definition of a permanent establishment has been deleted and substituted to include: i) A fixed place of business through which business is wholly or partly carried on and includes: • A place of management, a branch, an office, a factory, a workshop and a sales outlet; • **A mine, an oil or gas well, a quarry, or any other place of extraction or exploitation of natural resources;** • A warehouse in relation to a person whose business is providing storage facilities to others; or • A farm, plantation or other place where agricultural, forestry	The amended definition of a permanent establishment should now read: "Permanent establishment" now includes: i) A fixed place of business through which business is wholly or partly carried on and includes: • A place of management, a branch, an office, a factory, a workshop and a sales outlet; • A mine, an oil or gas well, a quarry, or any other place of extraction or exploitation of natural resources, if it is in existence for more than 12-months; • A warehouse in relation to a person whose business is	i) An extraction site (a mine, an oil or gas well, a quarry, or any other place of extraction or exploitation of natural resources) constitutes a PE if it lasts more than 12 months under the OECD Model Tax Convention and 6 months under the UN Model Tax Convention. ii) It is not logical to expect an individual who has not met the residency status in Kenya to create a PE for their non-resident employers. iii) The number of days for a consultant providing a

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	plantation or related activities are carried out; ii) A building site, construction, assembly or installation project, or any supervisory activity connected to a site or project if it continues for a period of more than 183 days, provided that: • Where a person carries on activities at a place that constitutes a building site or construction or installation project and these activities are carried on during one or more periods of time that, in the aggregate, exceed 30 days but do not exceed 183 days; and • Connected activities are carried on at the same building site or construction or installation project during different periods of time, each exceeding thirty days, by one or more enterprises closely related to the first-mentioned enterprise; the different periods of time shall be added to the aggregate period of time during which the first-	providing storage facilities to others; or • A farm, plantation or other place where agricultural, forestry plantation or related activities are carried out; ii) A building site, construction, assembly or installation project, or any supervisory activity connected to a site or project if it continues for a period of more than 183-days, provided that: • Where a person carries on activities at a place that constitutes a building site or construction or installation project and these activities are carried on during one or more periods of time that, in the aggregate, exceed 30-days but do not exceed 183-days; and • Connected activities are carried on at the same building site or construction or installation project during different periods of time, each exceeding thirty days, by one or more enterprises closely related to the first-	service on behalf of a non-resident should be aligned with the 183 days (6 months) in line with the Income Tax Act residency rules. iv) Definition (iii) providing that consultancy services provided by a non-resident person for a period exceeding 91 days will adversely affect businesses which require the foreign special expertise not available locally, will be affected as the non-resident supplier may refuse to conduct business with the local entities. This will adversely affect manufacturing and construction industries, where upon importation of machinery, they require the expertise of the non-resident consultants for installation and training purposes. Moreover, these

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	mentioned enterprise has carried on activities at that building site or construction or installation project; **iii) The provision of services including consultancy services provided by a person through employees or other personnel engaged for that purposes if the period exceeds the aggregate 91 days in any 12month period commencing or ending the year of income concerned;** iv) An installation or structure used in the exploration of natural resources provided the exploration continues for a period equal to 91 days or more; or v) A dependent agent of a person who habitually concludes, contracts or plays the principal role leading to the conclusion of contracts without material modification by the person, excluding the activities that are of a preparatory or auxiliary character such as:	mentioned enterprise; the different periods of time shall be added to the aggregate period of time during which the first-mentioned enterprise has carried on activities at that building site or construction or installation project; iii) The provision of services including consultancy services provided by a person through employees or other personnel engaged for that purposes if the period exceeds the aggregate 183-days in any 12-month period commencing or ending the year of income concerned; i) An installation or structure used in the exploration of natural resources provided the exploration continues for a period equal to 91-days or more; or ii) A dependent agent of a person who habitually concludes, contracts or plays the principal role leading to the conclusion of contracts without material	services are subject to 20% withholding tax, which effectively results into profit margin of 53.3% at the 37.5% non-resident rate of corporation tax.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	• The use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise; • The maintenance of stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display, for the purpose of processing by another enterprise; or • The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or collecting information for the enterprise, for the purpose of carrying on any other activity or combination of activities.	modification by the person, excluding the activities that are of a preparatory or auxiliary character such as: • The use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise; • The maintenance of stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display, for the purpose of processing by another enterprise; or • The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or collecting information for the enterprise, for the purpose of carrying on any other activity or combination of activities.	
Section 5 (b) (2)	Section 12E of the Income Tax Act is amended; (b) by deleting subsection (2) and substituting therefor the following new subsection—	• We propose that for purposes of clarity, a format for the proposed return be provided by KRA. The format of the proposed return should provide clarity on the nature of	i) Currently, non-resident persons subject to the DST are required to compute the DST and make an online payment of the DST due through the iTax platform.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	(2) A person subject to digital service tax shall submit a return and pay the tax due to the Commissioner on or before the twentieth day of the month following the end of the month in which the digital service was offered.	information which should be provided to the KRA to avoid ad hoc information requests. • The information that should be requested in the return should be limited to the • following: i) supplier's PIN; ii) tax period; iii) currency and exchange rate used; iv) taxable amount; and v) tax payable.	ii) There is no requirement to file a return and the format of the return has not been uploaded on iTax. The proposed amendment is welcome because the previous requirement to make real-time payment is unlikely to be achieved due to the volume of online transactions that occur at any given time.
Section 7(a)	Deleting paragraph (j) and substituting therefore the following new paragraph— (j) gross interest paid or payable to related persons and third parties in excess of thirty per cent of earnings before interest, taxes, depreciation and amortization of the borrower in any financial year: Provided that— i) any income which is exempt from tax shall be excluded from the calculation of earnings	The current paragraph (j) to be deleted and substituted with:) an amount of interest paid in proportion to the extent that the highest amount of all loans from non-resident lenders held by the company at any time during the year of income exceeds two times the sum of the revenue reserves and the issued and paid up capital of all classes of shares of the company; or an amount of deemed interest where a non-resident person is in control of the	i) Businesses in a free-market economy are at the liberty to decide how to finance the business and the restriction on how to structure the capital of an entity should not be governed by tax laws. The restriction of interest expense to 30% of EBITDA is too limiting to businesses and will adversely affect the financing of businesses, especially start-ups,

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	before interest, taxes, depreciation and amortization; and ii) this paragraph shall apply to— (A) interest on all loans; (B) payments that are economically equivalent to interest; and (C) expenses incurred in connection with raising the finance.	company – For the purpose of this subsection, the expression "revenue reserves" includes accumulated losses; Provided that this paragraph shall - (i) also apply to loans advanced to the company by a non-resident associate of the non-resident company controlling the resident company; and (ii) not apply where the company is a bank or a financial institution licensed under the Banking Act or Microfinance Act; **The other alternative is**: (j) interest payments in proportion to the extent that the highest amount of all	venture and private capital backed entities and capital intensive companies. Also for low-margin businesses, 30% of EBITA is a very low threshold. ii) Additionally, the interest expense paid on loans provided by local lenders are taxed as income on the resident lenders, and therefore there is no loss in revenue. Forcing companies not to borrow, will have its impact on the financial sector, which are one of the highest tax paying sectors. iii) The provisions as worded to include payments that are economically equivalent to interest, without defining what these mean could create a lacuna, as there are could be a conflict with interest un-winding in the accounting sense, which is not interest.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
		loans held by the company at any time during the year of income exceeds the greater of three times the sum of the revenue reserves and the issued and paid up capital of all classes of shares of the company or an amount of deemed interest where the company is in the control of a non-resident person and where the company is not a bank or a financial institution licensed under the Banking Act; Provided that this paragraph – i) shall apply to loans advanced to the company by a non-resident associate of the non-resident company controlling the resident company; and ii) shall exclude loans received from residents (including a bank or a financial institution licensed under the Banking Act or Microfinance Act).	iv) If Kenya is to act as an investment hub, we need to be cognizant of the financing structures used globally and not create our own restrictions, without having a full analysis of the impact of tax changes on these in-bound investments.
Section 8	(2) An ultimate parent entity of a multinational enterprise group shall submit to the Commissioner a return describing the group's financial	The prescribed turnover threshold has not been provided. The Finance Act, 2021 should state what is the prescribed threshold.	Multinational Groups whose Ultimate Parent Entities are located in Kenya need this

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	activities in Kenya, where its gross turnover exceeds the prescribed threshold, and in all other jurisdictions where the group has taxable presence, not later than twelve months after the last day of the reporting financial year of the group.		information for certainty on compliance with the provision.

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
	VALUE ADDED TAX, 2013		
Section 17 b	Section 17 of the Value Added Tax Act, 2013 is Amended by (b) in subsection (4), by inserting the words "leasing or hiring" immediately after the word "acquisition".	We recommend that ALL vehicles leased in excess of one year should be considered commercial vehicles for VAT purposes thus allowed automatic VAT offset against the output VAT generated in the month of supply.	• The Leasing Industry in Kenya has grown in leaps and bounds in the last seven years having blue chip corporates and several arms of the National & County Governments embracing leasing as a financing alternative as opposed to outright purchase and Hire purchase. • Some of the benefits that have given the Leasing aspect leverage over the two financing options can be identified as Cost savings in terms of Capex

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
			Outlay, Lease Rental payments are Tax Allowable & Wear and tear Deductions on Assets. • In the Previous Finance bill, Lease vehicle were Considered as Commercial Vehicles. The Input Vat attributable to these vehicles were allowable to be offset against the Output Vat generated in the month of taxable supply. • Under the Proposed Amendments, any Leased Passenger Cars or Minibuses, the registered Tax payer must prove that the vehicles are Exclusively for the Purpose of making taxable Supply in the ordinary course of Business. Where this is not clearly demonstrated, then claiming of Input VAT is not allowed. This amendment will then erode the tax benefits under lease, meaning that Leasing Finance

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
			option will become more expensive • Unlike outright purchase of asset, Leasing is a form of credit that has multiplier effects in the economy. Leased asset almost automatically attract insurance, maintenance, more asset are purchased by the leased company resulting in increased import duties, exercise duties, VAT etc. This means that leasing should be encouraged as an economic accelerator and accorded the same status and privileges that other priority investment options as positioned.
Section 27	67.(1) The Cabinet Secretary may make regulations for the better carrying of the provisions of this Act, and without prejudice to the generality of the foregoing, the regulations may – (a) prescribe conditions and procedures for the registration of registered persons;		• The deletion of the section contravenes Section 11(1) of the Statutory Instruments Act which requires all statutory instruments to be tabled in the National Assembly for approval. Moreover,

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
	(b) provide for the submission of returns and the place at which returns are to be submitted and tax is to be paid; (c) prescribe the form of notices, returns or other forms required for the purposes of this Act; (d) prescribe offence and penalties thereto; (e) prescribe rules for particular types of supplies and in relation to input tax credits; or (f) prescribe any other thing required to be prescribed for the purposes of any provision of this Act. **(2) Regulations made under this section shall be tabled before the National Assembly for approval before they take effect.** The Bill proposes the deletion of Section 67(2) above which requires the CS Treasury to table VAT regulations in the National Assembly for approval before they take effect.		regulations made in the absence of a review and feedback mechanism, could have its own consequences.

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
Section 19	Deletion of (9) The Cabinet Secretary may, in regulations, provide for the registration of a group of companies as one registered person for the purposes of the Act.	Keep the subsection (2) in its entirety	• The removal of requirement to table regulations before the National Assembly made by the CS before they take effect is improper and contrary to the rules on separation of powers in the interest of the end consumer. The tabling to the National Assembly acts as an additional check and balance.
Section 20	Section 67 of the Value Added Tax Act, 2013 is amended by deleting subsection (2)	Restate the existing provision that Regulations to be tabled before the National Assembly for approval before they take effect.	• Deletion of this clause contravenes Chapter Eight of the Constitution of Kenya which grants Parliament authority for oversight and to legislate hence enhancing accountability in the legislative process.
Section 21 (a) (xxiv) (114)	The First Schedule to the Value Added Tax Act 2013 is amended by (a) in Part I (xxiv) inserting the following new paragraphs immediately after paragraph 111—	Rephrase section 21 (a) (xxiv) (114) to consider Power Purchase Agreements. (PPA)	• Paragraph 114 introduces ambiguities for developers also providing power to KPLC. It seems intended to grandfather VAT exemptions for PPAs executed before 25 April 2020.

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
	(114) Taxable goods supplied to persons that had an agreement or contract with the Government prior to 25th April 2020 and the agreement or contract provided for exemption from value added tax: Provided that this exemption shall apply to the unexpired period of the contract or agreement and upon recommendation by the Cabinet Secretary responsible for matters relating to energy.		However, the language as drafted only preserves the VAT exemption if the exemption was "provided for" by the PPA itself. In our experience, PPAs do not themselves grant the VAT exemption, they simply acknowledge that the Parties will give effect to any VAT exemptions which apply under Kenyan law. Thus, Paragraph 114 wouldn't have any effect on most PPAs.
Section 21(b)(32)	The supply or importation of the following goods shall be exempt supplies. 32. The exportation of taxable services.	The supply of exportation of taxable services remain as a zero-rated supply. The supply should remain in the Second Schedule of the ITA and read as: Where the following supplies, excluding hotel accommodation, restaurant or entertainment services where applicable, take place in the course of a registered person's business, they shall be zero rated in accordance with the provisions of Section 7 –	Exempting exported services will increase the cost of doing business and also make Kenya a less competitive destination for outsourcing. Kenya is becoming regional powerhouse for provisions of exported services in areas of information technology, as a transport hub, professional services and advertising. KRA has continued to frustrate this growth by initially declining VAT refunds in areas of export of services in total

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
		1. The exportation of goods or taxable services.	contradiction of the OECD guidelines. When the principal accorded by KRA was not accepted by the Tax Appeals Tribunal and the courts, the solution now proposed is to exempt the export of services. What is being forgotten that export of services results in employment, is a source of foreign exchange and also results in local companies paying income and other taxes, which would all be lost if we make this sector uncompetitive.

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
	EXCISE DUTY ACT		
Section 24 (2)	Section 14 of the Excise Duty Act, 2015 is amended by renumbering the existing provision as subsection (1) and inserting the following new subsection- Where excise duty has been paid in respect of internet data services by a	Exemption from excise duty on bulk purchases of internet data services from a licenced operator.	• This is a welcome move as it will remove the double payment of excise duty on internet data ultimately reducing the cost of providing internet data services to consumers. It

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
	licensed person who purchases the data in bulk for resale, the excise duty paid shall be offset against the excise duty payable by that person on internet data services supplied to the final consumer.		should also lead to increased penetration of internet. • To enhance efficiency and reduce administration of excise, our proposal is to exempt from excise duty bulk sales from wholesalers to licenced operators and only charge excise on sale to the final consumers. • The provision is against the government strategy set out in the National Information Communications and Technology Policy 2019 which aims to facilitate universal access to ICT infrastructure and services all over the country.
none	None	Include a definition of internet data services in the Excise Duty act.	To provide clarity on the scope of internet data services that are subject to excise duty.

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
Section 25 (c)	The First Schedule to the Excise Duty Act, 2015 is amended— (c) in Part III, in the definition of "other fees", by deleting the words "fees or commissions earned in respect of a loan". The proposed definition of "other fees" will read as follows: "**other fees**" includes any fees, charges or commissions charged by financial institutions relating to their licensed financial institutions, but does not include interest on loan or return on loan or any share of profit or an insurance premium or premium based or related commissions specified in the insurance Act	• No amendment to the definition of other fees or; • Import the definition of interest from the ITA to read as follows; ***"interest" (other than interest charged to tax) means interest payable in any manner in respect of a loan, deposit, debt, claim or other right or obligation, and includes a premium or discount by way of interest and a commitment or service fee paid in respect of any loan or credit or an Islamic finance return"***	• Increased cost of borrowing- This is not in line with the strategic intent to spur economic growth and recovery • The proposed change is retrogressive and is likely to lead to ambiguity of the scope of interest that is exempt from excise duty, a deficiency that had already been cured by the Finance Act 2019. • Numerous tax disputes between the KRA and banks as it has been in the past, particularly with respect to charging of excise duty on loan related fees

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
	or regulations made thereunder		
Section 25 (a) (iii)	The First Schedule to the Excise Duty Act, 2015 is amended (a) in paragraph 1 of Part I– (iii) by deleting the description "imported glass bottles (excluding imported glass bottles for packaging of pharmaceutical products)" and the corresponding rate of excise duty;	Delete section 25(a) (iii)	• It is estimated that the production capacity of local glass manufacturers stands at about 67,125 MT against the required capacity of about 81,000 MT. The glass produced is therefore not sufficient to meet the demands of the local industrial glass users: • Local manufacturers of glass are also limited with respect to access to modern technology and are therefore unable to offer the wide range of products needed by industrial glass users. • Furthermore, the local glass manufacturers have furnace limitation and coupled with the lack of modern glass technology prevents them from

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
			switching from one type of glass to the next efficiently, which negatively impacts supply chain forecasting, quality, speed to market and efficiency of glass users. • Local manufactured glass is also expensive due to the high production costs and with respect to some categories of glass, there are challenges in quality, which has necessitated importation to ensure that specific client needs are met while remaining competitive and relevant in both local and international markets. • As glass users, we have demonstrated that we are ready to support the sourcing of glass locally and are prepared to partner with the

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
			government in upscaling the industry and enhancing competitiveness. As the local glass industry capacity grows, so will our local sourcing ratio. In demonstration of our commitment, we are jointly working with key players in this sector to address the challenges of the local glass industry and propose solutions for energy cost, cheap glass imports/under valuation into the country, and proposal on incentives to invest in technology and capacity of the local glass manufacturers. • The introduction of excise duty on glass last year did not aid in achieving growth in the local glass manufacturing sector but

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
			instead was a punitive measure that served to increase the cost and burden of doing business in Kenya. • Glass from Tanzania is also subjected to the 25% excise duty, this was in the contravention of Article 75 of the EAC Treaty, and Article 15(2) of the Protocol on Establishment of the East African Customs Union. The ongoing bilateral engagements between the Republic of Tanzania and Kenya seek to address issues affecting trade. This removal of excise duty will further promote regional economic growth with the largest amount of glass bottles being imported from Tanzania.

TAX PROCEDURES ACT, 2015			
Section 29	31.(1) Subject to this section, the Commissioner may amend an assessment (referred to in this section as the "original assessment") by making alterations or additions, from the available information and to the best of the Commissioner's judgement, to the original assessment of a taxpayer for a reporting period to ensure that— (4) The Commissioner may amend an assessment— (a) in the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time; or (b) in any other case, within seven years of— (i) for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates; or (ii) for any other assessment, the date the Commissioner notified the taxpayer of the assessment.	This amendment be adopted and Section 31 should remain as is. 31.(1) Subject to this section, the Commissioner may amend an assessment (referred to in this section as the "original assessment") by making alterations or additions, from the available information and to the best of the Commissioner's judgement, to the original assessment of a taxpayer for a reporting period to ensure that— (4) The Commissioner may amend an assessment— (a) in the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time; or (b) in any other case, within **five** years of— (i) for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates; or (ii) for any other assessment, the date the Commissioner notified the taxpayer of the assessment.	• With the resources provided to KRA including technological advances adopted, 5-years is a long time to for the revenue authority to confirm the validity of self-assessment returns. • Prior to the TPA, the timeframe for audit in the VAT Act was 5-years, and this was adopted as a common timeframe across all tax heads. • There is also concern in relation to the Voluntary Tax Disclosure Program, which runs for a 5year period from 1st January 2021. The impact of this change is that persons who make a volunteer declaration under the program, could be subject to an additional assessment in respect to the areas of voluntary disclosure, which is

	(6) Where an assessment has been amended, the Commissioner may further amend the original assessment— (a) seven years after— (i) for a self-assessment, the date the taxpayer submitted the self-assessment return to which the self-assessment relates; or (ii) for any other assessment, the date the Commissioner served notice of the original assessment on the taxpayer; or	(6) Where an assessment has been amended, the Commissioner may further amend the original assessment— (a) **five** years after— (i) for a self-assessment, the date the taxpayer submitted the self- assessment return to which the self- assessment relates; or (ii) for any other assessment, the date the Commissioner served notice of the original assessment on the taxpayer; or	not the aim of the program. This may affect taxpayers' willingness to take advantage of the Voluntary Tax Disclosure Program since an audit may be triggered for the remaining two years not captured under VTDP.

Section 32	The Bill proposes the deletion of the following section of the TPA. 42(4A). The Commissioner may at any time exempt any supplier from the provisions of this section if such supplier has sufficiently demonstrated that due to the nature of his business, and due to the application of this section, he is going to be in a continuous credit position for a period of not less than twenty-four months. The provision allowing the application for withholding VAT exemption for suppliers has been deleted. This move follows the reduction of the withholding VAT rate from 6% to 2%.	i) The provision for withholding VAT exemption should not be deleted and retained. ii) The provision should remain as: 42(4A). The Commissioner may at any time exempt any supplier from the provisions of this section if such supplier has sufficiently demonstrated that due to the nature of his business, and due to the application of this section, he is going to be in a continuous credit position for a period of not less than twenty-four months.	• Despite the reduction in the VAT withholding tax rate, some suppliers may still find themselves in a significant VAT refund position. • Given the significant time that VAT refund processes takes from application to payment, the deletion of this provision may still affect suppliers who transact in large volumes. • Given the impact the global pandemic has had on business cash flows, the exemption from withholding VAT may provide necessary relief.

Memorandum submitted by the Kenya Private Sector Alliance (KEPSA) on the Finance Bill, 2021 to the National Assembly Departmental Committee on Finance and National Submitted on 1st June, 2021

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
		INCOME TAX ACT	
Section 2(a)	The Bill has re-introduced the definition of **control** which is much more comprehensive, and also in line with the proposal in the Income Tax Bill. **Control** in relation to a person now includes: i) A person holding at least 20% voting rights in a company, directly or indirectly; ii) A loan advanced constituting at least 70% of the book value of the total assets of the entity, excluding a loan from a financial institution not associated with the person advancing the loan; iii) A guarantee by a person for any form of indebtedness constituting at least 70% of the total indebtedness of the entity, excluding a guarantee from a	The amended definition should read as follows: **"Control"** in relation to a person now includes: i) A person holding at least 20% voting rights in a company, directly or indirectly; ii) A loan advanced constituting at least 70% of the book value of the total assets of the entity, from i) a director of the entity; ii) a shareholder of the entity who holds any shareholding directly or indirectly; or iii) any associate of the director or shareholder of the entity; iii) A guarantee by a person for any form of indebtedness constituting at least 70% of the total indebtedness of the entity	There are a number of provisions in this that make Kenya uncompetitive for business: i) "Control" in its literal sense means the ability to influence or direct the operating and financial policies of an entity; and the definition should not be extended to bringing market based third-party transactions into the ambit of control. ii) In a number of third-party agency agreement, the supply terms are agreed between independent third-parties. The supply of goods or services, without the ability to exercise control over the financial

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	financial institution not associated with that guarantor; iv) The power to appoint more than half of the board of directors of the entity, or at least one director or executive member of the governing board of that entity; v) A person who has exclusive rights over the know-how (includes patent, copyright, trademark, license, franchise, and any other business or commercial right) on which the entity is wholly dependent for the manufacture or processing of goods or articles or business carried on by the other person; vi) The person or another person designated by him supplies at least 90% of the purchases of the entity; or in the opinion of the Commissioner, influences the price or other conditions relating to the supply of the purchases of the entity; vii) The person or another person designated by him purchases	from i) a director of the entity; ii) a shareholder of the entity who holds any shareholding directly or indirectly; or iii) any associate of the director or shareholder of the entity; iv) The power to appoint more than half of the board of directors of the entity, or v) The powers, under an agreement, to influence or direct the financial and operating policies of the entity or the ability to control the board;	and operating policies, does not constitute control. iii) An overarching power to determine control by the Commissioner is unconstitutional. A provision of law has to be specific with no provision for board interpretation, as the imposition of any unilateral power could be subject to abuse.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	90% of the sales of the entity; or in the opinion of the Commissioner, influences the price or any other conditions of sales of the entity; or viii) Any other relationship, dealing or practice that the Commissioner may deem to constitute control.		
Section 2(b)	The definition of a permanent establishment has been deleted and substituted to include: i) A fixed place of business through which business is wholly or partly carried on and includes: • A place of management, a branch, an office, a factory, a workshop and a sales outlet; • **A mine, an oil or gas well, a quarry, or any other place of extraction or exploitation of natural resources;** • A warehouse in relation to a person whose business is providing storage facilities to others; or • A farm, plantation or other place where agricultural, forestry	The amended definition of a permanent establishment should now read: "Permanent establishment" now includes: i) A fixed place of business through which business is wholly or partly carried on and includes: • A place of management, a branch, an office, a factory, a workshop and a sales outlet; • A mine, an oil or gas well, a quarry, or any other place of extraction or exploitation of natural resources, if it is in existence for more than 12-months; • A warehouse in relation to a person whose business is	i) An extraction site (a mine, an oil or gas well, a quarry, or any other place of extraction or exploitation of natural resources) constitutes a PE if it lasts more than 12 months under the OECD Model Tax Convention and 6 months under the UN Model Tax Convention. ii) It is not logical to expect an individual who has not met the residency status in Kenya to create a PE for their non-resident employers. iii) The number of days for a consultant providing a

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	plantation or related activities are carried out; ii) A building site, construction, assembly or installation project, or any supervisory activity connected to a site or project if it continues for a period of more than 183 days, provided that: • Where a person carries on activities at a place that constitutes a building site or construction or installation project and these activities are carried on during one or more periods of time that, in the aggregate, exceed 30 days but do not exceed 183 days; and • Connected activities are carried on at the same building site or construction or installation project during different periods of time, each exceeding thirty days, by one or more enterprises closely related to the first-mentioned enterprise; the different periods of time shall be added to the aggregate period of time during which the first-	providing storage facilities to others; or • A farm, plantation or other place where agricultural, forestry plantation or related activities are carried out; ii) A building site, construction, assembly or installation project, or any supervisory activity connected to a site or project if it continues for a period of more than 183-days, provided that: • Where a person carries on activities at a place that constitutes a building site or construction or installation project and these activities are carried on during one or more periods of time that, in the aggregate, exceed 30-days but do not exceed 183-days; and • Connected activities are carried on at the same building site or construction or installation project during different periods of time, each exceeding thirty days, by one or more enterprises closely related to the first-	service on behalf of a non-resident should be aligned with the 183 days (6 months) in line with the Income Tax Act residency rules. iv) Definition (iii) providing that consultancy services provided by a non-resident person for a period exceeding 91 days will adversely affect businesses which require the foreign special expertise not available locally, will be affected as the non-resident supplier may refuse to conduct business with the local entities. This will adversely affect manufacturing and construction industries, where upon importation of machinery, they require the expertise of the non-resident consultants for installation and training purposes. Moreover, these

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	mentioned enterprise has carried on activities at that building site or construction or installation project; iii) **The provision of services including consultancy services provided by a person through employees or other personnel engaged for that purposes if the period exceeds the aggregate 91 days in any 12month period commencing or ending the year of income concerned;** iv) An installation or structure used in the exploration of natural resources provided the exploration continues for a period equal to 91 days or more; or v) A dependent agent of a person who habitually concludes, contracts or plays the principal role leading to the conclusion of contracts without material modification by the person, excluding the activities that are of a preparatory or auxiliary character such as:	mentioned enterprise; the different periods of time shall be added to the aggregate period of time during which the first-mentioned enterprise has carried on activities at that building site or construction or installation project; iii) The provision of services including consultancy services provided by a person through employees or other personnel engaged for that purposes if the period exceeds the aggregate 183-days in any 12-month period commencing or ending the year of income concerned; i) An installation or structure used in the exploration of natural resources provided the exploration continues for a period equal to 91-days or more; or ii) A dependent agent of a person who habitually concludes, contracts or plays the principal role leading to the conclusion of contracts without material	services are subject to 20% withholding tax, which effectively results into profit margin of 53.3% at the 37.5% non-resident rate of corporation tax.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	• The use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise; • The maintenance of stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display, for the purpose of processing by another enterprise; or • The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or collecting information for the enterprise, for the purpose of carrying on any other activity or combination of activities.	modification by the person, excluding the activities that are of a preparatory or auxiliary character such as: • The use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise; • The maintenance of stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display, for the purpose of processing by another enterprise; or • The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or collecting information for the enterprise, for the purpose of carrying on any other activity or combination of activities.	
Section 5 (b) (2)	Section 12E of the Income Tax Act is amended; (b) by deleting subsection (2) and substituting therefor the following new subsection—	• We propose that for purposes of clarity, a format for the proposed return be provided by KRA. The format of the proposed return should provide clarity on the nature of	i) Currently, non-resident persons subject to the DST are required to compute the DST and make an online payment of the DST due through the iTax platform.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	(2) A person subject to digital service tax shall submit a return and pay the tax due to the Commissioner on or before the twentieth day of the month following the end of the month in which the digital service was offered.	information which should be provided to the KRA to avoid ad hoc information requests. • The information that should be requested in the return should be limited to the • following: i) supplier's PIN; ii) tax period; iii) currency and exchange rate used; iv) taxable amount; and v) tax payable.	ii) There is no requirement to file a return and the format of the return has not been uploaded on iTax. The proposed amendment is welcome because the previous requirement to make real-time payment is unlikely to be achieved due to the volume of online transactions that occur at any given time.
Section 7(a)	Deleting paragraph (j) and substituting therefore the following new paragraph— (j) gross interest paid or payable to related persons and third parties in excess of thirty per cent of earnings before interest, taxes, depreciation and amortization of the borrower in any financial year: Provided that— i) any income which is exempt from tax shall be excluded from the calculation of earnings	The current paragraph (j) to be deleted and substituted with:) an amount of interest paid in proportion to the extent that the highest amount of all loans from non-resident lenders held by the company at any time during the year of income exceeds two times the sum of the revenue reserves and the issued and paid up capital of all classes of shares of the company; or an amount of deemed interest where a non-resident person is in control of the	i) Businesses in a free-market economy are at the liberty to decide how to finance the business and the restriction on how to structure the capital of an entity should not be governed by tax laws. The restriction of interest expense to 30% of EBITDA is too limiting to businesses and will adversely affect the financing of businesses, especially start-ups,

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	before interest, taxes, depreciation and amortization; and ii) this paragraph shall apply to— (A) interest on all loans; (B) payments that are economically equivalent to interest; and (C) expenses incurred in connection with raising the finance.	company – For the purpose of this subsection, the expression "revenue reserves" includes accumulated losses; Provided that this paragraph shall - (i) also apply to loans advanced to the company by a non-resident associate of the non-resident company controlling the resident company; and (ii) not apply where the company is a bank or a financial institution licensed under the Banking Act or Microfinance Act; **The other alternative is**: (j) interest payments in proportion to the extent that the highest amount of all	venture and private capital backed entities and capital intensive companies. Also for low-margin businesses, 30% of EBITA is a very low threshold. ii) Additionally, the interest expense paid on loans provided by local lenders are taxed as income on the resident lenders, and therefore there is no loss in revenue. Forcing companies not to borrow, will have its impact on the financial sector, which are one of the highest tax paying sectors. iii) The provisions as worded to include payments that are economically equivalent to interest, without defining what these mean could create a lacuna, as there are could be a conflict with interest un-winding in the accounting sense, which is not interest.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
		loans held by the company at any time during the year of income exceeds the greater of three times the sum of the revenue reserves and the issued and paid up capital of all classes of shares of the company or an amount of deemed interest where the company is in the control of a non-resident person and where the company is not a bank or a financial institution licensed under the Banking Act; Provided that this paragraph – i) shall apply to loans advanced to the company by a non-resident associate of the non-resident company controlling the resident company; and ii) shall exclude loans received from residents (including a bank or a financial institution licensed under the Banking Act or Microfinance Act).	iv) If Kenya is to act as an investment hub, we need to be cognizant of the financing structures used globally and not create our own restrictions, without having a full analysis of the impact of tax changes on these in-bound investments.
Section 8	(2) An ultimate parent entity of a multinational enterprise group shall submit to the Commissioner a return describing the group's financial	The prescribed turnover threshold has not been provided. The Finance Act, 2021 should state what is the prescribed threshold.	Multinational Groups whose Ultimate Parent Entities are located in Kenya need this

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	activities in Kenya, where its gross turnover exceeds the prescribed threshold, and in all other jurisdictions where the group has taxable presence, not later than twelve months after the last day of the reporting financial year of the group.		information for certainty on compliance with the provision.

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
	VALUE ADDED TAX, 2013		
Section 17 b	Section 17 of the Value Added Tax Act, 2013 is Amended by (b) in subsection (4), by inserting the words "leasing or hiring" immediately after the word "acquisition".	We recommend that ALL vehicles leased in excess of one year should be considered commercial vehicles for VAT purposes thus allowed automatic VAT offset against the output VAT generated in the month of supply.	• The Leasing Industry in Kenya has grown in leaps and bounds in the last seven years having blue chip corporates and several arms of the National & County Governments embracing leasing as a financing alternative as opposed to outright purchase and Hire purchase. • Some of the benefits that have given the Leasing aspect leverage over the two financing options can be identified as Cost savings in terms of Capex

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
			Outlay, Lease Rental payments are Tax Allowable & Wear and tear Deductions on Assets. • In the Previous Finance bill, Lease vehicle were Considered as Commercial Vehicles. The Input Vat attributable to these vehicles were allowable to be offset against the Output Vat generated in the month of taxable supply. • Under the Proposed Amendments, any Leased Passenger Cars or Minibuses, the registered Tax payer must prove that the vehicles are Exclusively for the Purpose of making taxable Supply in the ordinary course of Business. Where this is not clearly demonstrated, then claiming of Input VAT is not allowed. This amendment will then erode the tax benefits under lease, meaning that Leasing Finance

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
			option will become more expensive • Unlike outright purchase of asset, Leasing is a form of credit that has multiplier effects in the economy. Leased asset almost automatically attract insurance, maintenance, more asset are purchased by the leased company resulting in increased import duties, exercise duties, VAT etc. This means that leasing should be encouraged as an economic accelerator and accorded the same status and privileges that other priority investment options as positioned.
Section 20	67.(1) The Cabinet Secretary may make regulations for the better carrying of the provisions of this Act, and without prejudice to the generality of the foregoing, the regulations may – (a) prescribe conditions and procedures for the registration of registered persons;		• The deletion of the section contravenes Section 11(1) of the Statutory Instruments Act which requires all statutory instruments to be tabled in the National Assembly for approval. Moreover,

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
	(b) provide for the submission of returns and the place at which returns are to be submitted and tax is to be paid; (c) prescribe the form of notices, returns or other forms required for the purposes of this Act; (d) prescribe offence and penalties thereto; (e) prescribe rules for particular types of supplies and in relation to input tax credits; or (f) prescribe any other thing required to be prescribed for the purposes of any provision of this Act. **(2) Regulations made under this section shall be tabled before the National Assembly for approval before they take effect.** The Bill proposes the deletion of Section 67(2) above which requires the CS Treasury to table VAT regulations in the National Assembly for approval before they take effect.		regulations made in the absence of a review and feedback mechanism, could have its own consequences.

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
Section 19	Deletion of (9) The Cabinet Secretary may, in regulations, provide for the registration of a group of companies as one registered person for the purposes of the Act.	Keep the subsection (2) in its entirety	• The removal of requirement to table regulations before the National Assembly made by the CS before they take effect is improper and contrary to the rules on separation of powers in the interest of the end consumer. The tabling to the National Assembly acts as an additional check and balance.
Section 21 (a) (xxiv) (114)	The First Schedule to the Value Added Tax Act 2013 is amended by (a) in Part I (xxiv) inserting the following new paragraphs immediately after paragraph 111— (114) Taxable goods supplied to persons that had an agreement or contract with the Government prior to 25th April 2020 and the agreement or contract provided for exemption from value added tax: Provided that this exemption shall apply to the unexpired period of the contract or agreement and upon recommendation by the Cabinet	Rephrase section 21 (a) (xxiv) (114) to consider Power Purchase Agreements. (PPA)	• Paragraph 114 introduces ambiguities for developers also providing power to KPLC. It seems intended to grandfather VAT exemptions for PPAs executed before 25 April 2020. However, the language as drafted only preserves the VAT exemption if the exemption was "provided for" by the PPA itself. In our experience, PPAs do not themselves grant the VAT exemption, they simply acknowledge that the Parties will give effect to any VAT

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
	Secretary responsible for matters relating to energy.		exemptions which apply under Kenyan law. Thus, Paragraph 114 wouldn't have any effect on most PPAs.
Section 21(b)(32)	The supply or importation of the following goods shall be exempt supplies. 32. The exportation of taxable services.	The supply of exportation of taxable services remain as a zero-rated supply. The supply should remain in the Second Schedule of the ITA and read as: Where the following supplies, excluding hotel accommodation, restaurant or entertainment services where applicable, take place in the course of a registered person's business, they shall be zero rated in accordance with the provisions of Section 7 – 1. The exportation of goods or taxable services.	Exempting exported services will increase the cost of doing business and also make Kenya a less competitive destination for outsourcing. Kenya is becoming regional powerhouse for provisions of exported services in areas of information technology, as a transport hub, professional services and advertising. KRA has continued to frustrate this growth by initially declining VAT refunds in areas of export of services in total contradiction of the OECD guidelines. When the principal accorded by KRA was not accepted by the Tax Appeals Tribunal and the courts, the solution now proposed is to exempt the export of services. What is being forgotten that export of services results in employment, is a source of foreign exchange and also results in local

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
			companies paying income and other taxes, which would all be lost if we make this sector uncompetitive.

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
	EXCISE DUTY ACT		
Section 24 (2)	Section 14 of the Excise Duty Act, 2015 is amended by renumbering the existing provision as subsection (1) and inserting the following new subsection- Where excise duty has been paid in respect of internet data services by a licensed person who purchases the data in bulk for resale, the excise duty paid shall be offset against the excise duty payable by that person on internet data services supplied to the final consumer.	Exemption from excise duty on bulk purchases of internet data services from a licenced operator.	• This is a welcome move as it will remove the double payment of excise duty on internet data ultimately reducing the cost of providing internet data services to consumers. It should also lead to increased penetration of internet. • To enhance efficiency and reduce administration of excise, our proposal is to exempt from excise duty bulk sales from wholesalers to licenced

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
			operators and only charge excise on sale to the final consumers. • The provision is against the government strategy set out in the National Information Communications and Technology Policy 2019 which aims to facilitate universal access to ICT infrastructure and services all over the country.
none	None	Include a definition of internet data services in the Excise Duty act.	To provide clarity on the scope of internet data services that are subject to excise duty.
Section 25 (c)	The First Schedule to the Excise Duty Act, 2015 is amended— (c) in Part III, in the definition of "other fees", by deleting the words "fees or commissions earned in respect of a loan".	• No amendment to the definition of other fees or; • Import the definition of interest from the ITA to read as follows; ***"interest" (other than interest charged to tax) means interest***	• Increased cost of borrowing- This is not in line with the strategic intent to spur economic growth and recovery • The proposed change is retrogressive and is likely to lead to ambiguity of the scope of interest that is

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
	The proposed definition of "other fees" will read as follows: "**other fees**" includes any fees, charges or commissions charged by financial institutions relating to their licensed financial institutions, but does not include interest on loan or return on loan or any share of profit or an insurance premium or premium based or related commissions specified in the insurance Act or regulations made thereunder	***payable in any manner in respect of a loan, deposit, debt, claim or other right or obligation, and includes a premium or discount by way of interest and a commitment or service fee paid in respect of any loan or credit or an Islamic finance return"***	exempt from excise duty, a deficiency that had already been cured by the Finance Act 2019. • Numerous tax disputes between the KRA and banks as it has been in the past, particularly with respect to charging of excise duty on loan related fees
Section 25 (a) (iii)	The First Schedule to the Excise Duty Act, 2015 is amended (a) in paragraph 1 of Part I– (iii) by deleting the description "imported glass bottles (excluding imported glass bottles for packaging of	Maintain section 25(a) (iii) as is in the Finance Bill 2021.	• It is estimated that the production capacity of local glass manufacturers stands at about 67,125 MT against the required capacity of about 81,000 MT. The glass produced is

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
	pharmaceutical products)" and the corresponding rate of excise duty;		therefore not sufficient to meet the demands of the local industrial glass users: • Local manufacturers of glass are also limited with respect to access to modern technology and are therefore unable to offer the wide range of products needed by industrial glass users. • Furthermore, the local glass manufacturers have furnace limitation and coupled with the lack of modern glass technology prevents them from switching from one type of glass to the next efficiently, which negatively impacts supply chain forecasting, quality, speed to market and efficiency of glass users. • Local manufactured glass is also expensive due to

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
			the high production costs and with respect to some categories of glass, there are challenges in quality, which has necessitated importation to ensure that specific client needs are met while remaining competitive and relevant in both local and international markets. • As glass users, we have demonstrated that we are ready to support the sourcing of glass locally and are prepared to partner with the government in upscaling the industry and enhancing competitiveness. As the local glass industry capacity grows, so will our local sourcing ratio. In demonstration of our commitment, we are

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
			jointly working with key players in this sector to address the challenges of the local glass industry and propose solutions for energy cost, cheap glass imports/under valuation into the country, and proposal on incentives to invest in technology and capacity of the local glass manufacturers. • The introduction of excise duty on glass last year did not aid in achieving growth in the local glass manufacturing sector but instead was a punitive measure that served to increase the cost and burden of doing business in Kenya. • Glass from Tanzania is also subjected to the 25% excise duty, this was in the contravention of Article 75

NO.	CLAUSE (as it is in the Bill)	PROPOSED AMENDMENT	JUSTIFICATION
			of the EAC Treaty, and Article 15(2) of the Protocol on Establishment of the East African Customs Union. The ongoing bilateral engagements between the Republic of Tanzania and Kenya seek to address issues affecting trade. This removal of excise duty will further promote regional economic growth with the largest amount of glass bottles being imported from Tanzania.

TAX PROCEDURES ACT, 2015			
Section 29	31.(1) Subject to this section, the Commissioner may amend an assessment (referred to in this section as the "original assessment") by making alterations or additions, from the available information and to the	This amendment be adopted and Section 31 should remain as is. 31.(1) Subject to this section, the Commissioner may amend an assessment (referred to in this section as the "original assessment") by making alterations or	• With the resources provided to KRA including technological advances adopted, 5-years is a long time to for the revenue authority to confirm the

	best of the Commissioner's judgement, to the original assessment of a taxpayer for a reporting period to ensure that— (4) The Commissioner may amend an assessment— (a) in the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time; or (b) in any other case, within seven years of— (i) for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates; or (ii) for any other assessment, the date the Commissioner notified the taxpayer of the assessment. (6) Where an assessment has been amended, the Commissioner may further amend the original assessment— (a) seven years after— (i) for a self-assessment, the date the taxpayer submitted the self-assessment return to which the self-assessment relates; or	additions, from the available information and to the best of the Commissioner's judgement, to the original assessment of a taxpayer for a reporting period to ensure that— (4) The Commissioner may amend an assessment— (a) in the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time; or (b) in any other case, within **five** years of— (i) for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates; or (ii) for any other assessment, the date the Commissioner notified the taxpayer of the assessment. (6) Where an assessment has been amended, the Commissioner may further amend the original assessment— (a) **five** years after— (i) for a self-assessment, the date the taxpayer submitted the self- assessment return to which the self- assessment relates; or	validity of self-assessment returns. • Prior to the TPA, the timeframe for audit in the VAT Act was 5-years, and this was adopted as a common timeframe across all tax heads. • There is also concern in relation to the Voluntary Tax Disclosure Program, which runs for a 5year period from 1st January 2021. The impact of this change is that persons who make a volunteer declaration under the program, could be subject to an additional assessment in respect to the areas of voluntary disclosure, which is not the aim of the program. This may affect taxpayers' willingness to take advantage of the Voluntary Tax Disclosure Program since an audit may be triggered for the remaining two years not captured under VTDP.

	(ii) for any other assessment, the date the Commissioner served notice of the original assessment on the taxpayer; or	(ii) for any other assessment, the date the Commissioner served notice of the original assessment on the taxpayer; or	
Section 32	The Bill proposes the deletion of the following section of the TPA. 42(4A). The Commissioner may at any time exempt any supplier from the provisions of this section if such supplier has sufficiently demonstrated that due to the nature of his business, and due to the application of this section, he is going to be in a continuous credit position for a period of not less than twenty-four months. The provision allowing the application for withholding VAT exemption for suppliers has been deleted. This move follows the reduction of the withholding VAT rate from 6% to 2%.	i) The provision for withholding VAT exemption should not be deleted and retained. ii) The provision should remain as: 42(4A). The Commissioner may at any time exempt any supplier from the provisions of this section if such supplier has sufficiently demonstrated that due to the nature of his business, and due to the application of this section, he is going to be in a continuous credit position for a period of not less than twenty-four months.	• Despite the reduction in the VAT withholding tax rate, some suppliers may still find themselves in a significant VAT refund position. • Given the significant time that VAT refund processes takes from application to payment, the deletion of this provision may still affect suppliers who transact in large volumes. • Given the impact the global pandemic has had on business cash flows, the exemption from withholding VAT may provide necessary relief.

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1 June 2021

Dear Sir

KPMG Advisory Services Limited
Memorandum for Consideration by the National Assembly in the Matter of the Finance Bill, 2021

We refer to the above subject and to the invitation for public comments on the Finance Bill 2021. KPMG is delighted to submit it proposals for the National Assembly's consideration during its deliberations on the Finance Bill, 2021.

We have reviewed the Finance Bill, 2021 (the Bill) and appreciate that it is not only a document embodying the Kenyan Government's revenue planning for the next financial year, but is also a document seeking to provide a favourable business and work environment for key industries, small businesses, investors and individual Kenyans.

The proposals highlighted in this submission are alive to the intentions alluded to above. We have also sought to address issues that we believe to be critical issues for the efficient functioning of a good taxation regime.

At a high level, our submissions cover amendments proposed to the following Acts:

a) The Income Tax Act, Cap 470 of the Laws of Kenya;

b) The Value Added Tax Act, 2013;

c) The Excise Duty Act, 2015;

d) The Kenya Revenue Authority Act, 1995

e) Miscellaneous Fees and Levies Act; and

f) The Tax Procedures Act, 2015.

The detailed submissions including the proposed wording of the requested changes are included as appendices to this letter.

Conclusion

We would be delighted to provide any clarifications that you may require regarding our submissions even as we strive to collaborate in coming up with implementable tax policies that will positively impact the economy.

Yours sincerely

Clive Akora

Clive Akora
Director – Tax & Regulatory Services

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NN Mosa
JN Mugo
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AW Pringle*
S Sanghrajka

Appendix I: Proposed amendments in the Finance Bill 2021

1. Proposed changes to the Income Tax Act, Cap 470 of the Laws of Kenya

Item	Request	Issue with the clause	Proposed amendment	Justification
1.	Request to amend the definition of control **Relevant section:** ***Section 2 (a), Finance Bill 2021***	The Bill proposes a new definition of control which lowers the shareholding threshold and deems control to arise in otherwise arm's length transactions.	We propose that the shareholding and voting power threshold for purposes of determining control be increased to 50% and the trading transactions as a basis for inferring control be removed. The proposed changes are as follows: *a)* Delete the words twenty percent and replace them with ***fifty per cent*** in paragraph (a). *b)* In paragraph (c) replace the words *total indebtedness* with the words ***book value of the total assets.*** *c)* Delete paragraph *(e)* *d)* Delete paragraph *(f)* *e)* Delete paragraph *(g)* *f)* Delete paragraph *(h)*	The proposed changes align the shareholding and voting power threshold for purposes of determining control under the Income Tax Act to the provisions in the Companies Act. The shareholding level determines the number of directors a shareholder can appoint. The directors of a company control its operations and it is important to have consistency in how control is viewed from both the shareholding and directors' level. In the Bill, at the director level control is 50% while at the shareholding level it is 20% which is a contradiction. The our proposed changes to paragraph (c) on guarantees as a criteria for control align the paragraph to paragraph (b) on loans which link control to the amount of debt/guarantees as a percentage of the book value of assets rather than to the value of the debt and prevents instances where a person is deemed to control another simply by giving a guarantee especially in cases where such a person is not heavily geared. The deletion of paragraphs (e), (f), and (g) is important to prevent imputation of control on normal business relationships between independent parties. Paragraph (h) gives the *Commissioner* blanket power to impute control without providing a criteria for such imputation. The deletion of this provision will prevent potential abuse to the detriment of taxpayers and provides clarity by ensuring that conditions for deeming control are clearly spelt out.

Item	Request	Issue with the clause	Proposed amendment	Justification
2.	Request to extend the number of days after which a company can be deemed to create a Permanent Establishment (PE) in Kenya **Relevant section:** ***Section 2(b), Finance Bill 2021***	The Bill proposes to amend the ITA by expanding the definition of what will constitute a PE. The Bill proposes that the definition of a PE be expanded to include the provision of services by a person through employees or other personnel for a period of, in aggregate, 91 days in any twelve-month period. It is however international best practice for a PE to be established in a longer time period	We propose to delete the words ***ninety-one days*** and replace them with ***one hundred and eighty-three days.***	The current proposal on the number of days required to determine whether a PE has been formed, is half the number of days suggested by international best practice, as is evidenced by the OECD proposals. The government has repeatedly expressed its desire of ensuring that Kenya remains a competitive force in the region as one of its top priority. As such, the government should focus on enhancing the competitiveness of the Kenyan economy by aligning its tax legislation to its medium to long term economic objectives.
3.	Request to retain the current provisions of Section 16 (2) (j) **Relevant section:** ***Section 7 (a), Finance Bill 2021***	The bill proposes to amend the ITA by deleting the current provision which restricts the deductibility of interest payments to the highest amount of all loans held by the company and which exceed the greater of three times the sum of the revenue reserves and the issued and paid up capital of all classes of shares of the company and replacing it with a new provision which caps the deductibility of interest to the gross interest paid or payable to related non-resident persons or third parties in excess of 30% of earnings before interest, taxes, depreciation and amortization. The proposed change will negatively affect heavily geared companies and banks where interest contributes over 60% of total expenses.	We propose the deletion of the proposal of Section 16(2)(j) of the income Tax Act (ITA)	Under the current COVID-19 pandemic, a lot of businesses are struggling to stay afloat, and the economy is going to take some time to recover even post COVID-19. In the short term, majority of businesses are borrowing to cover working capital requirements such as rent, utilities, salaries. As such if any business is to remain as a going concern, they will have to rely on debt, even in the short term, for survival in the foreseeable future. In this regard, a proposal which will further strain cash flows for struggling businesses may be ill timed. As such the proposal ought to be shelved until such a time as when the economy will start showing signs of recovery.

Item	Request	Issue with the clause	Proposed amendment	Justification
4.	Request to reduce the Withholding Tax (WHT) rate on dividends paid to non-residents. **Relevant section:** ***Paragraph 3(d) of the Third Schedule to ITA***	The Finance Act, 2020 increased the WHT rate on dividends paid to non-residents from 10% to 15%. The increase was a counter action to the reduction of the local Corporate Income Tax (CIT) rate from 30% to 25% to help local businesses during the Covid-19 pandemic. Even though, the CIT has been reinstated to 30% with effect from 1 January 2021, the WHT rate has remained at the higher rate of 15%.	We propose amendment of Paragraph 3(d) of the Third Schedule to the ITA by substituting *"fifteen" with the word "ten."*	Kenya competes with other countries in the region for FDI and it is in the interest of the country that businesses set up locally to provide employment and markets for local businesses. The change of the WHT adopted earlier in the year has made Kenya less attractive for businesses to set up locally. This situation is aggravated by the coming into force of the Africa Continental Free Trade Area which will make it easier for companies to set up in countries with favourable income tax regime but have access to markets across Africa. In order to attract companies that will seek to diversify from the traditional manufacturing hubs of Asia, a review of the WHT rate is important or purposes of attracting such businesses to set up in Kenya.

2. Proposed changes to the Excise Duty Act, 2015

Item	Request	Issue with the clause	Proposed amendment	Justification
5.	Request to exempt fees and commissions earned on loans from Excise Duty **Relevant section:** ***Section 25(b), Finance Bill 2021***	The bill proposes to amend the definition of 'other fees' as provided for in the Excise Duty Act under part III of the interpretation schedule by deleting the words '*fees or commissions earned in respect of a loan.*' As it currently stands, other fees are defined to include any fees, charges or commissions charged by financial institutions relating to their licensed activities but does not include interest on loan or return on loan or fees or commissions earned in respect of a loan. Effectively this means that fees and commission earned on loans are not within the purview of excise duty.	We propose deletion of the proposed change part III of the interpretation schedule to the Excise duty Act	The definition of "other fees" as contained in the EDA was amended in 2019 to exclude fees or commissions earned in respect of a loan from the ambit of fees subject to excise duty. The amendment was meant to provide clarity on the scope of interest that is exempt from excise duty. The amendment implied that fees such as loan processing and commitment fees were not subject to excise duty. Therefore, the proposed deletion of the words *"fees or commissions earned in respect of a loan"* is, in our view a step in the wrong direction, as it will lead to ambiguity on the scope of interest that is exempt from excise duty. Further, the imposition of excise duty on fees and commissions earned on loans will lead to higher fees paid by borrowers and therefore imposing upon them a heavy burden and as a result this move may not spur the much-needed economic growth due high cost of accessing credit.

Item	Request	Issue with the clause	Proposed amendment	Justification
6.	Request to reduce the Withholding Tax (WHT) rate on dividends paid to non-residents. Paragraph 3(d) of the Third Schedule to the Income Tax Act, Cap 470 **Relevant section:** ***Paragraph 3(d) of the Third Schedule to ITA***	The Finance Act, 2020 increased the WHT rate on dividends paid to non-residents from 10% to 15%. The increase was a counter action to the reduction of the local Corporate Income Tax (CIT) rate from 30% to 25% to help local businesses during the Covid-19 pandemic. Even though, the CIT has been reinstated to 30% with effect from 1 January 2021, the WHT rate has remained at the higher rate of 15%.	We propose amendment of Paragraph 3(d) of the Third Schedule to the ITA by substituting *"fifteen" with the word "ten."*	Kenya competes with other countries in the region for FDI and it is in the interest of the country that businesses set up locally to provide employment and markets for local businesses. The change of the WHT adopted earlier in the year has made Kenya less attractive for businesses to set up locally. This situation is aggravated by the coming into force of the Africa Continental Free Trade Area which will make it easier for companies to set up in countries with favourable income tax regime but have access to markets across Africa. In order to attract companies that will seek to diversify from the traditional manufacturing hubs of Asia, a review of the WHT rate is important or purposes of attracting such businesses to set up in Kenya.

3. Proposed changes to the Value Added Tax Act, 2013

Item	Request	Issue with the clause	Proposed amendment	Justification
7.	Request to zero rate the supply of ordinary bread **Relevant section:** ***Section 21, Finance Bill 2021***	The bill proposes to charge VAT on the supply of ordinary bread. Currently, the supply of ordinary bread is zero rated. The proposed change of VAT rate on the supply of bread from zero rate to VATable will increase the price of this product which is a staple food for the ordinary "Mwananchi".	We propose the deletion of the proposed change to paragraph 13A of the Second Schedule to VAT Act, 2013	Food security is one of the Big Four Agenda that the government is focusing on and bread is an essential commodity for the Kenyan population. Subjecting this key commodity to VAT will erode the gains the government is making in ensuring the average Kenyan is able to put food on their table.
8.	Request to rescind the change proposing to delete taxable services from the list of zero-rated supplies. **Relevant Section:** ***Paragraph 1 to the Second Schedule of VAT Act***	The Finance Bill, 2021 proposes to transfer the export of taxable services from the zero-rated to tax exempt category. Following this change, exporters of services will continue not to charge VAT to their customers. But will now not be entitled to claim the input VAT they incur to provide their services. Further, the exporters will be exposed to reverse VAT on services they procure from other countries to make their supplies. Many international organisations which have made Nairobi the regional centre for their Africa operations operate under a cost-plus model where they invoice for their services based on the full cost of their operations plus a mark-up determined in accordance with the Kenya transfer pricing provisions. Under the current VAT provisions, these organisations are allowed a deduction of input VAT incurred to make the supplies. Under the proposed changes, they will be forced to absorb the input VAT into their cost base. Further for the services they procure from outside Kenya they will be forced to account for reverse VAT which they are not allowed a deduction since their services are exempt. Below is an example of the implications of the change, using an example of a regional business that imports services from outside Kenya to deliver an engagement	Propose to delete the following proposals in the Finance Bill 2021: a) Under Section 21(b), delete the proposed introduction of a paragraph 32 – The exportation of taxable services. This section introduces export of services under the exempt supplies category b) Delete Section 22(a), this section removes the exportation of taxable supplies from the zero-rated supplies category The above changes will retain the export of services as a zero-rated supply.	Kenya has struggled over many years on the application of the zero-rating to exported services. This lack of clarity has led to numerous disputes between taxpayers and the KRA with the issue still to be conclusively resolved. The Finance Bill 2021 proposal to transfer export of services from the zero-rated not only fails to provide the much-needed clarity but also negatively impacts Kenya's aim of being the undisputed regional hub for services. Our proposal to retain the export of services under the zero-rated category is important if Kenya is to be able to compete with other African Countries for Services Exports and retain its position as a regional hub for the following reasons: a) It ensures that the Kenyan VAT legislation is consistent

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<tr><th>Item</th><th>Request</th><th>Issue with the clause</th><th>Proposed amendment</th><th>Justification</th></tr>
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that covers multiple jurisdictions. Assume a cost base of KES 1,000,000 and mark-up of 10%.
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<tr><th></th><th>Current regime</th><th>Proposed regime</th></tr>
<tr><td>Cost base</td><td>1,000,000</td><td>1,000,000</td></tr>
<tr><td>Reverse VAT</td><td>-</td><td>160,000</td></tr>
<tr><td>Cost base</td><td>1,100,000</td><td>1,160,000</td></tr>
<tr><td>Deduct claimable VAT</td><td>-</td><td>-</td></tr>
<tr><td>Cost base</td><td>1,000,000</td><td>1,160,000</td></tr>
<tr><td>10% Mark-up</td><td>100,000</td><td>116,000</td></tr>
<tr><td>Revenue</td><td>1,100,000</td><td>1,276,000</td></tr>
<tr><td>Less costs</td><td>(1,000,000)</td><td>(1,160,000)</td></tr>
<tr><td>Taxable profit</td><td>100,000</td><td>116,000</td></tr>
<tr><td>30%</td><td>30,000</td><td>34,800</td></tr>
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Summary of incremental cost:
<table>
<tr><th>Cost item</th><th>KES</th></tr>
<tr><td>Non-deductible input VAT</td><td>160,000</td></tr>
<tr><td>Impact on non-deductible VAT on mark-up</td><td>16,000</td></tr>
<tr><td>Incremental corporation tax</td><td>4,800</td></tr>
<tr><td>Total</td><td>180,800</td></tr>
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<td>with international norms on taxation of internationally traded services. One of the important tenets of VAT is the principle of neutrality. This provides that businesses should not bear the cost of VAT. To ensure that this happens, the export of services is zero-rated to allow businesses to claim the input VAT they incur to make the supplies. The effect of the above is that the ultimate consumer bears the full cost of VAT and that it is only applied once at the end of a supply chain.
b) 6These organizations include regional service centres, business process outsourcing organisations (BPOs), consultants, translators etc. This is likely to drive such businesses out of the country which contradicts the stated government policy of seeking to establish Nairobi as a regional service centre.
c) The proposed changes conflicts with international best practice both globally and regionally. It will make Kenya the only country in the region that exempts from VAT, rather than zero-rates export of services. Tanzania, Uganda, Rwanda and even South Africa which are competing with Kenya to be regional</td>
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Item	Request	Issue with the clause	Proposed amendment	Justification
		As a percentage of original cost 18.1% The proposed change will lead to an 18% increase in the cost of doing business in Kenya. The above example would also apply to services that the organisations procure locally for their regional business.		service centres zero-rate the export of taxable services. d) Kenya exports both goods and services. Under the VAT Act, the export of goods will remain zero-rated with the exporters eligible for refund of their input VAT, in addition to a waiver of the requirement to account for reverse VAT. The Finance Bill proposal to transfer services to the exempt category is discriminatory especially because Kenya does not have substantial exports of goods and seeking to grow its export muscle through the growth of the services industry. Should the proposals be confirmed into law, the consequences are likely to be: a) A reduction in the budget for the regional service organizations to reduce the impact of VAT; or b) Increased contracting from outside the country; or c) Shifting of operations out of Kenya; or d) Transfer of operations to Special Economic Zones. The net impact of the above movements will be a reduction in employment opportunities and tax contributions in form of PAYE and corporation tax. In the long term, Kenya's position has a regional

Item	Request	Issue with the clause	Proposed amendment	Justification
				hub will be severely damaged.
9.	Removal of input VAT restriction on supplies of materials to affordable housing projects exempted from VAT under the VAT Act. **Relevant section:** ***Section 17(6) of the VAT Act.***	We propose that the Finance Bill, 2021 amends Section 17(6) of the Value Added Tax Act, No. 35 of 2013 Income Tax Act, Cap 470 of the Laws of Kenya by adding the words ***including supplies of taxable goods and services made to projects whose taxable purchases are exempted from VAT under the First Schedule to this Act*** immediately after the words taxable supplies under 6(a) as follows: *(6) Subject to this Act, if a taxable supply to, or a taxable import by, a registered person during a tax period relates partly to making taxable supplies and partly for another use, the input tax deductible by the person for acquisitions made during the tax period shall be determined as follows:* *(a) full deduction of all the input tax attributable to taxable supplies,* ***including supplies of taxable goods and services made to projects whose taxable purchases are exempted from VAT under the First Schedule to this Act*** *(b) no deduction of any input tax which is directly attributable to other use; and* *(c) deduction of input tax attributable to both taxable supplies and other uses calculated according to the following formula:* $\frac{A \times B}{C}$ *Where:* ***A** is the total amount of input tax payable by the person during the tax period on acquisitions that relate partly to making taxable supplies and partly for another use;* ***B** is the value of all taxable supplies made by the registered person during the period; and* ***C** is the value of all supplies made by the registered person during the period in Kenya.*	Paragraph 109 of Section A, Part I of the First Schedule to the VAT Act, No. 35 of 2013 exempts from VAT, good imported or purchased locally for use in the construction of houses under the affordable housing scheme approved by the Cabinet Secretary responsible for Housing. Section 17(6) and (7) of the VAT Act restricts the amount of input VAT that a taxpayer to the input VAT that is incurred on purchases that are used to make taxable supplies.	While the exemption from VAT is a welcome move in reducing the cost of houses under the affordable housing program, the developers are finding it increasingly hard to procure goods locally since most suppliers are declining to make the suppliers due to restrictions in claiming VAT as provided for under Section 17(6) of the VAT Act. The suppliers who incur input VAT when procuring the building materials can claim the input VAT when making taxable supplies. However, since the goods are exempt when supplied to the affordable housing projects, the input VAT is not deductible under the provisions of Section 17(6) forcing the suppliers to incur the input VAT. As a result, many suppliers are declining to make supplies to the projects, putting the scheme at risk. It is important to note that imports of the goods for developers under the affordable housing schemes are not subject to the same restriction which effectively puts local suppliers at a disadvantage, yet the project is designed to benefit the local economy. The proposed amendment will cure this anomaly and allow the exemption to have the intended

Item	Request	Issue with the clause	Proposed amendment	Justification
				impact.
10.	Request to amend the provision relating to taxable value of fuel Section 5(2) of the Value Added Tax, 2013 **Relevant section:** ***Section 5(2) of the VAT Act***	The Tax Laws Amendment Act, 2020 deleted Section 5(2)(aa)(i) of the VAT Act effectively including excise duty, fees and other charges in computing the taxable value for fuel	We propose amendment to Section 5 to include Section 5(2) (aa)(i) as follows; Provided that; ***The taxable value in respect of fuel products shall exclude excise duty, fees and other charges.***	The current sky-high fuel prices are unsustainable and threaten to jeopardize the economic recovery which is still facing the realities of a reduction in the disposable income of most Kenyans. The high fuel price is therefore likely to further erode the much need income apportionment and affordability of other essential commodities like food.
11.	Request to rescind provision on charging VAT on transfer of businesses **Relevant Section:** ***First Schedule to Value Added Tax Act, 2013***	The Tax Law Amendment Act, 2020 provided for the charging VAT at the rate of 16% on the transfer of business as a going concern. This has significantly increased the cost of restructuring businesses.	We propose that transfer of business as a going concern be listed under Part I of the First Schedule to VAT Act:	The proposed amendment will help businesses which will likely suffer the economic consequences of COVID-19 and may therefore require to restructure their businesses in the post-COVID period in order to remain afloat.

Item	Request	Issue with the clause	Proposed amendment	Justification
12.	Request to rescind the provision on charging VAT on insurance agency, brokerage and securities brokerage reinsurance businesses **Relevant Section*: First Schedule to Value Added Tax Act, 2013***	The Tax Law Amendment Act, 2020 provided for the charging of VAT at the rate of 16% on insurance agency, brokerage and reinsurance business.	We request that the bill be amended by making the following proposed change by adding to Part I of the First Schedule to VAT Act: *'insurance agency, brokerage and reinsurance business'*	Insurance cover is becoming a necessity in this country. As such, charging of VAT on the insurance business will have an impact increasing cost on insurance. This will in effect have a negative effect on access to basic insurance cover by Kenyans.

4. Proposed changes to the Tax Procedures Act, 2015

Item	Request	Issue with the clause	Proposed amendment	Justification
13.	Interest on late tax payment as a result of COVID-19 **Relevant Schedule: *Section 33 of the TPA***	Section 33 of the Tax Procedures Act, 2015 (TPA) allows a taxpayer experiencing cash flow difficulties to apply to the KRA for additional time to make the payment. However, the Act provides that where such an extension is given interest will apply.	We propose that extensions given post the COVID-19 period be exempted from the interest charge through the addition of a proviso to Section 33(5) of the TPA as follows: (5) Despite being granted an extension of time to pay a tax or permission to pay a tax due by instalments by the Commissioner, a taxpayer shall be liable for any late payment interest arising from the original date the tax was due for payment. *Provided that no interest shall be due and payable on any extensions granted between 1 July 2021 and 1 July 2023.*	Many businesses continue to struggle to pay taxes on time due to the disruptions to their businesses, the extension of time to pay the tax is a good move but the imposition of interest where an extension is granted will put pressure on the businesses. Deferring the interest charge for two years will allow the businesses to recover to their pre COVID-19 level.
14.	Request to amend the period within which the Commissioner is required to render an objection decision **Relevant Section: *Section 51(11) of the TPA***	Section 51(11) of the TPA provides that the Commissioner may make an objection decision within sixty days from the date of receipt of the notice of objection or any further information the Commissioner may require from the taxpayer. Linking the objection decision to the receipt of information that the Commissioner may require provides a loophole that can be used to extend the period indefinitely. For instance, if the commissioner requests for information on the fifty-ninth day, the period resets and the 60-day count starts again. This process can go on indefinitely delaying the resolution of tax disputes.	We propose that Section 51(11) of the TPA be amended as follows: *The Commissioner shall make the objection decision within sixty days from the date of receipt of the notice of objection failure to which the objection shall be deemed to be allowed.* *Provided that prior to the expiry of the sixty days, the Commissioner may by writing to the taxpayer extend the period by an additional thirty days where there are ongoing discussions between the taxpayer and the Commissioner to resolve the tax dispute.*	Taxpayers are entitled to service that is expeditious, efficient, lawful, reasonable and procedurally fair. The proposed amendment will protect the taxpayers from extended tax audits while making provision for genuine instances where there are ongoing discussions between the taxpayer and the KRA. Further, before issuing an assessment the Commissioner has an unlimited time to go through the taxpayer documents which when added to the sixty days for review of the objection

Item	Request	Issue with the clause	Proposed amendment	Justification
				makes the additional time unnecessary.
15.	Carry forward of income tax overpayments ***Relevant Section:* Section 28 (2) of the TPA**	Kenya operates a self-assessment regime where taxpayers compute their tax liability, file tax returns and pay taxes based on their computations. The KRA has the legal right to audit and amend the assessments. Where the audits results in a tax liability, the taxpayer is penalized through imposition of a penalty and interest. The longstanding practice has been that where the self-assessment results in an overpayment, the taxpayer can carry forward the overpayment and set it off against the tax liability for the subsequent year. Recently, the KRA has been rejecting taxpayer carry forward of overpayments insisting that such overpayments should be audited before payment. The danger is that if this is allowed, there will be a huge backlog under income tax compounding the current backlog under VAT which the government has struggled to resolve.	To address this challenge and ensure clarity in the legislation we propose the inclusion of a proviso to Section 28(2) of the TPA as follows: (2) If a taxpayer liable for income tax has submitted a self-assessment return in the prescribed form for a year of income and the taxpayer has a deficit for the year, the taxpayer shall be treated as having made an assessment of the amount of the deficit for the year being the amount set out in the return. ***Provided that where the taxpayer has a surplus for the year, the taxpayer may carry forward the surplus for set-off against the tax liability in the next tax period.***	The proposed change clarifies the treatment of tax overpayments and prevents an emerging scenario where the current refund backlogs under VAT will be replicated under income tax significantly increasing the financial burden on taxpayers. The proposal also reinforces the current practice under the self-assessment tax regime which has been in place since Kenya started imposing income tax but is now in danger of being upended by the KRA.
16.	Request to retain the time for record keeping under the Tax Procedures Act 2015. **Relevant Section: *Section 28, Finance Bill 2021***	The Finance Bill proposes to increase the period that taxpayers are required to maintain documents from the current five years to seven years. This also increases the period that the KRA can audit back years from five to seven years. The increase in the number of years that are open for audit substantially increases uncertainty for businesses. This change is inconsistent with the investments that the KRA has made in technology which allow it to spot inconsistencies in taxpayer filings immediately they occur.	Delete Section 28(a) of the Finance Bill, 2021.	This proposal will reduce uncertainty for taxpayers and encourage the KRA to better utilize the investments that it has made in technology and data analytics. In the Finance Act, 2020 the Government introduced a Voluntary Tax Disclosure Programme (VTDP) encouraging taxpayers to self-declare all tax arrears going back five years from 1 July 2020. Under the program, persons who make a

Item	Request	Issue with the clause	Proposed amendment	Justification
				self-disclosure and pay the principal tax liability receive a waiver of the penalties and interest. The five years period was chosen to coincide with the statute of limitation under the current legislation. Extension of the statute of limitations creates a situation where some years could fall outside the VTDP program, exposing taxpayers to penalties and interest.
17.	Changes to the period within which the KRA can demand for evidence of tax payment after the lapse of the period within which the taxpayer is required to maintain records **Relevant Section: *Section 32 of the TPA***	Section 32(1) of the TPA provides that a tax payable by a person shall be treated as a debt due to the government and shall be payable the commissioner. Due to challenges with the records maintenance at the KRA, there are numerous instances where the KRA demands that the taxpayers provide evidence of payment of tax for periods that are over 20 years from the date the return was filed. For instance, the KRA is currently demanding for evidence of taxes paid in the early 1990. This demand contradicts the provisions under the TPA which require taxpayers to only maintain records for five years. This means that taxpayers who only maintain records for the statutory period of five years are unable to provide evidence of payment even though they filed their returns and paid the tax due. We recommend that unless there is evidence of fraud or investigation, the period within which the KRA can demand for payment or evidence of payment of tax be limited to five years to align with the document retention period.	We propose an amendment to Section 32 of the TPA to include new subsections 3 and 4 as follows: 3) The Commissioner may demand for payment of tax or evidence of payment of tax at any time prior to the expiry of five years from the date that the taxpayer filed the tax return. (4) Subsection (3) shall not apply in the case of gross or willful neglect, evasion or fraud by a taxpayer.	This move aligns different sections of the TPA and provides certainty to taxpayers that once they legally destroy their documents, the KRA cannot demand for production of the same documents. This will also provide impetus to the KRA to update the taxpayer records expeditiously

MEMORANDUM TO THE NATIONAL ASSEMBLY-TWELFTH PARLIAMENT ON THE FINANCE BILL 2021/2022 UNDER ARTICLE 27 AS READ WITH ARTICLE 118 (1) (b) OF THE CONSTITUTION AND STANDING ORDERS 127(3) OF THE NATIONAL ASSEMBLY STANDING ORDERS



May 2021

SUBMITTED BY:

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Introduction

The Finance Bill 2021/2022 which was introduced for the first reading in the National Assembly on 5th May 2021 proposes to amend the Value Added Tax Act and introduces tax on basic products key among this product being the baby formula milk. FIDA-Kenya opposes the proposed amendments under the Finance Bill 2021/2022 that seek to impose Value Added Tax on baby formula milk. From the onset, we point out that the consumers of formula baby milk are children some of who are newly born and do not fall in the bracket of taxation.

Constitutional and legislative basis for FIDA-Kenya's opposition

Chapter 12 of the 2010 Constitution is the foundational basis of Public Finance Management in the country. This chapter provides that the public finance system of Kenya shall **"promote an equitable society, "**and one where the burden of taxation shall be shared fairly. To impose VAT on baby formula is an affront to the Constitutional provisions and the canon of taxation which provides that **tax systems must promote equitable resource distribution.**

FIDA-Kenya further contends that the CS Treasury and Planning has violated the constitution on taxation that promotes equitable resource distribution by imposing tax on basic commodities without involving stakeholders.

FIDA-Kenya opposes the imposition of VAT on baby formula milk as it increases the cost of living for mothers from the stage of birth of children notwithstanding the other maternal costs they have to bear. During this these difficult economic times the proposed increase of the price of Formula baby milk will compromise the health care of babies and limit the use of complementary nutritious supplements that ought to be introduced to the life of an infant to catalyse optimal growth, development, and health. The cost of a tin of Nestle NAN2 Optipro as well as the NutriStart Cow and Gate baby formula *(the cheapest baby formula in the market)* cost Kshs. 1100.A baby takes roughly 2 tins of baby formula milk per week which translates to Kshs. 2200 per week and in a month Kshs. 8800.In a year parents spend around Kshs.105,600 on baby formular milk. This cost increases as the infant advances in age as the consumption rate increases. The imposition of tax on baby formula would exacerbate the prices for this essential commodity and in turn increase the economic burden on parents.

FIDA-Kenya posits that although breastfeeding is a natural act, some women experience difficulty in production of breast milk and to exclude women's experiences and challenges with respect to development of breastfeeding policies is an affront to their human rights. Some children do not also enjoy the benefit of being brought up by their natural mothers and the proposed increase will deny them the nutritional benefit that Formula milk supplements.

Whilst the World Health organization recommends exclusive breast feeding for the first six months, most mothers are not able to produce sufficient milk for their infants for six months. According to the Kenya 2014 Demographics and Health Survey, three in five (61%) children under six months are exclusively breastfed. On average children in Kenya are breastfed for 21 months but exclusive breastfeeding is for 4.3 months.[1]Scholars argue that exclusive breast feeding for 4.3 months has a direct correlation with the three months maternity leave granted

[1] Kenya 2014 Demographics and Health Survey Key Findings, https://www.dhsprogram.com/pubs/pdf/sr227/sr227.pdf (accessed on 20 May 2021)

to working women who combine it with their annual leave to be able to spend at the very least four months with their infants.

A huge population of women are productive workers, whether in the formal or informal sector. When they resume work, they cannot consistently access the infant and their milk production reduces due to the stressors attendant to working life. They therefore require supplements to complement the insufficient breast milk available for feeding the infant when they exercise their productive role.

The Maputo Protocol under Art.8 as read with Art. 14 recognizes breastfeeding as a health and reproductive right. FIDA-Kenya posits that the Maputo protocol places an obligation on the state to undertake steps to ensure both pregnant and nursing mothers can access adequate prenatal delivery and postnatal health and nutritional services. The protocol further recognizes breastfeeding mothers as vulnerable groups in need of special additional protection. It is therefore incumbent upon the Government to take measures to ensure that breastfeeding mothers access quality health and nutritious services, baby formula milk being part of the nutritious services.

The Convention on the Rights of the Child under Art. 24 provides that states must ensure that every child enjoys the right to the highest attainable standards of health. Moreover, state parties are required to take measures to diminish infant and child mortality and are obligated to combat diseases and malnutrition. While breastmilk is considered best, baby formula milk is deemed a good alternative. FIDA-Kenya states that there are instances in which the use of baby formula milk and related products are necessary especially where mothers are unable to produce sufficient milk, where a mother delivers multiple babies or cases where the mother passes on during or soon after birth. Additionally, pediatricians advocate for the use of breast or baby formula milk after a child is weaned till after the baby's first birthday when other milk including cow milk can be introduced. Imposition of tax on baby formula milk would limit the purchase of baby formula milk and therefore expose the infants to high morbidity.

FIDA-Kenya further opposes the proposed amendments to the VAT Act under the Finance Bill 2021/2022 that seek to exclude the requirement for Parliamentary oversight/approval on any proposed VAT Regulations by the Cabinet Secretary, National Treasury and Planning.

It is FIDA-Kenya's position that this amendment is an affront to the provisions of Art. 118 of the Constitution on the requirement of public participation through parliamentary representatives and/or the Wanjiku, living ordinary Kenyans with no opportunity to contribute and participate in formulations of a bill that substantially affects their economic livelihood.

The Breast Milk Substitute (BMS) Act of 2012 establishes the National Committee on Infant Young Child Feeding which is mandated to advise the National Government on the policy to be adopted in relation to infant and young child nutrition.[2]It is FIDA-Kenya's contention that the Cabinet Secretary, National Treasury and Planning erred in law for failure to incorporate the views and recommendations of National Committee on Infant Young Child Feeding in the formulation of the Finance Bill 2021/2022.

[2] Sec.5(1)(a)

Conclusion and Recommendations

FIDA-Kenya is alive to the fact that the COVID-19 has impacted the government's ability to raise its revenue collection and service the huge recurrent expenditure as well as ballooning national debt. However, FIDA-Kenya posits that as the National Government puts measures in place to increase its tax bracket and expand revenue collection for the FY 2021/2022, the same should be done in compliance with the Constitution and written law and in furtherance of equitable distribution of resources. Therefore, to raise revenue for the National Government, FIDA-Kenya makes the following recommendations:

1. That the proposed Financial Bill 2021/2022 be amended to comply the Chapter 12 of the Constitution and **"promote an equitable society, "**and in particular one where the burden of taxation is shared fairly.

2. That the proposed amendment to the VAT Act to impose tax on basic commodities and baby formula milk be quashed by parliament as it contravenes Chapter 12 as highlighted in (1) above.

3. That the National Committee on Infant Young Child Feeding do provide an advisory on baby formula supplements.

4. That the CS National Treasury and Planning do incorporate the views of women with respect to the socio-cultural and economic factors that impact their decisions to exclusive breastfeeding.

Nancy Ikinu,

Chairperson, FIDA-Kenya



RETIREMENT BENEFITS AUTHORITY

MEMORANDUM ON THE FINANCE BILL 2021

Introduction

The Retirement Benefits Authority ('Authority') is a State Corporation established under the Retirement Benefits Act, Cap 197 Laws of Kenya. The Authority's core mandate is to supervise and regulate the retirement benefits sector in Kenya. The Authority also, interalia, advises the Cabinet Secretary, National Treasury on matters policy with regard to retirement benefits schemes

The preparation of the Budget Memorandum 2021-2022 commenced with a call for proposals from stakeholders in the retirement benefits industry. The proposals received were reviewed through an internal interrogation process that resulted in classification of the proposals into four categories including; Adopted, not adopted, deferred and proposal requiring administrative action. The categorized policy proposals were then presented to Stakeholders for feedback and buy in.

Subsequently, the adopted policy proposals were taken through public participation exercise as per the Statutory Instruments Act. The public participation covered various towns where majority of the schemes are located including; Nairobi, Machakos, Kisumu, Kakamega, Nyeri, Meru, Eldoret, Kericho, Nakuru and Mombasa.

EXPLANATORY NOTES TO CLAUSES UNDER THE RETIREMENT BENEFITS ACT

1. **Clause 51** seeks to amend Section 2 of the Retirement Benefits Act

   (a) to define post-retirement medical funds to allow for formulation of regulations to allow for the registration and regulation of stand-alone and umbrella post-retirement medical funds established under irrevocable trust or written law;

   (b) Insert the definitions of a "corporate trustee". The Act provides for the definition of a trust corporation and the requirement to have capital of not less than Kes10 million. The corporate trustee provides essential trustee services to Individual retirement benefit schemes and Income Drawdown as required by retirement benefits legislation. However, the corporate trustees have no registration requirement by the Authority despite the role they play in the management of retirement benefits schemes.

2. **Clause 52** seeks to provide for mandatory requirement for registration for any person establishing a corporate trustee to oversee the retirement benefits under Section 22 of the Retirement Benefits Act, 1997 like the other existing stakeholders in the Retirement benefits industry like retirement benefits schemes, fund managers, custodians and administrators.

3. **Clause 53** seeks to provide for the registration procedures under Section 23 of the Retirement Benefits Act, 1997 like the other existing stakeholders in the Retirement benefits industry like retirement benefits schemes, fund managers, custodians and administrators.

4. **Clause 54** seeks to provide for conditions for registration for registration for any person establishing a corporate trustee to oversee the Retirement benefits under the new Section 25C of the Retirement Benefits Act.

5. **Clause 55** seeks to empowers the retirement Benefits Authority to refuse registration of a corporate trustee like other stakeholders in the retirement benefits industry like retirement benefits schemes, fund managers, custodians and administrators for reasons to be made known in writing to the applicant;

6. **Clause 56** seeks to provide for a mechanism for deregistration of a corporate trustee like any other stakeholder in the retirement benefits industry **where there in breach of the provisions of the RB Act and Regulations and in the grounds set out therein;**

7. **Clause 57** seeks to provide for the duration and renewal of the registration certificate issued to a corporate trustee under shall be valid until revoked. The provisions are in section 29 of retirement benefits Act.

Royal FloraHolland Kenya Ltd.
P.O. Box 19279, 00501-Nairobi, Kenya
E fhservices@royalfloraholland.com
M 0731-069092

We would be grateful for an opportunity to appear before the Committee or engage you through an online portal to further deliberate with your members on our proposals and recommendations.
We are happy to provide any additional information on the above should you require us to.

Yours faithfully
For and on behalf of Royal Flora Holland Kenya Limited

Edwin Gakonyo
General Manager - Kenya

CC: PricewaterhouseCoopers Limited

Attention:JobKabochi

Royal FloraHolland Kenya Ltd.
P.O. Box 19279, 00501-Nairobi, Kenya
E fhservices@royalfloraholland.com
M 0731-069092

The Chairperson
Departmental Committee of Finance and National Planning
Main Parliament Building
Parliament Road
Nairobi

Attention: Hon. Gladys Wanga

Wednesday, June 2, 2021

Dear Madam,

In the matters under consideration by the National Assembly – The Finance Bill, 2021
Submissions by Royal Flora Holland Kenya Limited

Pursuant to Article 118(1) (b) of the Constitution of Kenya and pursuant further to Standing Order 127(3),The Departmental Committee of Finance and National Planning, now considering the Finance Bill, 2021 ("the Bill") called for public participation and involvement in the legislative process.

The Bill proposes to amend *inter alia,* the VAT Act, 2013 (VAT Act) by exempting from Value Added Tax ("VAT"), the exportation of taxable services with effect from 1 July 2021.Exportation of taxable services is currently a zero-rated supply, which is consistent with the Organization for Economic Cooperation and Development (OECD) guidelines which focuses on the destination principle as well as the principle of international neutrality.

We note that for a long time the subject of VAT treatment of export of services from Kenya has remained a contentious issue, which has resulted in many unresolved disputes between various taxpayers and the Kenya Revenue Authority (KRA).

As mentioned above, the Finance Bill proposes to exempt from VAT the supply of taxable exported services. However, we submit that exempting exported services will have far reaching adverse implications to the Kenyan economy: the cost of doing business for companies exporting services from Kenya will increase making the country unfavourable to investors looking to operate regional hubs from Kenya. This will consequently reduce the competitive power of Kenyan businesses in the world market where Kenya is perceived as a favourable tax jurisdiction by global companies and expose the country to the risk of investors leaving to more favourable jurisdictions. In summary, the proposed change will negatively impact cross border trade services in Kenya.

We have provided in detail under the body of this submission the proposed change and the impact of our proposed amendment.

			employer to recover the amounts due; f) Where there is no possibility to recover the debt, recommend to the Authority to take appropriate action which may include applying to the Courts for the employer to be declared insolvent and winding up of the scheme;

NZOMO MUTUKU

CHIEF EXECUTIVE OFFICER, MBS

		Recommendation The Authority to be given powers to appoint agents to recover scheme debts. The process is expected to take a shorter time where the Authority uses an agent like Kenya Revenue Authority to recover the scheme pending debt. The proposal seeks to protect the interest of members and safeguard the shilling value of their contributions to a scheme.	**d) Issue a notice to any person or persons holding any of the employer's money, or assets not to transfer, withdraw, dispose or otherwise deal with that money or the assets as the case maybe, except as stated in the notice. The notice shall remain valid until such a time the Authority will approve a remedial plan of the employer or receive evidence of payment by the employer, whichever comes earlier;** **e) To institute summary proceedings against the**

		summary proceedings which usually take long to arrive at judgement. Therefore, there is need to clearly state whether the Authority can use an agent to collect funds owed to a scheme. *Proposal* The Authority proposes to insert a proviso under Section 53B of the Retirement Benefits Act to empower the Authority to appoint any person, bank or institution to be an agent of the Authority for the purposes of collection and recovery of a debt owed to a scheme.	**(1) An agent appointed under sub-section (2) shall have the power to; -** **a) Recover the outstanding debt through disposal of movable properties owned by the employer;** **b) Recover the outstanding debt through charging or disposal of immovable properties of the employer;** **c) Recover the debt from banks and other third parties holding the employer's money;**

		rising to over Kshs. 32.1 billion of which Kshs. 27.8 billion (95%) is held by quasi-government institutions; Local Authorities owing Kshs.16.7 billion (52%) and Universities owing Kshs. 11.8 billion (36%); only Kshs.3.6 billion (11%) is owed by others. 2. Sec. 53B of the Retirement Benefits Act empowers the Authority to recover unremitted contributions, interest accrued, and penalties owed to a scheme. 3. The procedure to recover, however, is not clearly defined in the section other than instituting	**53B (2) Notwithstanding the provisions of sub-section (a) and without prejudice to any penalty accrued, where an employer has failed to remit contributions, the Authority may appoint any person including a government agency to be an agent of the Authority for the purposes of collection and recovering any debt owed to a scheme, and to exercise such powers prescribed in this Act to recover the debt owing. The period of such appointment shall be specified in the instrument of appointment.**

	"post-retirement medical fund" means a fund established within a scheme into which contributions are made and from which the costs of medical benefits can be met as may be determined in accordance with the medical fund rules.	retirement medical funds which are established within pension schemes and those that are currently unregulated; 3. In any event, the two definitions contradict each other if they are both sustained; 4. The manner of accessing the funds or the specific medical benefits can be determined in the Regulations; a medical cover is one of them.	a) by inserting the following new definitions in proper alphabetical sequence – **"post-retirement medical fund" means a fund established under this Act into which contributions are made and from which costs of medical benefits can be met in accordance with the medical fund rules;**
2.	**New proposal for insertion in the finance bill – *Collection of Scheme Debt.***	1. Unremitted Contributions owed by employers to members (their workers) pension schemes has continued to worsen in recent years with the unremitted amount	**Section 53B of the Retirement Benefits Act, 1997 is amended by inserting the following new subsection immediately after subsection 53B (c)-**

	CLAUSES	JUSTIFICATION	PROPOSED WAY FORWARD
1.	**CLAUSE 51** Section 2 of the Retirement Benefits Act is amended— (a) in the definition of "retirement benefits scheme", by inserting the words "**or post-retirement medical cover"** immediately after the words "form of payments"; (b) by inserting the following new definitions in their proper alphabetical sequence—	1. The draft proposal is erroneous. It provides that schemes will provide a medical cover- which is an insurance product and not the core objective of a pension scheme; 2. The draft proposal does not reflect the intention of the proposed amendment by stakeholders; which was to allow for formulation of Regulations for the registration and regulation of stand-alone and Umbrella post-	**Proposal deletion of the draft proposal and replace with the following new provision: -** 1. Section 2 of the Retirement Benefits Act, 1997 is amended- a) in the definition of "retirement benefits scheme", by inserting the words "**and includes a post-retirement medical fund"** immediately after the words "or other instrument"

13. **Proposed new clause** seeks to introduce a mechanism for collection of scheme debt that arise as a result of unremitted contributions following discussions with the Committee on Finance & Planning of the National Assembly on June 2, 2021.

PROPOSALS FOR AMENDMENT

The Authority proposes minor amendments to the finance bill, 2021 as set out below;

8. **Clause 58** seeks to provide for the register of all registered corporate trustees be kept in the register. The provisions are in section 30 of retirement benefits Act.

9. **Clause 59** seeks to provide for the register kept be used as evidence as per the facts kept in the register about registered corporate trustees. The provisions are in section 31 of retirement benefits Act.

10. **Clause 60** seeks to empower the Authority to extend time for submission of annual accounts for a period not exceeding three months on application by Trustees under Section 34 of retirement Benefits Act. Penalty shall not apply for the extended period.

11. **Clause 61** seeks to provide for general obligation of Trustees and Manager including corporate trustees under Section 41 of retirement Benefits Act.

12. **Clause 62** seeks to empower the Inspector to cause inspection of a registered corporate trustee under Section 42 of retirement Benefits Act.

3. **Clause 53** seeks to provide for the registration procedures under Section 23 of the Retirement Benefits Act, 1997 like the other existing stakeholders in the Retirement benefits industry like retirement benefits schemes, fund managers, custodians and administrators.

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7. **Clause 57** seeks to provide for the duration and renewal of the registration certificate issued to a corporate trustee under shall be valid until revoked. The provisions are in section 29 of retirement benefits Act.

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Retirement Benefits Authority

RETIREMENT BENEFITS AUTHORITY

MEMORANDUM ON THE FINANCE BILL 2021

	"post-retirement medical fund" means a fund established within a scheme into which contributions are made and from which the costs of medical benefits can be met as may be determined in accordance with the medical fund rules.	retirement medical funds which are established within pension schemes and those that are currently unregulated; 3. In any event, the two definitions contradict each other if they are both sustained; 4. The manner of accessing the funds or the specific medical benefits can be determined in the Regulations; a medical cover is one of them.	a) by inserting the following new definitions in proper alphabetical sequence— **"post-retirement medical fund" means a fund established under this Act into which contributions are made and from which costs of medical benefits can be met in accordance with the medical fund rules;**

NZOMO MUTUKU

CHIEF EXECUTIVE OFFICER, MBS

	CLAUSES	JUSTIFICATION	PROPOSED WAY FORWARD
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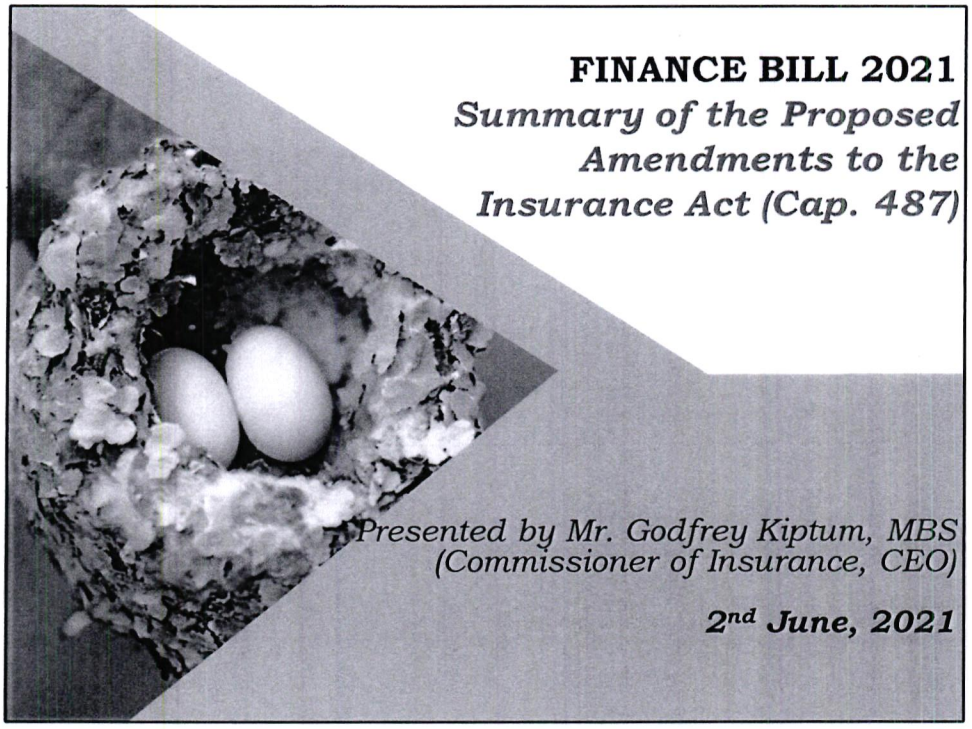

FINANCE BILL 2021

Summary of the Proposed Amendments to the Insurance Act (Cap. 487)

Presented by Mr. Godfrey Kiptum, MBS
(Commissioner of Insurance, CEO)

2nd June, 2021

Clause 46 – Definition of a Broker

Insurance Regulatory Authority
IRA

Current Definition (Section 2)	Proposed Definition (Clause 46)
"Broker" means an intermediary concerned with the placing of insurance business with an insurer or reinsurer for or in expectation of payment by way of brokerage, commission for or on behalf of an insurer, policy holder or proposer for insurance or reinsurance and includes a health management organization; but does not include a person who canvasses and secures reinsurance business from or to an insurer or broker in Kenya so long as that person does not undertake direct insurance business and does not have a place of business, or a resident representative, in Kenya; (our emphasis)	"broker" means an intermediary involved with the placing of insurance business with an insurer or reinsurer for or in expectation of payment by way of brokerage commission for or on behalf of an insurer, policyholder or proposer for insurance or reinsurance and includes a medical insurance provider.

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Definition of Broker (Clause 46) [Cont]

Insurance Regulatory Authority
IRA

Limitations of Current Definition	Proposed Amendment(s)
• Section 20 of the Insurance Act prohibits placement of Kenyan insurance business with unregistered persons , except for reinsurance business. • Exclusion of foreign insurance brokers from the definition of 'broker' under Section 2 of the Insurance Act therefore allows foreigners to transact reinsurance business in Kenya without being regulated.	Clause 46 proposes that the definition of 'broker' under Section 2 of the Insurance Act be revised to include foreign reinsurance brokers transacting Kenya reinsurance business.
• The current definition of 'broker' includes the words "health management organisation" instead of "medical insurance providers", who currently place medical insurance business with underwriters in the capacity of brokers.	Clause 46 proposes to amend Section 46 to confirm that medical insurance providers shall be deemed as brokers if they are placing Kenya insurance or reinsurance business with underwriters.

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Definition of a Broker (Clause 46) [Cont]

Insurance Regulatory Authority
IRA

Expected Impact

- The proposed definition of 'broker' under Clause 46 will bring the operations of foreign brokers within the scope of the Authority's regulatory mandate.
- Regulation of foreign brokers will enhance protection of the interests of insurers and policyholders
- The replacement of "Health Management Organisation" with "Medical Insurance Providers" will enhance the internal coherence of the Insurance Act.

Note:

The term ' Medical Insurance Provider' is already defined in Section 2 of the Insurance Act.

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Clean Up of Transition Provision (Clause 47)

Insurance Regulatory Authority
IRA

Current Section Section 20 (3)	Proposal (Clause 47)
Section 20(3) proposed to be repealed provides as follows *Paragraph (a) of subsection (2) shall be deemed to have been complied with in respect of any reinsurance treaty or contract in force on the appointed date or the date of the renewal of the treaty or contract, whichever is earlier, if the treaty or contract is certified by the Kenya Reinsurance Corporation Limited as having been approved by that Company.*	Repeal Section 20 (3)

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Clean Up of Transition Provision (Clause 47)

Insurance Regulatory Authority
IRA

Limitation of Section 20(3)	Rationale and Impact
The Insurance Act in Sections 20 (2)(a) and (b) empowers the Commissioner to approve both treaty reinsurance and facultative insurance thereby rendering the functions that were hitherto being performed by Kenya Reinsurance Corporation redundant.	Section 20(3) is now redundant, as it is a transitional provision that allowed continuity of treaty and facultative reinsurance based on contracts and treaties that had been approved by Kenya Reinsurance Corporation prior to the grant of the Commissioner's powers under Sections 20 (2)(a) and (b). **Impact** • There will be no impact on Kenya Reinsurance Company as registration of reinsurers and affected treaties and contracts has already been done by Commissioner of Insurance. • There will be no impact on reinsurance treaties and contracts as their validity was limited to the date of their next renewal.

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Closed Fund (Proposed New Clause 48)

Proposed New Section 21A

21A. Closed Fund Business

1. *The provisions of this Act shall apply management and continuity of the closed fund.*

   Closed fund in this section means the continuance, subject to sections 10 and 123(1) (b), of insurance business by an insurer for purposes of maintaining, without renewal, any policy or contract of insurance Budget Memorandum 2021/2022

2. *The Commissioner may, by notice require an insurer to furnish him with particulars of the insurer's business in Kenya. The notice will specify the period within which to give the particulars.*

3. *An insurer that fails to comply with subsection (2) shall be liable to a penalty of two hundred thousand shillings and a further penalty of ten thousand shillings for each day after the expiry of the prescribed period during which the insurer remains non-compliant.*

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Closed Funds (Proposed New Clause 48) [cont]

4. *The penalty imposed under subsection (3) shall be payable into the Policyholders Compensation Fund.*

5. *No person shall dispose of any assets from a closed fund except with the prior written approval of the Commissioner.*

6. *A person who contravenes the provisions of subsection (4) commits an offence.*

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Closed Fund (Proposed New Clause 48) [cont]

Insurance Regulatory Authority
IRA

Rationale of Proposal	Impact of Proposal
The Companies and Insolvency Legislation (Consequential Amendments) Act, 2015, Section 36, amended the Insurance Act by repealing Section 21 of the Insurance Act (Closed Fund Business). Consequently, there is currently no provision within the Insurance Act to cater for closed funds.	The proposal provides the Authority with a legal basis to allow insurers to operate closed fund business. Protection for policyholders is enhanced as there is currently no regulation of closed funds. Authority will be able to get info on how closed fund is being operated to ensure protection of beneficiaries.

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Annual Fees for Insurers (Clause 49)

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Proposed Sec. 31(3)	Rationale	Impact
31 (3) An insurer issued with a license under this Act shall pay the prescribed annual fee.	The Insurance Act has no express provision that insurers shall pay annual fees.	The amendment will clarify that insurers must pay annual fees.

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Insurance Regulatory Authority
IRA

THANK YOU

A&K | ALN
ANJARWALLA & KHANNA

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The African Legal Awards 2018 | African Network/ Alliance of the Year | Winner

Our Ref DNG/KKN/GEN
Your Ref TBA
Date 1 June 2021

The Clerk of the National Assembly
Office of the Clerk, Main Parliament Buildings
P.O. Box 41842 – 00100
Nairobi, Kenya

Attention: Michael R. Sialai, EBS (clerk@parliament.go.ke) and Leah W. Mwaura (leahwanjiru4@gmail.com)

Dear Sirs,

RE: SUBMISSION OF MEMORANDUM ON THE FINANCE BILL, 2021

We refer to the above matter and your public notice inviting the public to submit their comments on the Finance Bill, 2021 (the **Bill**) which was published on 5 May 2021.

Please see annexed to this letter a schedule setting out our comments and proposals relating to the Bill.

Should you require any clarifications, please do not hesitate to contact Kenneth Njuguna (kkn@africalegalnetwork.com) or myself (dng@africalegalnetwork.com).

Yours faithfully,

Daniel Ngumy
For and on behalf of Anjarwalla & Khanna LLP

Partners: Atiq Anjarwalla, Karim Anjarwalla, Mona Doshi, Akash Devani, Amyn Mussa, Sonal Sejpal, Anne Kiunuhe, Rosa Nduati-Mutero, Dominic Rebelo, Aisha Abdallah, Daniel Ngumy, Ian Gaitta, Wangui Kaniaru, Shellomith Irungu, Faith Machana, Adnan Khan, Kenneth Njuguna | **Consultant:** Ushwin Khanna | **REG No:** LLP-6R1VXP **PIN No:** P000621390P **VAT No:** 0010493A

ALGERIA | ETHIOPIA | GUINEA | KENYA | MADAGASCAR | MALAWI | MAURITIUS | MOROCCO | MOZAMBIQUE | NIGERIA | RWANDA | SUDAN | TANZANIA | UGANDA | ZAMBIA • UAE

Effective 18 June 2019, Anjarwalla & Khanna (Registration Number BN/3920) converted from a partnership to a limited liability partnership and is now registered under the name of Anjarwalla & Khanna LLP.

SCHEDULE

SUBMISSIONS TO THE NATIONAL ASSEMBLY ON THE FINANCE BILL, 2021

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	RECOMMENDATION AND JUSTIFICATION
	AMENDMENTS TO THE INCOME TAX ACT (CHAPTER 470, LAWS OF KENYA)		
1.	Clause 2 (a) **Definition of Control**	The Bill proposes to expand the definition of 'control' to include where a person: a. holds more than 20 percent of the voting rights of a company; b. advances a debt or gives a debt guarantee of at least 70 percent of indebtedness of a company; c. has power to appoint more than 50 percent of the board of directors of a company or at least one director or executive member of the governing board of that company. d. owns or has exclusive right to the intellectual property rights that a company is dependent on for the manufacture or processing of goods for its business; e. supplies or purchases at least 90 percent of the purchases or supplies of a company or has influence on supply of goods, prices or markets of a company; or	The proposed definition is wide and encompassing and is likely to apply to businesses that are truly independent. The proposed definition if adopted will consequently increase the compliance burden for the affected taxpayers in a bid to comply with the transfer pricing legislation in Kenya for Kenyan businesses that are deemed to be under the control of another person while in actual sense the businesses are not controlled by the relevant parties. **Recommendation:** We propose that the new definition be limited to voting rights and power to appoint directors in a company. A proposed definition for adoption is set out below: *"control", in relation to a person, means where:* *a) that the person, directly or indirectly, holds at least twenty-five per cent of the voting rights in a company; or* *b) the person appoints more than half of the board of directors of another person or at least one director or*

		f. has any other relationship, dealing or practice with another person which the Commissioner may deem to constitute control.	*executive member of the governing board of that person.*
2.	Clause 2 (b) **Definition of permanent establishment**	The term 'permanent establishment' has been defined to include: *(a) a fixed place of business through which business is wholly or partly carried on and includes a place of management, a branch, an office, a factory, a workshop, a mine, an oil or gas well, a quarry or any other place of extraction or exploitation of natural resources, a warehouse in relation to a person whose business is providing storage facilities to others, a farm, plantation or other place where agricultural, forestry plantation or related activities are carried on and a sales outlet.*	The proposed definition does not state the period in which the fixed place of business should exist before a permanent establishment is deemed to have been created. **Recommendation:** We propose that a period of **six months** set out in the current definition of permanent establishment in the Income Tax Act be adopted. This is to avoid a situation where a permanent establishment could be deemed to be created on the first day of a foreign enterprise having a fixed place of business in Kenya (which may be of a preparatory nature).
3.	Clause 5 **Accounting and Payment of Digital Service Tax (DST)**	The Bill proposes to amend Section 12E (2) of the ITA by replacing it with the following sub-section: (2) A person subject to digital service tax shall submit a return and pay the tax due to the Commissioner on or before the twentieth day of the month following the end of the month in which the digital service was offered.	Currently, non-resident persons subject to the DST are required to compute the DST and make an online payment of the DST due through the iTax platform. There is no requirement to file a return and the format of the return has not been uploaded on iTax. The proposed amendment is welcome because the previous requirement to make real-time payment is unlikely to be achieved due to the volume of online transactions that occur at

			any given time. **Recommendation:** However, we propose that for purposes of clarity, a format for the proposed return be provided by KRA. The format of the proposed return should provide clarity on the nature of information which should be provided to the KRA to avoid ad hoc information requests. The information that should be requested in the return should be limited to the following: i) supplier's PIN; ii) tax period; iii) currency and exchange rate used; iv) taxable amount; and v) tax payable.
4.	Clause 7 **Thin capitalisation**	The Bill proposes to amend section 16 of the Income Tax Act in respect of the provision relating to thin capitalisation restrictions by deleting the current debt to equity ratio of 3 to 1, to a percentage of earnings before interest taxes depreciation and amortization (**EBITDA**). The proposed thin capitalisation restriction requires that the gross interest paid or payable to related persons and third parties in excess of 30% of the EBITDA of a resident borrower in any financial year will not be deductible for tax purposes.	Under the proposed amendment, the provision does not state that the thin capitalisation restrictions only apply to companies that are under the control of a non-resident person as currently provided under the Income Tax Act. **Recommendation:** Since thin capitalisation is intended to avoid flight of capital from Kenyan companies by non-residents by way of interest payments, we propose that a new paragraph (iii) is inserted to state as follows:

			"(iii) this subsection shall apply where a person is controlled by a non-resident person alone or together with not more than four other persons and where the company is not a bank or financial institution under the Banking Act.
	AMENDMENTS TO THE VALUE ADDED TAX ACT, 2013		
5.	Clause 16 **Treatment of Imported Services**	The Bill proposes to amend Section 10 (1) of the VAT Act by deleting the word "registered" to clarify that <u>any person</u> (not only registered persons) who imports taxable services will be deemed to have made the taxable supply to themselves. Further, the Bill proposes to amend Section 10 (2) to clarify that if the person importing the taxable supply is a registered person, then will they be entitled to claiming input VAT credit on the tax payable on a taxable supply made.	The Value Added Tax (Digital Marketplace Supply) Regulations, 2020 (the **DMS Regulations**) provide that business-to-customer (**B2C**) transactions will fall under its provisions while business-to-business (**B2B**) transactions will fall within the provisions of Section 10 of the VAT Act. This posed a challenge for digital businesses like Uber who have both B2B and B2C customers. Specifically, it was not clear in the VAT Act or the DMS Regulations what information could be relied on by non-resident suppliers to determine whether a transaction is B2B (therefore not to charge VAT) or B2C (therefore to charge VAT). However, with the proposed amendment to the VAT Act, <u>all</u> persons (whether in B2B or B2C transactions) will be subject to Section 10 of the VAT Act. This provision under the VAT Act currently contradicts the DMS Regulations which provides for B2C transactions and requires that B2B transactions to apply Section 10. The challenge that will be faced by digital businesses such as

			Uber is the difficulty in determining whether a transaction falls within the scope of the DMS Regulations or under the provisions of Section 10. As a result, it is not clear for such businesses to determine whether to charge VAT on their supplies or not. **Recommendation:** We propose that clarity should be provided further on this point in the VAT Act and/or the DMS Regulations. Our proposal is that the provision in the DMS Regulations that provides for only B2C transactions should be deleted to the effect of subjecting all transactions to Section 10, which would have an implication of subjecting all DMS transactions to VAT in Kenya. Entities which are registered for VAT will be in a position to claim input vat. In particular, we propose the following amendments to the DMS Regulations so as to subject to VAT all supplies made by non-resident persons in relation to digital services in Kenya. Specifically, we propose that: Regulation 4 of the DMS Regulations is amended – a) by deleting subsection (2) (3) (4) and subsection (5) and substituting therefor the following new paragraph under subsection (1)- (2) Where the supply under Regulation 3 is made in a business-to-business transaction, the provisions of Section 10(3) shall apply.

			Regulation 5 of the DMS Regulations is amended: a) in subsection 1(a) by deleting the words " a recipient in Kenya in a business-to-customer transaction" and substituting therefor the word "any recipient in Kenya" b) in subsection 2 by deleting the words "business-to-customer" appearing immediately before the words "a person from an export country who makes a" Regulation 6 of the DMS Regulations is amended: c) by deleting the words "business-to-customer" appearing immediately before the "a person from an export country who makes a" The effect of the proposed amendments to the DMS Regulations is to subject to VAT "all persons" receiving a supply from a non-resident supplier making supplies on a digital marketplace. In our view, this will not cause any prejudice because in any event, Section 10 provides that persons in B2B transactions will be entitled to claim input VAT while B2C transactions will bear the burden of VAT as it was intended by the DMS Regulations. We note that a similar model has been adopted by countries like South Africa that requires electronic sales made by non-resident suppliers to businesses in South Africa to charge VAT on such supplies and not to use the reverse charge method.

6.	Clause 20 **Powers of Cabinet Secretary to make Regulations**	The Bill has proposed to amend the Value Added Tax Act, 2013 to delete the requirement for Regulations made under the Value Added Tax Act to be tabled before the National Assembly for approval before they take effect.	The proposed amendment implies that the Cabinet Secretary for National Treasury will have powers to make regulations under the Value Added Tax Act, 2013 without approval of the National Assembly. Effectively, the National Treasury will be able to come up with new tax measures and implement them without any oversight by the National Assembly. The proposed amendment would be inconsistent with the provisions of the Statutory Instruments Act, 2013, which requires all statutory instruments, such as legal notices and regulations, which are made pursuant to powers granted to a Cabinet Secretary under a written law, to be tabled in Parliament within 7 days after the publication of the relevant statutory instrument. **Recommendation:** We recommend that the proposed amendment is shelved to keep it clear that the regulations made under section 67 of the Value Added Tax Act, 2013 should be tabled in the National Assembly for approval.
7.	Clause 21 (b) **Exportation of services exempt from VAT**	The Bill has proposed to exempt exportation of services from VAT (a supply which is currently zero rated).	Exportation of services is currently a zero-rated supply which means that input VAT incurred in making the supply is set off against output VAT received in making other taxable supplies and a VAT refund can be applied for from the KRA in respect of the excess portion of input VAT credit incurred in making zero-rated supplies. It is a globally accepted principle and international best practice that exportation of both goods and services are zero rated

			supplies for VAT purposes. Zero rating of exportation of goods and supplies promotes and encourages exports to enhance the balance of payments for Kenya. The impact of the proposed amendment is that suppliers of services may have to dig deeper into their capital to fund the tax cost relating to the restricted input VAT on exportation of services. The proposed amendment will therefore discourage exportation of services from Kenya. **Recommendation:** We propose that the proposed amendment be shelved and the current position in the VAT Act be retained as is.
	AMENDMENTS TO THE EXCISE DUTY ACT, 2015		
8.	Clause 25 (a) **Excise duty on locally manufactured sugar confectionary**	The Bill seeks to amend the excise duty provision by reintroducing excise duty on locally manufactured sugar confectionery and white chocolate. Through the Finance Act, 2019, locally manufactured sugar confectionery and chocolate were excluded from excise duty.	The Bill has proposed to charge excise duty on all supplies of sugar confectionery and white chocolate whether imported or local. The additional cost will negatively impact the consumption and manufacture of these products. This move may also discourage the local manufacturing of these goods as this proposal will not cushion the local companies from the competition of cheaper imports. **Recommendation:** We propose that the proposed amendment is rejected.

9.	Clause 25 (b) **Excise duty on betting activities**	The Bill has proposed to reintroduce excise duty on betting at a rate of 20% of the amount waged or staked by punters.	Excise duty on betting was first introduced in November 2019 by the Finance Act, 2019 and deleted a few months later, July 2020, by the Finance Act, 2020. The proposed amendment will erode the betting firms' profitability and is likely to discourage punters in placing bets which may ultimately lead to investors exiting the Kenyan betting industry. **Recommendation:** We propose that the proposed amendment is shelved.
	AMENDMENTS TO THE TAX PROCEDURES ACT, 2015		
10.	Clause 28 (a) **Increase of look-back period for tax purposes**	The Bill has proposed to increase the period within which the Commissioner may amend a tax assessment from five years to 7 years. Under the proposed amendment, the Commissioner will be permitted by law to investigate / look into the affairs of a taxpayer within 7 years from the date the Commissioner serves notice of intention to audit the tax affairs of a taxpayer.	The proposed amendment is a departure from the limitation period of five years adopted by East African Countries such as Tanzania, Uganda and Rwanda. Currently, taxpayers are required to retain documents under a tax law for five years from the end of the reporting period to which the document relates. **Recommendation:** We propose that the current period of 5 years is retained as the same is sufficient for the Commissioner to investigate the tax affairs of a taxpayer. Extending the period to 7 years will make it onerous for taxpayers to maintain records and effectively respond to any questions relating to periods past five years.

			In addition, since taxpayers have been maintaining records for five (5) years, implementing the limitation period of 7 years would be challenged from a constitutional point of view as taxpayers would not have the records for the additional 2 years since they are under obligation to keep records for 5 years under the current law. In this regard, should the proposed amendment to extend the limitation period from 5 years to 7 years be adopted, the look back period for the additional 6th year and 7th year should be effective in the first and second anniversary, respectively, of the effective date of the proposed amendment. This is because the taxpayers would then be able to expand the period for maintenance of records to cover the additional period.
	AMENDMENTS TO THE CENTRAL DEPOSITORIES ACT, 2000		
11.	Clause 64, 65 **Beneficial ownership information**	The Bill proposes to require authorized nominees to furnish central depositories with information on the beneficial owners of securities accounts upon request in order to promote transparency to ensure that proceeds of crime are not channeled through the securities exchange.	We note that the Bill does not include any mechanisms to safeguard the confidentiality of beneficial ownership information. The Bill should include wording to the effect of regulating access to beneficial ownership information and placing a burden of confidentiality on central depositories. The Bill should also make it clear which other entities would have access to this information following requisition by the central depository. **Recommendation:** We propose that a new section 30C is inserted after section 30C with the wording same as the wording in Regulation 13 of the Companies (Beneficial Ownership Information) Regulations,

			2020 to ensure that the confidentiality of the beneficial disclosure information is maintained. Proposed new section 30C: *(1) Authorized nominees and central depositories shall not use or disclose any information about beneficial owners obtained under Section 30B, except -* *a) for communicating with the beneficial owner concerned;* *b) in order to comply with any requirement of this Act; or* *c) in order to comply with a court order.* *(2) Notwithstanding subsection (1), information relating to a beneficial owner may be disclosed with the written consent of the beneficial owner.* *(3) Beneficial ownership information shall not be made available to the public.*
	ADDITIONAL PROPOSED TAX AMENDMENTS		
12.	New Proposal under section 12D of the Income Tax Act **Minimum tax exemption to independent**	The Finance Act 2020 amended the Income Tax Act by introducing minimum tax which is payable at the rate of 1% of the gross income of a person effective 1 January 2021. The minimum tax is payable in instalments which are due on the 20th day of each period ending on the fourth, sixth, ninth and twelfth month of the year of income of a person, similar to the timelines for instalment taxes.	Independent Power Producers (IPPs), invest significant capital and incur high development costs during the implementation phase of the power projects. As a result, IPPs are usually in a tax loss position in the initial years of operation due to capital allowances and investment deductions that are claimed under the provisions of the Income Tax Act. With the introduction of Minimum Tax, IPPs will be required to pay 1% of their gross income despite being in a tax loss position due to investment deductions and capital allowances.

	power producers		Capital allowances apply as a tax incentive to investments as they offer tax relief on the significant investment costs incurred in the energy sector. Applying Minimum Tax on the revenue received by IPPs while they are, by law expected to enjoy tax relief arising from capital allowances, is a claw-back to the very purpose of the capital allowances as an incentive to investment in the energy sector. In addition, we point out that Power Purchase Agreements (PPAs) between IPPs and the Kenya Power and Lighting Company Limited (KPLC) in respect of the various power projects are entitled to issue Change in Tax Notices when there is a Change in Tax that has an impact on the projects. The IPPs are entitled to remedies which include an adjustment of the Energy Charge Rates and Tariffs with the effect of placing the IPPs in the same financial position as it would have been in had the Change in Tax not occurred. In the event the IPPs are unable to obtain the remedy relating to adjustment of the Energy Charge Rates as per the provisions of the PPAs, the IPPs are entitled to seek a lumpsum payment from the Government of such amount that will eliminate the adverse impact of the Changes in Tax on their Projects pursuant to the Letters of Support issued by the Government to the IPPs. This means that the Government is under obligation to reimburse the IPPs for additional tax costs in respect of the changes in tax. **Recommendation** We propose that a new provision is inserted under section 12D of the Income Tax Act exempting from Minimum Tax, income derived from or accrued in Kenya by IPPs supplying electricity to the national grid under a power purchase agreement.

END

KENYA ASSOCIATION OF MANUFACTURERS

Driving Global Competitiveness

MEMORANDUM ON THE FINANCE BILL 2021

Submitted to

MICAHEL SIALAI, EBS, THE CLERK, NATIONAL ASSEMBLY

HON. GLADYS WANGA, THE CHAIRPERSON, DEPARTMENTAL COMMITTEE ON FINANCE AND PLANNING, NAITIONAL ASSEMBLY

Submitted By

PHYLLIS WAKIAGA, THE CHIEF EXECUTIVE
KENYA ASSOCIATION OF MANUFACTURERS (KAM)

JUNE -2021

NAIROBI, KENYA

1.0 INTRODUCTION

Kenya Association of Manufacturers (KAM) is the leading business membership organization in East Africa that plays a key advocacy role on behalf of manufacturers in Kenya and in the region through her strong linkages with all sectors of the economy. KAM has over 950 members and represents over 40% of Kenya's manufacturing value add industries.

KAM represented Kenya's manufacturing sector interests in the East Africa Trade integration process through the design, ratification and implementation of the Customs Union, and the Common Market Protocol. The integration process in East Africa has been successful with Kenya Playing a critical role. The EAC region integration is expected to spur the manufacturing sector enhancing intra-EAC trade in value added products and thus grow the economies of the region.

The current Covid-19 crisis that has impacted supply chains and created uncertainty in the economic environment for Manufacturers in the Country. The impact of the situation is already evident in the manufacturing sector with slowdown in demand of goods reducing liquidity levels, supply and distribution markets being affected due to the global pandemic situation, and reduction in exports owing largely to global border shut down measures. It is therefore necessary for the Government to develop urgent measures to cushion the industry at this fragile economic period. This will ensure retention of job losses and continued operations in the manufacturing sector.

KAM wishes to acknowledge the economic measures that the Government has already put in place in the country and urges the Government to continue with its open consultations with the manufacturing sector to develop sustainable measures. Manufacturers pledge their full support to the people of Kenya and Government during this global crisis.

2.0 APPRECIATION FOR ADOPTION OF MANUFACTURERS PROPOSALS IN THE BUDGET FOR THE FINACIAL YEAR 2021/2022

We wish to appreciate the Government for consideration of the following tax proposals:

1. **Recognition of the Miscellaneous Fees and Levies Act, 2016 under Clause 26 of the Finance Bill 2021:** This proposal had been made by manufacturers to the National Treasury based on the non-recognition of the said Act under the Tax Procedures Act. The lack of its recognition as a revenue law under the Tax Procedures Act was negatively impacting manufacturers who are governed under the Act on payment of Import Declaration Fees (IDF) and the Railway Declaration Levy (RDL).

2. **Provisions to allow for refunds under the Miscellaneous Fees and Levies Act, 2016 under the Clause 43 of the Finance Bill 2021:** This proposal was made by manufacturers to the National Treasury. The proposal under the Bill seeks to amend the Miscellaneous Fees

and Levies Act, 2016 to apply provisions of Section 47 of the Tax Procedures Act, 2015 on refund applications, ascertainment and repayment of fees and levies, overpayments or payments made in error. This will support manufacturers based on earlier challenges faced on overpayment.

3. **Income tax incentive to enhance technical and vocational graduate skills by employers:** This proposal was made by manufacturers under Clause 10 of the Finance Bill 2021 to extend the income tax incentive to employers to enhance uptake of graduate under the TVET programme similar to the support given to university graduates. Manufacturers highly rely on technical skills for their industrial operation and to support imparting practical skills in partnership with TVET colleges in the country.

4. PROPOSED AMENDMENTS TO THE FINANCE BILL 2021

In response to the call for public participation on the afore-referenced Bill, we propose the following amendments to be considered before the Bill is enacted.

INCOME TAX ACT

	Clause Reference	Proposal	Justification	Proposed Commencement date
	Clause 7 **Deductions not allowed.** **Section 16 (2) of the Income Tax Act is amended.**	Delete the proposed amendments to retain the current position of Debt: Equity of 3:1 as opposed to limiting the interest EBITDA to 30%.	• The current provisions provide that interest can only be deducted to the extent that the ratio of interest to capital does not exceed a ratio of 3:1 for all companies. The proposal seeks to limit interest to be deducted to a maximum of 30% of Earnings Before Interest Tax, Depreciation and Amortization (EBITDA). • We propose deletion of the proposed amendments based on the following reasons: • Kenya at present requires capital investments for growth to spur jobs and avert the rising trade deficit. This proposal may deter new investments in the country. • The proposed rate is extremely high and will affect capital-intensive businesses such as manufacturing sector and as a result: (i). increase the cost of financing manufacturing investment in Kenya, most of which is in the form of debt. (ii). increase the income tax payable by manufacturers who are struggling with profitability. (iii). the proposed formula will lead to higher taxable profits since 70% on interest expense will not be allowable considering it is a key cost for many taxpayers who depend on loans to finance operations. • Enclosed as **Annex 1** please find a detailed workings scenario on the impact of the proposed amendment to the manufacturing sector. The Annex provides two different scenarios – a company investing in a new	Not applicable Proposed deletion

			manufacturing business, and a struggling manufacturer that slips into a loss-making position. The findings indicate a dire situation as follows: (i) In the first scenario example, **the income tax increases 40 times from KES 300k to KES 11.9 million**. (ii) In the second scenario example, **a loss-making manufacturer ends up having a substantially higher tax liability.** Based on the findings, we propose deletion of the proposed amendment.	
	Clause 12 **Deductions in Respect of Capital Expenditure** Paragraph 1 of Second Schedule to the Income Tax Act	**Introduce a new definition of "farm work" as follows which is not included under the Income Tax Act. We propose adoption of the definition in the previous repealed Income tax Act under Section 23, Second Schedule which read as follows:** **"Farmworks"** *means farmhouses, labour quarters, any other immovable buildings necessary for the proper operation of the farm, fences, dips, drains, water and electricity supply works other than machinery, windbreaks, and other works necessary for the proper operation of the farm.*	• We propose introduction of a definition of farm work due to the following reasons: (1) The definition is currently missing in the Act. This seems to have been erroneously left out during the transition to the new act from the repealed Income tax act. (2) The effect of not having a definition creates ambiguity on which investments should qualify for this capital deduction. • The repealed Income Tax Act had provided a definition, and which seems to have been erroneously left out in the development of the current Income Tax Act.	1st July 2022
	New proposal **Second Schedule - Paragraph 24.**	Introduce the following two amendments under the Second Schedule of the Income Tax Act: 1) Tax deduction for plant and	In 2020, the Government altered the cost of Plant and Machinery for manufacturers under Chapter 84 and 85 of the East African Community Common External Tariff (CET) used for the manufacture of goods vide the Tax Law Amendment	1st July 2022

	Deduction of capital expenditure incurred – **24(1)(f) – on the construction of a building or purchase and installation of machinery outside the city of Nairobi or municipalities of Mombasa and Kisumu where the values exceed KES 200M.** **24(2)(c) – in the case of investments referred above (1)(f) the investment deduction be equal to one hundred and fifty percent of the capital expenditure.**	machinery, for investment in the **construction, purchase and installation of machinery** located out of Nairobi, Kisumu, and Mombasa investment over Kenya shillings two hundred million outside the City Counties at a percentage rate of 150%. 2) Tax deduction for Cities, Nairobi, Kisumu, and Mombasa at a percentage rate of 100%	Act 2020: • reduced the Income Tax Deduction percentage rate of 150% for plant and machinery, provided for under the Second Schedule to the Income Tax Act for investment over Kenya shillings two hundred million outside the City Counties. • 100% deduction for Cities, Nairobi, Kisumu and Mombasa. • Plant and machinery are a primary critical asset that drives business production operations. The cost for such plant and machinery for manufacturers requires to be at its lowest level to ensure productivity, attract more investors into the manufacturing sector and allow existing manufacturers to continue investing in new and high-capacity equipment. • The impact of the said changes continues to adversely affect manufacturers as follows: (i). The introduction of the said changes under the Tax Laws Amendment Act, 2020 entered into force without transitional provisions thereby disrupting local manufacturers who had made investments on Plant and Machinery for that year to unforeseen high costs. (ii). The reduction of the percentage of income tax investment allowance by half of the previous rate of one hundred percent, is disincentivizing investments outside the key City Counties of Nairobi, Mombasa, and Kisumu. Previously, the manufacturing sector was evidencing significant new investments in manufacturing facilities in other Counties such as	

			Machakos, Kajiado, Kiambu, Kilifi among others in the last 5 –7 years. (iii). Kenya's local manufacturing industry remains uncompetitive in the regional and global market due to the local tax policy changes on plant and machinery. (iv). The sudden policy change on plant and machinery investments continues to have adverse effect on businesses especially, new investments and SMEs seeking to diversify production through investing in plant and machinery. In addition, with the ongoing Covid-19 crisis impacting manufacturers, the move goes against its anticipated growth initiative.	
	Clause 2 **Definition of control**	Delete the provisions on "manufacture or processing of goods" under part (e) Delete b and c. Delete g (i) and g (ii). Delete (h)	The new definition of "control" will have the following impact: (1) The definition is too broad and will affect businesses operating as **contract manufacturing**. To address this, we propose excluding "contract manufacturing businesses" in the proposed definition of control. (2) The powers given to the Commissioner of tax are too wide on disclosures which counters the proposed definition which seeks to provide clarity on the same. We propose deletion of the provisions.	1st July 2021

VALUE ADDED TAX				
	Clause Reference	**Proposal**	**Justification**	**Proposed date**
	Clause 22 **Ordinary Bread** **Zero rated Goods** **The Second Schedule to the Value Added Tax Act, 2013** **The Second Schedule to the Value Added Tax Act, 2013 is amended—** **(b)by deleting paragraph 13A.**	**Delete the proposed amendment to remove ordinary bread from the value added tax (VAT) zero rate status.**	We propose deletion of the proposed amendments to impose 16% VAT on ordinary bread based on the following reasons: • Bread is considered a basic staple commodity consumed largely by persons who are categorized as living within the poverty level. This includes students in public boarding schools. • Basic bread is one of the cheapest food commodities that a large portion of Kenyans rely upon to feed themselves and their families, retailing at between Kshs. 50 and Kshs. 55 per 400g loaf, yet which most Kenyans are barely even able to afford. • The bread value chain supports informal and micro businesses such as roadside vendors, kiosks among others. The proposed VAT tax will negatively affect their businesses due to inevitable price increases which will deter consumers. The strenuous Covid-19 crisis facing the country worsens the situation for consumers. • In 2019, the bread industry recorded a 3.5 per cent growth on account of bread production which increased by 3.9 per cent accounting for 3.18% contribution to the manufacturing sector (KNBS, Economic Survey 2020). The sector growth and contribution will likely be affected by the proposed changes. • The absence of VAT on bread has enabled manufacturers to offer the bread at affordable prices. In addition, the supply side dynamics ensure that it is a highly competitive industry where gross margins are extremely	Not applicable Proposed deletion

			low, and manufacturers rely on volume and scale to make minimal profits. The increase in fuel prices during the past few months have reduced further the margins. • Early 2021, manufacturers have had to increase the ex-factory price of bread after several years due to the Covid-19 crisis that has seen increases in world wheat and other raw material prices. By being zero-rated, manufacturers were able to claim input VAT which was the reason of stability in the price of bread over the last few years. • **The introduction of 16% VAT as per the proposal contained in the Finance Bill 2021 on this commodity will have the following impact:** (i). Increase in the Average Price of a 400g loaf of bread: There will be a further increase the average price of a 400g loaf of bread by approximately Ksh. 8/-, thereby making it unaffordable to most Kenyans. (ii). Violation of fundamental right to affordable food: This will be in violation of the fundamental right to affordable food. (iii). Fall in Demand: Demand of bread will fall drastically since increasing the price on staple products are the last thing, we all need, especially after the turmoil of the last year with the Covid-19 pandemic. (iv). Reduced margins to manufacturers: The increased taxes will eat into most of the gross margins of manufacturers with many forced to close permanently, thereby putting at risk more than 100,000 jobs.	
	Clause 20 **Regulations to be**	Delete the proposed amendments which seek to delete the existing provision of section 67 (2) of the Value Added Tax Act	Section 67 (2) of the VAT Act provide that Regulations made under this section shall be tabled before the National Assembly for approval before they take effect.	Not applicable

	tabled before National Assembly. **Section 67 (2) of the Value Added Tax Act, 2013**	requiring National Assembly's approval of regulations.	We propose retaining of the provisions based on the following reasons: • There is need for checks and balances in case of changes in tax regulations. • The proposed removal of the provisions will deny citizens an avenue for public consultation. • In addition, development of laws including statutory instruments are the mandate of the legislature. • The proposal will go against the provisions of the Statutory Instruments Act.	Proposed deletion
	Clause 17 **Credit for input tax against output tax** Section 17 (4) (a) of the Value Added Tax Act, 2013	**We propose to delete the proposed amendment under Section 17 (4) (a)** that seeks to disallow claim of Vat Credit with respect to acquisition, costs incurred with respect to leasing or hiring of passenger cars, minibuses and costs associated in repairs.	The Bill proposes that in addition to acquisition, **costs incurred with respect to leasing or hiring of passenger cars, minibuses** and costs associated in repairs shall not be claimable as a credit for VAT purposes. We propose deletion of the provisions to retain existing provisions allowing Vat Credit on the basis that if acquisition or hiring of passenger cars, minibuses and repair costs is incurred during the ordinary course of the business.	Not applicable Proposed deletion
	Clause 21 **Exempt Supplies - Goods** The First Schedule to the Value Added Tax Act, 2013 a) (iv & xxiv)	Delete the proposed amendments to place medicaments under exempt status to retain its existing status under zero rated. or Impose a concessionary rate of not more than 4% on the proposed medicaments.	We propose deletion of the proposed amendments that seek to move medicaments to the exempt VAT status due to the following reasons: • The said move will adversely affect the local pharmaceutical manufacturing sector in the Country. This is because local manufacturers of medicaments will not be able to claim their input VAT being under	Not applicable Proposed deletion

			the Exempt VAT and as a result, the Input VAT becomes part of the manufacturing cost. Inability to claim VAT input is expected to lead to, an increase operating and production costs for local manufactured medicaments and vaccines, rendering local manufacturers less competitive, on both, local market and exports, promotion of imports of medicaments leading to increasing our trade deficit, loss of revenue and jobs, increased over-reliance on imports presenting a high risk for the country especially during this coronavirus pandemic. • The medicines under these HS Codes falling VAT exempt status, the cost of medicines increases as manufacturers are not able to claim input VAT on capital expenditure, business operations such as maintenance, rent, electricity, etc. incurred for use in the local manufacture of medicaments cannot be recovered. As such, manufacturers are forced to expense these unrecoverable VAT resulting into increased cost of production in manufacture of medicaments. • Consumers will also be affected by having to purchase medicine from local manufacturers at a higher price than was the case before. In other words, unrecoverable input VAT incurred on business operations increases the cost of productions and ultimately the price of medicaments to the final consumer. This will result into reduced sales for Kenyan pharmaceutical manufacturers, which will ultimately lead to laying off employees. • The proposed exemption will result into higher prices of locally produced medicaments, which will make	

			local manufacturers uncompetitive against cheap imports of such medicaments. This brings unfair competition in the market and eventually weaknesses the manufacturing sector. This move goes against Government agenda to prioritize public investments geared to the realization of The Big Four Agenda of which local pharmaceutical manufacturers fall under both Universal Health Care (UHC) and local manufacturing. • For a developing economy like Kenya, VAT exemption on essential commodities is not the best solution. This is because VAT is a consumption tax and exemption of essential commodities results in an increase in the cost of the final product, which is borne by the final consumer. Majority of Kenyans live below the poverty line, and this implies that increased cost of medicaments will lead to poor Kenyans not being able to purchase essential commodities like medicaments. • The Kenya pharmaceutical manufacturers will be unable to recover input VAT incurred in business expenses in the manufacture of medicaments resulting in a higher cost of medicaments. The local manufacturers would not be in a level playing field with medicaments that are directly imported by interested parties. • In addition, the proposed concessionary rate of not more than 4% on medicaments would be the alternative to such a move. This would lead to increased Government revenue since imported medicaments will also be subject to VAT as opposed to the current proposal in which seeks to exempt the same. Further, the introduction of a concessionary rate	

			will reduce the underground economy where briefcase traders would also purchase or import medicaments at 4%. • The proposed 4% VAT on medicaments can be used to support the Governments agenda on UHC. • Globally, most countries either provide for zero rating of medicaments or provide for imposition of a lower rate. This **ensures that healthcare is more affordable. Such best practices are seen in countries such as Uganda; United Kingdom; Spain; Netherlands; Belgium; Cyprus; Hungary; Italy; Poland; Portugal; Turkey; and Switzerland.**	
	New proposal on medicaments under Clause 21 a) (iv & xxiv)	**Addition of the following HS Codes 3003.20.00; 3003.90.00; and 3004.31.00 under the Schedule of the VAT Act on zero rate status which have been omitted subjecting them to 16% VAT:** **3003.20.00** **3003.90.00** **3004.31.00** Move to Zero Rated VAT Status or, A Concessionary rate of not more than 4% on medicaments	We propose the addition of the medicaments under the HS Codes 3003.20.00; 3003.90.00; and 3004.31.00 to be included under the zero-rate status. Currently, the medicaments under these HS Codes are not exempt or zero rated therefore subjecting them to the VAT standard rate status of 16%. The impact of this is as follows: • The cost of the medicines is high since manufacturers of the items are forced to charge 16% VAT resulting into increased price of medicaments to the final consumer. Consumers are forced to purchase medicine, both locally manufactured and imported at a higher price than was the case before. • This move goes against Government agenda to prioritize public investments geared to the realization of The Big Four Agenda of which local pharmaceutical manufacturers fall under both UHC and local manufacturing. • For a developing economy like Kenya, 16% VAT on essential commodities is not the best solution. This is because VAT is a consumption tax which is borne by the final consumer. Majority of Kenyans live below the poverty line, and this implies that increased cost of	1st July 2021

			medicaments will lead to poor Kenyans not being in a position to purchase essential commodities like medicaments. • In addition, the proposed concessionary rate of not more than 4% on medicaments would be the alternative to such a move. This would lead to increased Government revenue since imported medicaments will also be subject to VAT as opposed to the current proposal in which seeks to exempt the same. • Further, the introduction of a concessionary rate will reduce the underground economy where briefcase traders would also purchase or import medicaments at 4%. • Globally, most countries either provide for zero rating of medicaments or provide for imposition of a lower rate. This ensures that healthcare is more affordable. Such best practices are seen in countries such as Uganda; United Kingdom; Spain; Netherlands; Belgium; Cyprus; Hungary; Italy; Poland; Portugal; Turkey; and Switzerland.	
	New proposal **Medicaments under VAT zero rate status**	Addition of the following items under the Zero-Rated VAT Status or, impose a Concessionary rate of not more than 4% on medicaments: 3003.10.00 3003.39.00 3004.10.00 3004.20.00 3004.32.00 3004.39.00	We propose addition of the said medicament items under the zero rate VAT status due to the following reasons: • The said move will adversely affect the local pharmaceutical manufacturing sector in the Country. This is because local manufacturers of medicaments will not be able to claim their input VAT being under the Exempt VAT and as a result, the Input VAT becomes part of the manufacturing cost. • Inability to claim VAT input is expected to lead to, an	1st July 2021

		3004.41.00 3004.42.00 3004.49.00 3004.50.00 3004.90.00	**increase operating and production costs for local manufactured medicaments and vaccines, rendering local manufacturers less competitive, on both, local market and exports, promotion of imports of medicaments leading to increasing our trade deficit, loss of revenue and jobs, increased over-reliance on imports presenting a high risk for the country especially during this coronavirus pandemic.** • The medicines under these HS Codes falling VAT exempt status, the cost of medicines increases as manufacturers are not able to claim input VAT on capital expenditure, business operations such as maintenance, rent, electricity, etc. incurred for use in the local manufacture of medicaments cannot be recovered. As such, manufacturers are forced to expense these unrecoverable VAT resulting into increased cost of production in manufacture of medicaments. • Consumers will also be affected by having to purchase medicine from local manufacturers at a higher price than was the case before. In other words, unrecoverable input VAT incurred on business operations increases the cost of productions and ultimately the price of medicaments to the final consumer. This will result into reduced sales for Kenyan pharmaceutical manufacturers, which will ultimately lead to laying off employees. • The proposed exemption will result into higher prices of locally produced medicaments, which will make local manufacturers uncompetitive against cheap imports of such medicaments. This brings unfair	

			competition in the market and eventually weaknesses the manufacturing sector. This move goes against Government agenda to prioritize public investments geared to the realization of The Big Four Agenda of which local pharmaceutical manufacturers fall under both Universal Health Care (UHC) and local manufacturing. • For a developing economy like Kenya, VAT exemption on essential commodities is not the best solution. This is because VAT is a consumption tax and exemption of essential commodities results in an increase in the cost of the final product, which is borne by the final consumer. Majority of Kenyans live below the poverty line, and this implies that increased cost of medicaments will lead to poor Kenyans not being able to purchase essential commodities like medicaments. • The Kenya pharmaceutical manufacturers will be unable to recover input VAT incurred in business expenses in the manufacture of medicaments resulting in a higher cost of medicaments. The local manufacturers would not be in a level playing field with medicaments that are directly imported by interested parties. • In addition, the proposed concessionary rate of not more than 4% on medicaments would be the alternative to such a move. This would lead to increased Government revenue since imported medicaments will also be subject to VAT as opposed to the current proposal in which seeks to exempt the same. Further, the introduction of a concessionary rate will reduce the underground economy where briefcase traders would also purchase or import medicaments at	

			4%. • The proposed 4% VAT on medicaments can be used to support the Governments agenda on UHC. • Globally, most countries either provide for zero rating of medicaments or provide for imposition of a lower rate. This ensures that healthcare is more affordable. Such best practices are seen in countries such as Uganda; United Kingdom; Spain; Netherlands; Belgium; Cyprus; Hungary; Italy; Poland; Portugal; Turkey; and Switzerland.	
10.	**New proposal** **First Schedule Section A Part I** **(ii) Plant and Machinery**	Introduce plant and machinery as a paragraph under the Second schedule of the VAT Act as zero-rated items.	Imposed 16% VAT on plant and machinery which manufacturers were previously exempted. (1) Plant and machinery are a primary critical asset that drives business production operations. The cost for such plant and machinery for manufacturers requires to be at its lowest level to ensure productivity, attract more investors into the manufacturing sector and allow existing manufacturers to continue investing in new and high-capacity equipment. (2) The impact of the said changes continues to adversely affect manufacturers as follows: (i). The introduction of the said changes under the Tax Laws Amendment Act, 2020 entered into force without transitional provisions thereby disrupting local manufacturers who had made investments on Plant and Machinery for that year to unforeseen high costs. (ii). The reduction of the percentage of income tax investment allowance by half of the previous rate of one hundred percent, is disincentivizing investments	1st July 2022

			outside the key City Counties of Nairobi, Mombasa, and Kisumu. Previously, the manufacturing sector was evidencing significant new investments in manufacturing facilities in other Counties such as Machakos, Kajiado, Kiambu, Kilifi among others in the last 5 –7 years. (iii). Kenya's local manufacturing industry remains uncompetitive in the regional and global market due to the local tax policy changes on plant and machinery. (iv). The sudden policy change on plant and machinery investments continues to have adverse effect on businesses especially, new investments and SMEs seeking to diversify production through investing in plant and machinery. In addition, with the ongoing Covid-19 crisis impacting manufacturers, the move goes against its anticipated growth initiative.	
11.	**New proposal** **First Schedule Section A Part I** **(vi) Agricultural Tractors**	Introduce agricultural tractors as a new paragraph under the Second schedule of the VAT Act as exempt items of the value added tax.	Currently Tractors are subjected to 16% VAT rate following their removal from the exempt status under the Tax Laws Amendment Act of 2020. This move has negatively affected businesses. 90% of Kenya Farmers are small holder single farms and cannot afford an additional 16% as well as the price increase attributed to devaluation of the Kenya Shilling against the hard currencies. Food Security should be encouraged by agri-mechanization in-line with the Government's agenda. By adding a VAT on the machinery, farmers will go back to Oxen and Cart and factually manual labour cannot compete with mechanization.	1st July 2022

			There has been growing change to mechanization in the agriculture sector which has resulted in reduction of harvesting losses and therefore enhanced productivity. The Mechanization of both land preparation and harvesting makes Kenya's agricultural sector more competitive. Example: Rice farmers in Mwea started using rice combine harvesters leading to major productivity improvements in speed of harvesting and reduction of harvesting losses that were being recorded during manual harvesting and threshing.	
	New proposed Clause **First Schedule to VAT Act, 2013,** **Exclude from exemption, infant food under tariff code 1901.10.00.**	**Introduce "infant food of tariff code 1901.10.00" under the First Schedule of the VAT Act.**	We propose the introduction of infant food of tariff code1901.10.00 to be exempted uder the VAT Act based on the following justification: • 2021 Finance Bill proposes to amend the First Schedule to VAT act, 2013, to exclude from exemption, milk specifically prepared for infants under tariff code 0402.99.10 while retaining the exemption in respect of the following: • 0402.21.00; Milk in powder, granules or other solid forms, of a fat content, by weight, exceeding 1.5%, not containing added sugar or other sweetening matter 0402.29.00; Other milk in powder granules or other solid forms, of a fat content, by weight, exceeding 1.5% 0402.91.00; Other milk not containing added sugar or other sweetening matter. • The proposed amendment is to have infant food, classified under tariff code 1901.10.00, to be accorded similar exemption under the VAT Act, 2013. • The Ministry of Health ('MOH'), UNICEF and the WHO	

			recommend exclusive breastfeeding of infants for the first 6 months of their life. Thereafter, as the infant is introduced to additional types of food, breastfeeding continues up to the age of 2 years (World Health Organization, 1981). However, we recognize situations where exclusive breastfeeding of infants is not possible or is severely restricted due to several factors or circumstances, such as: (i). Ill health or death of the mother, (ii). Abandonment or separation between the mother and her baby. (iii). The mother is unable to exclusively breastfeed due to her inability to produce sufficient milk. (iv). The mother returns to work and is unable to express milk in a hygienic set up and store the milk. (v). baby (partly due to lack of access to lactating rooms in most organizations and in public facilities such as markets, bus stops, etc.). (vi). When the baby is pre-term or has low birth and therefore needs special infant food to give her (vii). additional nutrients and supplement the breastmilk (if available). • In such instances, mothers have resorted to alternative solutions such as cow's milk, cereals such as porridge, fruits, and vegetables such as pawpaw, butternut, etc. as illustrated in the Kenya Demographic and Health Survey 2014 (Kenya National Bureau of Statistics, 2015). Research has demonstrated that these alternatives (animal milk, porridge, etc.), on a varying scale, are not appropriate for the babies as their digestive systems are underdeveloped, they do not	

			have some or most of the required nutrients and have adverse consequences on the growth and development of the babies. • In the absence of breastmilk, infant food has been shown to be the most suitable source of nutrition for a developing baby as the nutrients are adapted to meet the infant's nutritional needs as stipulated by governing bodies such as CODEX standards and Kenya Standards on Infant food (as prescribed by the Kenya Bureau of Standards ('KEBS')). However, the benefits of infant food are not accessible to a vast majority of those who would benefit from it mainly due to the price of the formula. • One of the biggest determinants of price and affordability is the tax structure. Currently, infant milk formula is subject to the following taxes: Import Declaration Fees (3.5%); Railway Development Levy (1.5%), Import Duty (25%), VAT (16%) and Dairy Tax (10%). These comprise approximately +56% of the customs value or 30 % of the recommended retail price, thus significantly affect their affordability, making infant food twice expensive in Kenya than most other countries. • To improve affordability and therefore increase vulnerable mothers and infants' access of these products, we request they be exempted from VAT, as other countries have done. **The Current Tax Structure and its Impact on Pricing of Infant foods** • Infant food is subject to the following taxes upon importation: (i). Import Declaration Fees (3.5%). (ii). Railway Development Levy (2%). (iii). Dairy Tax (10%).	

			(iv). Import Duty (25%); and (v). VAT (16%). (vi). Others (vii). KPA Charges (0.5%) (viii). Clearing charges (~2%) • These costs comprise approximately 57% of the customs value or 30 % of the recommended retail price, thus significantly affect their affordability. A tin of infant formula retails approximately at Kes 1250, which taxes being at ~Kes 376 per a tin of 400g **Basis of the request for tax exemption:** The request for the tax concession is anchored on the following: • Infant foods are an important source of nutrition in several situations as detailed in Appendix 1. The impact • of the taxes on these formulas has impeded their accessibility and therefore hampered the role of the • formulas in contributing to the fight against infant mortality. • Taxes on these products are a significant contributor to their pricing. • International examples exist to demonstrate that infant food is subjected to minimal taxes as a means of increasing affordability and accessibility. • The VAT concessions being sought have been granted to milk specially prepared for infants under a different tariff code (0402) and were not extended to infant food, under tariff code 1901. • Basic food commodities (e.g milk, rice, bread, cereals) consumed by adults have been exempted or zerorated for VAT, and similar treatment needs to be accorded to basic food commodities for infants such as milk	

			formula. • The concessions being sought have been granted for other products of similar importance, such as pharmaceuticals. • Enclosed is a Petition by the Federation of Women Lawyers justifying the need to reduce prices of infant food to support mothers in Kenya annexed as "**Annex 2**".	
	Clause 22 **First Schedule to the Value Added Tax Act** **The exportation of taxable services**	**Delete proposed amendments under clause 22 (a)**	The proposed amendment to remove exported services from zero rate status to exempt will negatively impact manufacturers as follows: (1) Manufacturers exporting goods will not be entitled to deduct input tax incurred to make these supplies. (2) The proposed change will increase the cost of doing business for companies exporting due to increase in costs from support services costs increasing from Kenya. (3) The proposal will deter investment into the country and can cause investor flight risk to more favorable jurisdictions. (4) The proposal contradicts the Country's Big Four Agenda and current export Policy that has zero rated exports to increase the same.	Not applicable Proposed Deletion
Excise Duty Act				
	Clause Reference	**Proposal**	**Justification**	**Proposed date**
14.	**Clause 31** **The First Schedule to the Excise Duty Act, 2015 is amended–**	**Option 1: Delete the provision imposing shs. 20 per kg on sugar confectionery under clause 31 and introduce new provisions as follows:** In Part 1 - **Imported Sugar confectionary** of tariff heading 17.04 @ KShs. 20 per Kg	We propose the deletion of provision imposing shs. 20 per kg on sugar confectionery based on the following: • This proposal will negatively affect job creation agenda and support to micro businesses who earn a living from this sector such as open-air sellers who include hawkers, tabletop sellers and kiosk sellers. This will also likely	1st July 2022

	(a) in Part I— Sugar confectionery (including white chocolate) of tariff heading 17.04; chocolate in blocks, slabs or bars of tariff Nos. 1806.31.00, 1806.32.00, 1806.90.00 Shs. 20 per kg	in Part 1 - **Imported White chocolate** in blocks, slabs or bars of tariff Nos. 1806.31.00, 1806.32.00, 1806.90.00 @ KShs. 200 per Kg or **Option 2: Exclude East African Community partner states as follows:** In Part 1 - **Imported Sugar confectionary** excluding East African Community partner states of tariff heading 17.04 @ KShs. 20 per Kg in Part 1 - **Imported White chocolate** excluding East African Community partner states in blocks, slabs or bars of tariff Nos. 1806.31.00, 1806.32.00, 1806.90.00 @ KShs. 200 per Kg	worsen the unemployment rate in the country. • The proposal will also affect the existing local industry producing the confectionery items. There are currently nine (9) main confectionery manufacturers in Kenya directly employing about 5,000 people and 16,000 indirectly. Through planned investments, the sub-sector anticipates creating additional jobs of about 6,500 by 2023. **The implications are:** 1) Majority of consumers of these products are aged between 2 to 18 years of age and this amounts to taxing them ex-ante (that is before becoming "real" income earners). 2) Introduction of this excise tax on confectionery and chocolate will go against the spirit of the Big Four Agenda and make local manufacturers uncompetitive. 3) Introduction of this excise tax will reduce demand hence negatively impacting on government revenue and job creation in the country. 4) **Other EAC countries such as Uganda have lifted the imposition of equivalent excise tax on locally manufactured confectionery and chocolates citing increase of smuggling, counterfeits and disincentive to attract sector investment.** Imposing the excise tax on domestic confectionery manufacturers will likely create a replica of Uganda's post-excise tax regime on confectioneries. 5) The strong vertical integration and the whole supply chain that exists in the entire value chain will be adversely affected by this tax e.g. packaging, transportation etc. 6) Sugar is more prevalent in other products compared to confectioneries. 7) It will increase net VAT by at least 20% or KShs. 3.2 per kilo.	

			8) Globally, confectioneries have never been in the blanket for excise tax. **Current challenges facing confectionery manufacturers:** • Liquidity constraints arising from Withholding VAT and Export Refund formula. Introduction of this excise tax will further compound the problem given that most of the sales are on credit. The credit period previously at about 50 days, has increased double fold to 100 days. • Manufacturers have not recovered from ongoing Covid pandemic which left buyers with less purchasing power and adversely impacted. • Introduction of minimum tax which has increased the tax burden on manufacturers. • The world is currently facing a serious supply constraint due to unavailability of containers which is in turn causing serious delays in supply of raw materials and exorbitant charges for the same. • The ever-rising exchange rates have made the cost of importing raw material for production more expensive hence greatly increasing the cost of production. • Thus, the introduction the new tax will worsen the situation for confectionery manufacturers in the country. **Alternative proposal to the National Treasury** • To delete the proposal levy excise duty on locally manufactured sugar confectionery of tariff HS Code: 1704 and Chocolates (HS Code: 1806) and instead levy it on imported products from countries other than EAC countries. This would be similar to the tax incentive offered to local automotive assembly sector where they have been exempted while imported automotive attract excise tax.	

	Clause 25 **The First Schedule to the Excise Duty Act, 2015 is amended—** **Products containing nicotine**	**Substitute the proposed** KSh. 5,000 per kg under clause 25 with KSh**. 757 per kg.**	We propose substitution of the proposed excise rate of Kenya shillings 5,000 per kilogram for nicotine products with Kenya shillings 757 per Kilogram based on the following justification: • The item proposed is a new category of products which with the right fiscal framework has the opportunity to grow, securing future revenues for the Government and allowing us to recoup our significant investment in manufacturing. • Tobacco-free nicotine containing oral pouches are a new product category that is only available in a limited number of countries. Being new, sales are currently very small compared to those of factory-made cigarettes	1st July 2022
	New proposal **"Part III – Interpretation of Schedule" of the Excise Duty Act, 2015** **Electronic cigarettes**	Delete the rate of KSh. 3,974.08 per unit on electronic cigarettes.	WE propose deletion of the existing rate of excise on electronic cigarettes due to the high cost of the same.	1st July 2022
	New proposal **"Part III – Interpretation of Schedule" of the Excise Duty Act, 2015** **Cartridge for use in electronic cigarette**	Substitute the current rate of KSh. 2,649.74 per unit for cartridge for use in electronic cigarettes with **KSh. 5 per milliliter of nicotine refilling cartridges.**	We propose the substitution of the current rate of excise on cartridge used of electronic cigarettes on the basis that the units are not uniform since some may contain more liquids than others.	1st July 2022

Tax Procedures Act				
	Clause Reference	**Proposal**	**Justification**	**Proposed date**
16.	**Clause 28** **Record keeping** **Section 23 of the Tax Procedures Act, 2015**	Substitute the proposed "seven years" period to "five years" from the current financial year under the proposed amendments in line with the global standards for the same.	We propose to substitute the words "seven years" with "five years" to retain the current provisions. This is based on the following reasons: (1) The proposed change will enable taxpayers to provide sufficient information or data pertaining the assessment within a reasonable required time and thereby minimize exposure to their businesses. Any issue will be resolved within workable period and not too prolonged. (2) An analysis of other jurisdictions shows that the average period of record keeping for tax purposes is between three years and five as below: • India - three years. • Malaysia has South Africa - five years. • Singapore, Australia, Canada and UK - four years. (3) There is no strong justification for increasing the timelines in Kenya. (4) A longer period, the higher the costs for businesses. It also brings inefficiencies on the part of Government. (5) The proposal contradicts the limitation of action requirements in the country that seek to ensure prompt actions from Government including on record keeping.	Not applicable Proposal to delete provisions
17.	**Clause 32** **Exemption from**	Delete the proposed amendment under clause 32 seeking to delete subsection (4A) the Tax Procedures Act.	The provisions amendments seek to delete Subsection 4A of the Tax Procedure Act which allows the Commissioner to exempt a supplier from withholding tax if the supplier was in	Not applicable

	Withholding Vat		a credit position for at least 2 years. We propose deletion of the provisions based on the following reasons: (1) The proposed change will negative affect Taxpayers who are in perpetual Vat Credit position. (2) The change will exacerbate the current refund situation in the country where businesses are experiencing continued delays of settlement of VAT refunds in the country. There are outstanding refunds for the last three to four years. The affected companies are exporters in the country and affect cashflows, outstanding payments and competitiveness.	Proposed deletion
	Clause 33 **Section 47 of the Tax Procedures Act, 2015** **Refund of overpaid tax**	Delete the provisions **"from the date of the notification"** to read as follows: (4A) Where the Commissioner notifies a taxpayer that an application for a refund has been ascertained in accordance with subsection (3) and applies the refund to the payment of an outstanding tax in accordance with subsection (4)(a) or (b), interest or penalties shall not accrue on the amount applied to the payment of the outstanding tax.	The provisions are a welcome move aimed at supporting businesses including manufacturers to receive refunds for overpaid tax. However, the inclusion of the words "from the date of the notification" negates the intended effect of ensuring refund of overpaid tax due to the following reasons: (1) The period when the interest and penalties cease applying should be on the date when the overpayment arises and not the date of notification by the Commissioner of Tax of the ascertainment of the overpayment as indicated. (2) Interest and penalties applied from the date of notification will be unfair to businesses.	1st July 2022

Kenya Breweries Limited | UDV (Kenya) Limited
Subsidiaries of the EABL Group

2nd June 2021

Michael R. Sialai EBS,
Clerk of the National Assembly
Parliament Building
E-mail : clerk@parliament.go.ke
Nairobi

Advance by Email
Original by Recorded Hand Delivery

Dear Sir,

RE: SUBMISSION OF MEMORANDUM TO FINANCE BILL 2021 (NATIONAL ASSEBMBLY BILL NO. 18 OF 2021)

INTRODUCTION

In line with the request for submission of memorandum on the Finance Bill 2021, published in the Nation Newspaper on 21st May 2021, Kenya Breweries Limited (KBL) and UDV (Kenya) Limited (UDV) would like to submit the comments below. Our proposals are geared towards supporting government's efforts to optimise tax revenue, mitigating the negative impact of covid-19, illicit brew consumption, massive income and jobless within the alcohol industry value chain. Further details are provided below.

Clause in the Finance Bill 2021	Current Provision	Proposed Amendment/Provision	Justification
Clause 25 (a) (iii) of the Bill– Amendment to Part I of the First Schedule to the Excise Duty Act, 2015	Paragraph 1 - Imported glass bottles (excluding imported glass bottles for packaging of pharmaceutical products) are subject to 25%	No amendment just a support of the proposed deletion	1. Glass Users and local glass manufacturers are working together to resolve the challenges that occasioned the introduction of 25% excise duty on imported glass bottles. The challenge include, but are not limited to, quality, capacity, entry of affordable glass from COMESA and EAC/ 2. Currently, there is lack of adequate local capacity to provide high quality affordable glass bottles efficiently and reliably. 3. The tax has exposed Kenya to East Africa Court of Justice (EACJ) litigation, due to its contravention with Article 15(2) of the Protocol on Establishment of the East African Customs

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Clause in the Finance Bill 2021	Current Provision	Proposed Amendment/Provision	Justification
			Union. EACJ issued an injunction in November 2020, staying the collection of this excise tax. 4. Lack of equity and fairness in taxation of locally manufactured and imported finished excisable goods 5. Local glass manufacturers are importing glass bottles to supplement limited local capacity, evidence that there is limited local capacity. 6. East African Community Customs Management Act (EACCMA) already has provision to address the challenge of undervaluation of imported goods, an issue that precipitated the introduction the 25% excise duty on imported glass bottles 7. The tax was encouraging the use of plastic bottle bottles, increasing the risk of environment degradation.
New Clause- Amendment to section 12D of the Income Tax Act (ITA) Cap 470	1. Paragraph 11 of the Third Schedule to the ITA reads *"the rate of tax in respect of minimum tax under section 12D shall be **one** percent of the gross turnover""* 2. Section 12D (1) states "Notwithstanding any other provision of this Act, a tax to be known as minimum tax shall be payable by a person if	1. Amend paragraph 11 of the Third Schedule to the ITA to *"the rate of tax in respect of minimum tax under section 12D shall be **zero point three** percent of the gross turnover"* 2. New paragraph 12D (1) (f) i.e. (f) a company declares losses for more than 3 years excluding the impact of high capital investments	1) At 0.3% Minimum Tax (MT), the government will be able to distribute that tax burden without negatively impacting established and compliant business 2) MT is an inequitable tax: - From an analysis of KBL &UDV's distribution model, the effective tax on our Customers is 58% under the MT regime which is significantly higher that Corporate tax rate at 30%, which unfairly impacts them. 3) MT is a tax on capital investments as opposed to gains. At the current threshold, the tax will discourage long-term investment in the country. 4) Double Taxation – Gross turnover base on which MT is charged contains other taxes such as excise taxes, which are then subjected to 1% MT, unfairly increasing the tax burden on alcoholic beverages.

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Clause in the Finance Bill 2021	Current Provision	Proposed Amendment/Provision	Justification
	(a) That person's income is not exempt under this Act; (b) That person's income is not chargeable to tax under section 5, 6A, 12C, the eighth or the Ninth Schedule; or (c) The instalment tax payable by the person under section 12 is lower than the minimum tax (d) The person is not engaged in business whose retail price is controlled by the government (e) That person is not engaged in insurance business		5) MT regime does not consider the unique differences between company Profit& loss Accounts 6) MT is a discriminatory tax since some sectors of the economy have been exempt 7) Increased illicit alcohol – adjustment of alcoholic beverage pricing to compensate for the low operating margins will lead to attrition of legitimate alcohol distribution value chains in favour of more affordable illicit alcohol. Currently, the level of illicit are high, latest estimated from WHO 2018 being 44% of alcohol consumed in Kenya.
New Clause – Amendment to Section 10 of the Excise Duty Act 2015	Section 10 (1) states: - *Despite section 8, the*	Amend Section 10 (1) of the Excise Duty Act 2015 as follows: -	1. Alcohol industry has been hardest hit by the measures meant to control the spread of Covid-19. Approximately 23,689 farmers (Kshs1.4bn)[1], 10,000 (Kshs 2.4bn) transport workers, 110,000 (Kshs 3.3Bn income per month) direct jobs at the

[1] Barley and Sorghum grain demand has been fluctuating, with overall reduction of approximate 40% (16,200 tonnes) and 58% (21,866 tonnes) respectively since March 2020, with a risk of income loss of Kshs 599,400,000 and Kshs 809,042,000 for Barley and Sorghum farmers respectively.

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Clause in the Finance Bill 2021	Current Provision	Proposed Amendment/Provision	Justification
	Commissioner may, with the approval of the Cabinet Secretary, by notice in the Gazette, adjust the specific rate of excise duty <u>once every year</u> to take into account inflation in accordance with the formula specified in Part 1 of the First Schedule	*Despite section 8, the Commissioner may, with the approval of the Cabinet Secretary, by notice in the Gazette, adjust the specific rate of excise duty <u>once every two years</u> to take into account inflation in accordance with the formula specified in Part 1 of the First Schedule* a) deleting the word "shall" immediately after the word Commissioner and replace with the word "may" b) deleting the words "once every year" appearing immediately after the words "specific rate of excise duty" No excise tax rate increases through inflation adjustment or otherwise in Financial Year 2020/21	manufacturing and retail level have been lost or affected since March 2020. 2. alcohol share of wallet has declined from 3% in 2018 to 1% during covid-19 pandemic therefore increasing taxes is unlikely to lead to increase revenue for government as demonstrated by excise collection in FY 2019/20 after a 5.2% excise increase. The decline is evidenced by the 6.4% drop in domestic excise tax collection by Kenya Revenue Authority (KRA) in FY 2019/20. 3. Domestic tax differences across the East African Community (EAC) countries continues to widen and accelerating the frequency of contraband products. Beers in Tanzania and Uganda are more than half the price of a beer in Kenya (***see Appendix 1 for details***).
Clause 28 of the Bill- Amendment to Section 23 of the Tax Procedures Act (TPA) 2015	(1) A person shall— (c) subject to subsection (3), retain the document for a period of <u>five years</u>	1. Delete both provisions to retain the five-year Statute of Limitation period OR 2. Align the period to the Law of Contract Act	1. The provision goes beyond limit provided within the law contracts (i.e. 6 years) so it will be complicated to implement, should be aligned to the law of contracts 2. Increased cost of doing business for KBL&UDV due to increased rental and maintain of physical and virtual storage space

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Clause in the Finance Bill 2021	Current Provision	Proposed Amendment/Provision	Justification
	from the end of the reporting period to which it relates or such shorter period as may be specified in a tax law (3) When, at the end of the period specified in subsection (1)(c), a document - (3)(b) is necessary for a proceeding commenced before the end of the five year period, the person shall retain the document until all proceedings have been completed		3. Risk of delays in resolving tax disputes with impact on the tax audit efficiency by KRA
Clause 39 of the Bill - Amendment to Section 99 of the TPA	Amendment of subsection (1)(b) by deleting the expression "*as required under section 59(1)(c)*"	Delete Clause 39 of the Finance Bill	1. The provision presents the risk of malice or abuse of by public officers 2. The provision does not expound on the results/circumstances under which a taxpayer may be required to appear before the Commissioner 3. The provision is ultra vires since the primary mandate by KRA is to implement tax policies and laws not prosecution offenses 4. Other forms of redress exist such as sending assessment demands if taxpayer does not comply with compounding summons

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Clause in the Finance Bill 2021	Current Provision	Proposed Amendment/Provision	Justification
Clause 2: Amendment to Section 2 of the Income Tax Act	New definition of "Control"	Delete paragraphs (f), (g) and (h) within the definition of "Control"	1. Paragraph (h) gives the Commissioner discretion to define "Control" which brings in the element of bias, subjectivity, and lack of predictability in the interpretation of the term 2. The broad definition of "control" unnecessarily exposes businesses (e.g. franchises or licensed manufacturers) deemed to have control of certain value chains while in practice they either have none or the transaction are with completely independent parties.
Clause 7: Amendment to Section 16 of the ITA- New Section 16(2)(j) that provision that prohibits the deduction of interest paid/ payable to related and third parties in excess of 30% of earnings before interest, taxes, depreciation and amortization (EBITDA).	Section 16 (2)(j) which is proposed for deletion prohibits a foreign controlled entity from claiming a deduction of interest in excess of the debt-to-equity ratio of 3:1	1. Amend the provision to exclude financial institutions licensed under the Banking Act, start-ups, Special Purpose Vehicles (SPVs) and businesses operating in capital intensive sectors from the EBITDA-based interest limitations 2. Exclude interest on existing debt from the scope of debt whose interest would be subject to the EBITDA-based interest limitation rule	The proposed change will result in: - 1. capital flight, since investors may consider diverting their investments to other countries, thereby stifling development 2. Switch to equity financing, as debt financing could prove costly negatively impacting financial institutions

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Conclusion

Any increases in excise tax on alcohol undermines alcohol manufacturers' capacity for production and distribution of alcohol beverages which supports micro, small and medium enterprises. Increased tax will humper the industry's ability to prevent massive job losses, where several people previously employed in bar, resorts and restaurants have lost their jobs. Holding any excise tax increases for the next two years will allow manufacturers to focus on building public confidence and job restoration within the alcohol value chain, considering reintegration process post Covid-19 is expected to be between 12 to 24 months.

it is imperative that the alcohol industry retain their ability to hold or lower prices of alcohol products in order to save jobs within the industry value chain, provide reprieve to traders in the alcohol sector who have been adversely affected by the closure of bars and restaurants, boost the industry's capability to fight the more affordable illicit brews and cushion alcohol sector from the heavy investment required to come back to business within the guidelines issued by Ministry of Health.

Yours faithfully,
For: Kenya Breweries Limited/ UDV (Kenya) Limited

Eric Kiniti
Group Corporate Relations Director

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APPENDIX 1: ADDITIONAL INFORMATION

Table 1:Beer Tax policy comparison between Kenya, Uganda and Tanzania (Ushs/Kshs=0.028, Tshs/Kshs=0.045)

Countries	VAT	Beer Excise tax per litre	Beer LRM Incentives and other comments
Kenya	16%	Kshs 116.09	LRM incentive based on beer made from Sorghum, Millet or Cassava
Uganda	18%	Ushs 650 (Kshs 18.03)	LRM content is at least 75%,
	18%	Ushs 950 (Kshs 26.36)	Beer produced from barley grown and malted in Uganda.
Tanzania	18%	Tshs 765 (Kshs 34.43)	LRM content at 100% Last increase was 5% in 2018/19

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AND



JOINT SUBMISSION OF MEMORANDA

NATIONAL ASSEMBLY DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

2ND JUNE 2021

INTRODUCTION

The Finance Bill, 2021 (the Bill) was published on 30 April 2021. The Bill proposes to amend the following Laws: Income Tax Act (ITA), Value Added Tax (VAT) Act, Excise Duty Act, Tax Procedures Act (TPA), the Miscellaneous Fees and Levies Act, 2016, Capital Markets Act, Insurance Act, Kenya Revenue Act, Retirement Benefits Act and Central Depositories Act.

The Capital Markets Authority (CMA) and Nairobi Securities Exchange (NSE) do submit herein below comments on the Finance Bill as requested through an invitation letter dated on 27th May 2021, on the subject, Stakeholders Engagement on the Finance Bill, 2021

CMA AND NSE SUBMISSION OF MEMORANDATO THE FINANCE BILL 2021

1. Clause 21 (33): The VAT Act is amended to exempt ***"The Transfer of assets and other transactions to transfer of assets into Real Estate Investment Trusts and Asset Backed Securities".***
   CMA made this proposal as a way of ensuring tax neutrality in raising capital to finance housing and other developmental projects.

   In addition, the proposal will open up the vast opportunity in the REIT market in Kenya, as evidenced by the low REIT Market Cap to GDP, at less than 0.1%, compared to more developed markets such as South Africa, at 6.9% as well as growth of new asset class, Asset Backed Securities (ABS), thus offering investors a diversified pool of products.

   CMA and NSE thus supports this clause.

2. Clause 45 (17): Section 35A of the Capital Markets Act is amended by deleting Section 17 and substituting with ***"The Tribunal will hear and determine within ninety days for the time of filing the appeal."***

   CMA made this proposal to mitigate against frivolous appeals against the Authority's determination. As currently worded the provisions of Section 35A (17) of the Capital Markets Act, entitle a party to obtain an automatic stay of a decision of the Authority, by mere filing of an appeal against the Authority's decision. The interim and automatic orders are not subject of review or consideration and are expected to stay in place until hearing and determination of the appeal proceedings.

   The Bill proposes to introduce a time limit of 90 days (from the date of filing of the appeal) for the hearing and determination of appeals at the Capital Markets Tribunal. The limitation is intended to bring certainty regarding the end of litigation, improving efficiency at the Tribunal and ensuring fair administrative action.

   CMA and NSE thus supports this clause.

3. Clauses 63, 64, 65, and 66: The Central Depositories Act is amended through the foregoing Sections to allow for the operation of the omnibus accounts.

CMA made the proposals as one of the measures as envisaged in the Capital Markets Masterplan which aims at enhancing Kenya's capital markets competitiveness by its inclusion in the Morgan Stanley Capital International (MSCI) emerging market. The operationalization of omnibus accounts is one of the parameters tracked by MSCI to assess the operational enhancements that effectively increases the opening of the market to international institutional investors.

Under the Central Depositories Act, 2000, the Bill proposes to allow beneficial owners or legal owners of shares to appoint nominees for the purpose of opening a securities account or an omnibus account. This is intended to allow other authorized persons to invest on behalf of others in the securities market.

CMA and NSE thus supports this clause.

FEDERATION OF KENYA PHARMACEUTICAL MANUFACTURERS
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Tel: +254 723916980
E-mail: info@fkpm.co.ke Website; www.fkpm.co.ke

Our Ref: FKPM/120/12/2020/CNA **16th December 2020**

"Advance Copy by Email"

Clerk of the National Assembly,
Parliament of Kenya, Parliament Buildings,
P.O Box 41842 – 00100,
NAIROBI.

Dear Sir,

RE: Tax Laws (Amendment) (No 2) Bill 2020 Amendment to provisions with respect to the VAT status of medicaments manufactured by pharmaceutical manufacturers in Kenya

We, the **Federation of Kenya Pharmaceutical Manufacturers (FKPM),** are the representative body of pharmaceutical manufacturers in Kenya. FKPM is grateful for the invitation to present our submissions to the house committee on 17th December 2020 in response to our letter ref FKPM/119/12/2020/CAN, with respect to the Tax Laws (Amendment) (No 2) Bill 2020.

FKPM is sending under the cover of this letter a **Memorandum** with proposals on the Bill. This is in response to the request by the Parliamentary Departmental Committee on Finance and National Planning invited submissions on the Tax Laws (Amendment) (No 2) Bill 2020

We are available to meet with the relevant Committee to present the same at a suitable date and time.

Any feedback can be sent through our physical address and through email at info@fkpm.co.ke and a copy to fkpm.ke@gmail.com or call +254723 916980.

We look forward to your acknowledgement and feedback on the meeting request.

Yours Sincerely,

Dr Rohin Vora
Chairman
Encl/

FEDERATION OF KENYA PHARMACEUTICAL MANUFACTURERS (FKPM) MEMORANDUM ON THE FINANCE BILL , 2021 (NATIONAL ASSEMBLY BILL NO. 18 OF 2021)

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
1	Clause 21 a) (iv & xxiv)	Move to Zero Rated VAT Status or, A Concessionary rate of not more than 4% on medicaments	With medicines under these HS Codes falling VAT exempt status, the cost of medicines increases as manufacturers are not able to claim input VAT on capital expenditure, business operations such as maintenance, rent, electricity, etc. incurred for use in the local manufacture of medicaments cannot be recovered. As such, manufacturers are forced to expense these unrecoverable VAT resulting into increased cost of production in manufacture of medicaments. Consumers will therefore have to purchase medicine from local manufacturers at a higher price than was the case before. In other words unrecoverable input VAT incurred on business operations increases the cost of productions and ultimately the price of medicaments to the final consumer. This will result into reduced sales for Kenyan pharmaceutical manufacturers, which will ultimately lead to laying off of employees. Adding to the fact that exemption results into higher prices of locally produced medicaments, importers of such medicaments import from cheap countries and sell directly to customers in Kenya. This brings unfair competition in the market and eventually destroy local manufacturing. Again this is against Government agenda to prioritize public investments geared to the realisation of The Big Four Agenda of which local pharmaceutical manufacturers fall under both UHC and local manufacturing.

			For a developing economy like Kenya, VAT exemption on essential commodities is not the best solution. This is because VAT is a consumption tax and exemption of essential commodities results in an increase in the cost of the final product, which is borne by the final consumer. Majority of Kenyans live below the poverty line and this implies that increased cost of medicaments will lead to poor Kenyans not being in a position to purchase essential commodities like medicaments. The impact of this amendment would be to ensure that Kenya pharmaceutical manufacturers would be able to recover input VAT incurred in business expenses in the manufacture of medicaments resulting in a lower cost of medicaments. The local manufacturers would be in a level playing field with medicaments that are directly imported by interested parties. In addition, a concessionary rate of not more than 4% on medicaments would lead to increased Government revenue since imported medicaments will also be subject to VAT as opposed to the current proposal in which seeks to exempt the same. Further, the introduction of a concessionary rate will reduce the underground economy where briefcase traders would also purchase or import medicaments at 4%. The 4% VAT on medicaments can be used for UHC funding. Most countries either provide for zero rating of medicaments or provide for imposition of a lower rate. This ensures that healthcare is more affordable. The best practices reviewed include the following countries: • Uganda; • United Kingdom; • Spain • Netherlands • Belgium • Cyprus • Hungary • Italy

			• Poland • Portugal • Turkey • Switzerland
2	Clause 21 a) (iv & xxiv)	The following HS Codes to be included as they have been omitted hence still under 16% VAT: 3003.20.00 3003.90.00 3004.31.00 Move to Zero Rated VAT Status or, A Concessionary rate of not more than 4% on medicaments	With medicines under these HS Codes falling VAT standard rate status of 16%, the cost of medicines increases as manufacturers are forced to charge 16% VAT resulting into increased price of medicaments to the final consumer. Consumers therefore have to purchase medicine, both locally manufactured and imported at a higher price than was the case before. Again this is against Government agenda to prioritize public investments geared to the realisation of The Big Four Agenda of which local pharmaceutical manufacturers fall under both UHC and local manufacturing. For a developing economy like Kenya, 16% VAT on essential commodities is not the best solution. This is because VAT is a consumption tax which is borne by the final consumer. Majority of Kenyans live below the poverty line and this implies that increased cost of medicaments will lead to poor Kenyans not being in a position to purchase essential commodities like medicaments. The impact of this amendment would be to ensure that Kenya pharmaceutical manufacturers would be able to recover input VAT incurred in business expenses in the manufacture of medicaments resulting in a lower cost of medicaments. The local manufacturers would be in a level playing field with medicaments that are directly imported by interested parties. In addition, a concessionary rate of not more than 4% on medicaments would lead to increased Government revenue since imported medicaments will also be subject to VAT as opposed to the current proposal in which seeks to exempt the same. Further, the introduction of a concessionary rate will reduce the underground economy where briefcase traders would also purchase or import medicaments at 4%. The 4% VAT on medicaments can be used for UHC funding.

			Most countries either provide for zero rating of medicaments or provide for imposition of a lower rate. This ensures that healthcare is more affordable. The best practices reviewed include the following countries: • Uganda; • United Kingdom; • Spain • Netherlands • Belgium • Cyprus • Hungary • Italy • Poland • Portugal • Turkey • Switzerland
	New Clause	Move the following to Zero Rated VAT Status or, A Concessionary rate of not more than 4% on medicaments: 3003.10.00 3003.39.00 3004.10.00 3004.20.00 3004.32.00 3004.39.00 3004.41.00 3004.42.00 3004.49.00 3004.50.00 3004.90.00	With medicines under these HS Codes falling VAT exempt status, the cost of medicines increases as manufacturers are not able to claim input VAT on capital expenditure, business operations such as maintenance, rent, electricity, etc. incurred for use in the local manufacture of medicaments cannot be recovered. As such, manufacturers are forced to expense these unrecoverable VAT resulting into increased cost of production in manufacture of medicaments. Consumers will therefore have to purchase medicine from local manufacturers at a higher price than was the case before. In other words unrecoverable input VAT incurred on business operations increases the cost of productions and ultimately the price of medicaments to the final consumer. This will result into reduced sales for Kenyan pharmaceutical manufacturers, which will ultimately lead to laying off of employees. Adding to the fact that exemption results into higher prices of locally produced medicaments, importers of such medicaments

			import from cheap countries and sell directly to customers in Kenya. This brings unfair competition in the market and eventually destroy local manufacturing. Again this is against Government agenda to prioritize public investments geared to the realisation of The Big Four Agenda of which local pharmaceutical manufacturers fall under both UHC and local manufacturing. For a developing economy like Kenya, VAT exemption on essential commodities is not the best solution. This is because VAT is a consumption tax and exemption of essential commodities results in an increase in the cost of the final product, which is borne by the final consumer. Majority of Kenyans live below the poverty line and this implies that increased cost of medicaments will lead to poor Kenyans not being in a position to purchase essential commodities like medicaments. The impact of this amendment would be to ensure that Kenya pharmaceutical manufacturers would be able to recover input VAT incurred in business expenses in the manufacture of medicaments resulting in a lower cost of medicaments. The local manufacturers would be in a level playing field with medicaments that are directly imported by interested parties. In addition, a concessionary rate of not more than 4% on medicaments would lead to increased Government revenue since imported medicaments will also be subject to VAT as opposed to the current proposal in which seeks to exempt the same. Further, the introduction of a concessionary rate will reduce the underground economy where briefcase traders would also purchase or import medicaments at 4%. The 4% VAT on medicaments can be used for UHC funding. Most countries either provide for zero rating of medicaments or provide for imposition of a lower rate. This ensures that healthcare is more affordable.

			The best practices reviewed include the following countries: • Uganda; • United Kingdom; • Spain • Netherlands • Belgium • Cyprus • Hungary • Italy • Poland • Portugal • Turkey • Switzerland

*Please also find enclosed our letter to the National Assembly Ref: FKPM/120/12/2020/CNA dated 16th December 2020 and refer to page 2 of the Memorandum item no. 3. highlighting the error whereby the recent assented Tax Laws Amendment Act 2020 introduced various amendments to Value Added Tax (VAT) Act whereby Medicaments and Vaccines have been removed from the zero rate schedule of the value added Tax (VAT) and introduced it to the Exempt schedule.

- On the 17th of December 2020 we made our submissions on the floor of the Assembly and the Chairperson of the committee mentioned they would look into the error.

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MEMORANDUM ON THE TAX LAWS (AMENDMENT) (NO. 2) BILL, 2020

SUBMITTED TO

CHAIRPERSON, FINANCE AND PLANNING COMMITTEE
NATIONAL ASSEMBLY HOUSE OF PARLIAMENT

NAIROBI, KENYA

BY

DR ROHIN VORA
CHAIRMAN
FEDERATION OF KENYA PHARMACEUTICAL MANUFACTURERS (FKPM)

FKPM MEMORANDUM ON THE TAX LAWS (AMENDMENT) (NO. 2) BILL, 2020

1. INTRODUCTION

The Federation of Kenya Pharmaceutical Manufacturers (FKPM) is the representative body which promotes, protects and regulates the interests of Pharmaceutical Manufacturers in Kenya.

2. BACKGROUND

The current Government has prioritized manufacturing and affordable healthcare as two of their big four agenda to be purposed within the five year period. This is in line with the priorities the Country has set out in its development blue print document Vision 2030, to grow manufacturing sector to 15% of GDP.

3. FKPM PROPOSAL AND RECOMMENDATIONS

We wish to bring to your attention, that the recent assented Tax Laws Amendment Act 2020 introduced various amendments to Value Added Tax (VAT) Act whereby Medicaments and Vaccines have been removed from the zero rate schedule of the value added Tax (VAT) and introduced it to the Exempt schedule. This is despite our submissions to your committee to reconsider reverting to zero rating for all medicines. We wish to remind you the following:

1. As per the report on the consideration of the Tax Laws (Amendment) Bill 2020 which was approved for tabling on 21/04/2020 (Attachment I)
   (i) On the proposals from the Kenya Healthcare Federation, the **Committee agreed with the proposal on the need to continue with zero rating of medicaments** (Attachment I - 3 see page 19).
   (ii) On the proposals from the Kenya Private Sector Alliance (KEPSA), the **Committee agreed with the proposal on the need to continue with zero rating of medicaments** (see attachment I -4; page 29-30).

2. Considering that the National Assembly had debated this issue and indicated that there would be no changes to essential commodities that are touching on bread, milk and medicaments *(Refer to National Assembly Hansard, Page 22, Paragraph 4, Morning Session, dated 22nd April 2020)*. In the Act, the National Assembly deleted the proposed provisions on bread and milk and in our view, erroneously forgot to delete provisions on medicaments and vaccines under Paragraph 39(3) under the First schedule of the VAT Act and the provisions on repeal of Part C of the VAT Act that provided for zero rating medicaments of select tariff headings).

The following are FKPM proposals on the **Tax Amendment Laws (Amendment) No.2 Bill, 2020** for your consideration:

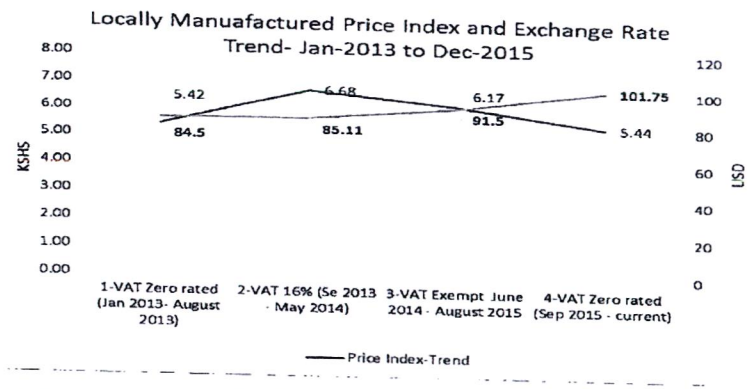
FKPM MEMORANDUM ON THE TAX LAWS (AMENDMENT) (NO. 2) BILL, 2020

1. **To rectify the error in the Tax Laws Amendment Act 2020 which moved Medicaments & Vaccines from Zero Rate Schedule to Exempt schedule, and propose locally manufactured medicaments and vaccines (HS Codes 3003 & 3004) are moved from the Exempt Schedule of the VAT Act and introduce them to the Zero Rate Schedule of the same.**
   (The Zero Rating of locally manufactured Medicines and Vaccines has been implemented in Uganda through their Finance Act 2019).

2. **In case the first proposal is not possible kindly consider introducing a standard of not more than 4% VAT rate for all medicaments and Vaccines (HS Codes 3003 & 3004).**

No.	Clause/reference in Act	Proposal	Rationale/ Justification for proposal
	Value Added Tax 2013 (No 35 of 2013) **Pages 25 – 28 (Tax Laws Amendment Act No. 2 2020)** **First Schedule, Section A, Part I Paragraph 39(3)** Insert the following new items in proper their proper numerical sequence– 3002.20.00 Vaccines for human medicine. 3002.30.00Vaccines for veterinary medicine 3003.10.00 Medicaments containing penicillin or derivatives thereof, with penicillanic acid structure, or streptomycin or their derivatives. 3003.39.00 Other medicaments, containing hormones or other products of heading No. 29.37 but not containing antibiotics, not put up in measured doses or in forms or packings for retail sale. 3003.40.00 Medicaments containing alkaloids or derivatives thereof but not containing hormones or other products of heading No. 29.37 or antibiotics, not put up in measured doses or in forms or packings for retail sale.	We propose; **Revert to the Zero Rating of Medicaments as per second schedule, Part C of the VAT Act 2013, prior to the Tax Laws Amendment Act 2020** **The following HS Codes to be Zero Rated** **3003** **3004**	**A. Impact on the two pillars of Kenya's Big Four Agenda – Local manufacturing and affordable healthcare** **Moving the Finished Products from Second Schedule (Zero Rated) to First Schedule (Exempt Supplies) through The Tax Laws (Amendment) Act No 2, 2020)** is in contradiction with the **Big Four Agenda, specifically the Pillar Country Strategy of H.E. Uhuru Kenyatta on the local manufacturing sector and the affordable healthcare.** Local Pharmaceutical Manufacturers play a critical role in contributing to the achievement of these two Pillars, namely **affordable Universal Healthcare** and **Local Manufacturing**, however the amendments have increased local manufactured medicine costs as **local Pharmaceutical manufacturers are not be able to recover any Input VAT incurred in their operations such as VAT on Repairs and Maintenance, Laboratory Expenses, Services Invoices, Electricity etc including Capital Expenditure.** • These higher costs will be transferred to consumers and thus increasing healthcare costs. **(Affecting the affordable Healthcare pillar)** • These higher costs will make local manufacturing less competitive against similar imports. **(Affecting the local manufacturing pillar)** **B. Statistical analysis on the impact of proposed VAT zero rate and exempt rate on consumer prices** From May 2014 to September 2015, the Government made medicaments exempt from VAT. It later reversed the position back to zero rate due to the price impact it had on consumers within the period.

FKPM MEMORANDUM ON THE TAX LAWS (AMENDMENT) (NO. 2) BILL, 2020

No.	Clause/reference in Bill	Proposal	Rationale/ Justification for proposal
	Value Added Tax 2013 (No 35 of 2013) **Pages 25 – 28 (Tax Laws Amendment Act No. 2 2020)** **First Schedule, Section A, Part I** **Paragraph 39(3)** 3003.90.00 Other. 3003.90.10 Infusion solutions for ingestion other than by mouth not put up in measured doses or in forms or packings for retail sale. 3003.90.90 Other medicaments (excluding goods of heading No. 30.02, 30.05 or 30.06) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale. 3004.10.00 Medicaments containing penicillin or derivatives thereof, with a penicillanic acid structure, or streptomycin o. their derivatives, put up in measured doses or in forms or packings for retail sale. 3004.20.00 Medicaments containing other antibiotics, put up in measured doses or in forms or packings for retail sale.		**See table below and enclosed a letter** by the **Federation of Kenya Pharmaceutical manufacturers** demonstrating the trend of prices to consumers during that period (2014-2015) when the medicaments VAT rate was changed to VAT exempt from zero rate. The trend showed an **increase in prices to consumers when medicaments were exempt and a decrease in consumer prices when the same was zero rated after September 2015.** Therefore the proposed exemption on medicaments will negatively impact consumers and also contradict the Governments agenda to provide affordable healthcare.  1-Prior to August 2013, the industry operated under a Zero-Rating VAT regime in which inputs (raw materials and packaging materials) & finished products were zero-rated for VAT. 2-In September 2013, VAT became applicable for all inputs at a rate of 16%, while the finished product was classified as exempt 3-In June 2014, VAT exemption was granted for inputs and the industry operated under an 'Exempt' regime. 4-In September 2015, the Zero-Rating regime was reinstated under the VAT Act 2015, whereby inputs & finished products were zero-rated for VAT.

No.	Clause/reference in Bill	Proposal	Rationale/ Justification for proposal
	Value Added Tax 2013 (No 35 of 2013) **Pages 25 – 28 (Tax Laws Amendment Act No. 2 2020)** **First Schedule, Section A, Part I Paragraph 39(3)** 3004.32.00 Medicaments containing adrenal cortical hormones, put up in measured doses or in forms or packings for retail sale. 3004.39.00 Other medicaments containing hormones or other products of heading No. 29.37 but not containing antibiotics, put up in measured doses or in forms or packings for retail sale. 3004.41.00Containing ephedrine or its salts. 3004.42.00 Containing pseudoephedrine (INN) or its salts. 3004.49.00 Other. 3004.50.00 Other medicaments containing vitamins or other products of heading No. 29.36 put up in measured doses or in forms or packings for retail sale.		**A. Pharmaceutical sectors contribution to GDP and job creation** The promotion of local manufacturing of generic drugs has been the key driver for many countries around the world and has successfully been used to reduce high healthcare costs and promote the home industry. In Kenya, high healthcare costs are linked to poor healthcare coverage. Imported medicines still covers 70% (in value terms) of the market demands (around U$S 1 billion/year), at much higher prices than local manufactured medicines of same quality. Drug costs in Kenya can make up an average of 45% of patients hospital bills, causing losses in both, the private and public health insurance sector. Insurance monthly topping are exhausted after the first 5 days of every month because of the high medicine costs, forcing even the 36% of health insured Kenyans to pay out of pocket to cover their monthly treatments. Kenya currently has 34 pharmaceutical manufacturers who employ directly 4,500 people and indirectly approximately 15,000. The combined turnover is approximately USD 150 million. The current installed capacity utilization is only 40-50%. **B. Impact of proposals on medicaments proposed for exemption** The amendments in the new Tax Amendments Act (No 2) 2020, moving the medicaments from "zero rate VAT" to "exempt VAT" for the pharmaceutical manufacturers has increase local manufactured costs, making more convenient to import goods, as the manufacturing sector is not able to claim any of their input VAT such as, **power costs, services costs, Laboratory reagents costs, Capital expenditure** etc

<table>
<tr><th>No.</th><th>Clause/reference in Bill</th><th>Proposal</th><th>Rationale/ Justification for proposal</th></tr>
<tr><td></td><td><u>Value Added Tax 2013</u>
<u>(No 35 of 2013)</u>
Pages 25 – 28 (Tax Laws Amendment Act No. 2 2020)
First Schedule, Section A, Part I
Paragraph 39(3)
3004.90.00 Other medicaments (excluding goods of heading No. 30.02, 30.05 or 30.06) consisting of mixed or unmixed products, for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale.

3004.90.90 Other medicaments (excluding goods of heading No. 30.02, 30.05 or 30.06) consisting of mixed or unmixed products, for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale.</td><td></td><td>This has lead local manufacturers to:
• Transfer the higher production costs directly to consumers, making local manufacturing disadvantageous and less competitive, on both, local market and exports.

C. Difference between "zero rate VAT" to "exempt VAT" and its implications

The difference between "Zero rate VAT" and "Exempt VAT" status is that where industries and / or commodities fall under "Zero rate VAT" status, Input VAT is claimable. However, where industries and / or commodities fall under "Exempt VAT" status, the manufacturers are not able to claim their Input VAT and as such the Input VAT becomes part of the manufacturing cost as illustrated in the tables below:

Table 1: The impact of zero rate and exempt is completely different as shown in the table below:
<table>
<tr><th></th><th>Zero Rate Tax status</th><th>Exempt Status</th></tr>
<tr><td>Output VAT Charged</td><td>0%</td><td>0%</td></tr>
<tr><td>Input VAT Charged</td><td>14%</td><td>14%</td></tr>
<tr><td>Amount of input VAT that can be claimed back

Eg. If kshs 100/- was paid as tax</td><td>Full amount (100%)

Kshs 100/- can be claimed back</td><td>Nil (0%)

Kshs 0/- can be claimed back</td></tr>
<tr><td>Refund position of input VAT paid</td><td>Full refund of input VAT paid (100% refund position)</td><td>No refund of input VAT paid (0% refund)</td></tr>
</table>
</td></tr>
</table>

The effects of the Tax Amendment Laws Amendment Act No 2 2020 are certainly in contradiction to the President's strategy.

We should be supporting local manufacturing of medicines, and not the contrary.

Moving the Finished Products from Second Schedule (Zero Rated) to First Schedule (Exempt Supplies) to No. 35 of 2013 (Page 188 of The Tax Laws (Amendment) Bill, 2020) means that local Pharmaceutical manufacturers are not be able to recover any Input VAT incurred in their operations such as VAT on Repairs and Maintenance, Laboratory Expenses, Services Invoices, Electricity etc including Capital Expenditure and are forced to pass on these costs to the to the final consumer.

The amendments that were passed into were against the spirit of H. E. The President's Big 4 Agenda of the government. The amendments that were passed at a critical time like this where the whole world is grappling with a global health crisis due to the CoVID-19 pandemic which has further resulted into a global economic crisis were in bad faith The erroneous passing of the bill into and Act happened but now is our chance to rectify it. The taxes need to be collected for the budget but such fixes aid in financing the budget only in short term and are detrimental in the medium to long term which pushes investors away with a number of Kenyan businesses relocating to other regional countries. We need to think long term and not short-term fixes.

One very important and crucial lesson that this CoVID-19 pandemic taught us and is teaching us is to be self-sufficient as essential commodities which include PPEs and medicines became scarce and the global powerhouses such as India and the likes closed their borders thereby making it difficult to import these essential commodities.

Attachment I-1

Approved for tabling.

JNA

21/4/2020

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT (FOURTH SESSION)

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

REPORT ON THE CONSIDERATION OF THE TAX LAWS (AMENDMENT) BILL, 2020

CLERKS CHAMBERS
DIRECTORATE OF COMMITTEE SERVICES
PARLIAMENT BUILDINGS
NAIROBI

APRIL, 2020

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deduct tax from the emoluments of an employee for a period of three months from the date of the enactment of this Act".

c. Amend paragraph 16. Part I of the First Schedule by inserting the following paragraph immediately after paragraph 16. "*16A Income from residential rental income for a period of three months from the date of enactment of this Act*".

d. Amend paragraph 25. Part I of the First Schedule by inserting the following new paragraph, "*25A The emoluments of an employee in the public service or private sector for a period of three months from the date of the enactment of this Act*".

3.9.2 Value Added Tax Act

Amend section 5 by inserting the following new sub-section immediately after sub-section (1), "*1A) The tax payable under subsection (1) shall not be chargeable for a period of three months from the date of the enactment of this Act*"

3.9.3 Miscellaneous Fees and Levies Act

Amend Part I of the Second Schedule by inserting the following new sub-paragraphs immediately after sub-paragraph (xx), "*(xxa) goods destined for combating the COVID-19 pandemic*" and "*(xxb) raw materials for the manufacture of goods used to combat the COVID-19 pandemic*"

Committee's Comments: The Committee noted that the proposals by Hon. Member were not sustainable and would lead to starvation of government from the much needed revenue to support the ongoing corona virus epidemic

3.10 KENYA HEALTHCARE FEDERATION

34 In their letter dated 6th April, 2020, the Federation was opposed to the proposed amendment to section 13 of the Value Added Tax and stated that medicaments including vaccines for human medicine, veterinary medicine, medicaments containing penicillin, antibiotics, hormones, infusion solutions among others should continue being zero rated. They also proposed that medical devices should be zero-rated. This is because these products are essential in Universal Health Coverage and overall healthcare delivery

Committee's Comments: The Committee agreed with the proposal on the need to continue zero rating of medicaments. However, on the additional proposal to zero rate medical devices, the Committee noted that this can be looked in future discussions to examine the impact.

3.11 MR. INNOCENT MOTURI NYANDIKA

35 In his letter dated 6th April, 2020, Mr. Nyandika proposed that section 15(3)(b) of the Income Tax Act be amended by deleting the words 'first four' appearing before the words 'financial institutions' and replacing with the words 'all'. This will ensure that members and staff of all financial institutions under the Fourth Schedule who get mortgages from those institutions also enjoy the mortgage relief

Committee's Comments: The Committee noted that employees of the financial institutions under the Fourth Schedule enjoy lower than market rate interest rate on mortgages hence this is sufficient relief to them.

Committee's Comment:

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3.22 KENYA PRIVATE SECTOR ALLIANCE (KEPSA)

In their memorandum the Alliance proposed the following amendments to the Bill:-

3.22.1 The Value Added Tax

92. Amend clause 31(1) to provide that the rate of value added tax should not include excise duty fees and other charges from taxable value of certain goods because this does not relieve the taxpayer instead it increases the tax by 15%.

93 Were opposed to the amendment to paragraph 39(3) part I section A of the First Schedule This is because the deletion promotes affordable healthcare to the public and realisation of Universal Healthcare Coverage They further proposed that medical devices should be zero-rated because they are essential healthcare products in the provision of health.

94 Amend paragraph 97 of the First Schedule by deleting the word 'marine' This amendment will extend the application to all fisheries - whether inland or sea, fresh water or salt water, in compliance with the Blue Economy policies.

95 Amend part A of the Second Schedule by retaining agricultural pest control products and raw material for manufacture of agricultural pest control products because introduction of VAT to the products will increase their price and may have a negative impact on food security

96 Objected the deletion of paragraph 26 of the First Schedule this is to make fertilisers and agrochemicals affordable to farmers.

97 Amend clause 97 of the First Schedule by deleting the word 'marine'. This is to support and promote growth in the aquaculture industry and allow for cheaper products to the consumer.

98. Remove duty on vegetable seed: pepper, corriander and water melon seed in order to make them affordable to farmers.

99 Wrong classification of pepper, peas, corriander and water melon seeds as spices consequently making them attract duty.

Committee's Comment: The Committee rejected the proposal to amend section 31 (1) of the VAT Act as the amendment in the Bill seeks to limit the period within which an application for refund in case of bad debts to 4 years. This is so as to harmonize the provisions relating to refund of tax arising from bad debts for both VAT and Excise Duty

The Committee agreed to support the continuation of zero rating of medicaments, fertiliser to remain as an exempt items and agricultural pest control products to remain as zero-rated item.

252 Opposed the deletion of paragraphs 26, 27, 47 and 56 of Part I of the First Schedule because the proposed amendments will increase the cost of inputs for farmers especially small holder tea farmers whose already eroded tea earnings will be reduced by the cost of fertilizers.

253 Opposed the deletion of paragraph 2, Part II of the First Schedule because the proposed amendment will have an adverse impact to the insurance sector as the brokerage agency services will become more expensive hence reduce the uptake of insurance.

254 Amend section 2 of the Act by expanding the definition of the word exports to include sales made out of the country, export processing zone or special economic zones through an agent or a consolidator. Additionally, a consolidator should be defined as *'an agent who sells on behalf of various parties under an agency agreement'*.

3.50 FEDERATION OF KENYA PHARMACEUTICAL MANUFACTURERS (FKPM)

In their letter Ref: fkpm/091/04/2020/CNA dated 6th April, 2020 FPKM proposed the following amendments to the Bill -

3.50.1 Value Added Tax Act

255 Opposed the deletion of paragraph 36(3), Part I Section A of the First Schedule because the proposed amendment will lead to higher costs that will be transferred to consumers and increase the cost of healthcare.

256 Opposed the amendment proposed to Part C of the Second Schedule because the proposed amendment is against the Big Four Agenda.

3.50.2 Income Tax Act

257. Opposed the amendment proposed to sections 4, 5 and 15 of the Second Schedule in order to attract investors and encourage existing manufacturers to invest more and expand current operations hence creating more employment.

258 Proposed the insertion of the following new paragraph (e)(vii) immediately after paragraph (vi), '(vii) heating, ventilation and air conditioning equipment'. These equipment are a requirement of WHO for pharmaceutical manufacturers to ensure that the medicines are manufactured in a clean environment to maintain the quality and stability of the medicines.

3.51 INSTITUTE OF PUBLIC FINANCE (IPF KENYA)

In their memorandum dated 6th April, 2020 they recommended that -

259 Fertilizers should remain in the list of exempted items in order to promote food production hence boost food security.

260 The time for the refund on tax on bad debts should be retained at five years for the case where a business is declared insolvent to avert any losses for the supplier.

261 Plants and machinery in Part I, Section A of the First Schedule should be retained in the list of exempt items in order to cushion manufacturers of medicines and vaccines especially during this time so that they can be able to manufacture medications and vaccines.

262 The section on the publication of private rulings should be retained in the Act in order to facility efficiency in doing business. Its deletion will negate the principles of transparency and accountability.

263 The section providing a timeline for receiving a private ruling should be retained in order to facilitate efficiency in business operations.

Attachment II

Markets Authority, Institute of Certified Public Accountants of Kenya, Kenya Association of Air Operators and the Agricultural Society of Kenya.

As the Departmental Committee on Finance and National Planning, while considering the impact of these proposals on Kenyans, we agreed with the National Treasury. It is because there is need to raise more revenue to fund the various measures that are being taken by the Government, which is in line with what the President said. However, if you look at the Bill, some of the proposals were touching on essential commodities.

Hon. Deputy Speaker: Your five minutes are over, but I am adding you a few more.

Hon. Joseph Limo (Kipkelion East, JP): I can confirm some issues so that Members can really understand. They do not need to dwell on them for long. We have taken some action to ensure we safeguard both the revenue being raised and the welfare of Kenyans. We have saved Kenyans on essential commodities that are touching on bread, milk and medicaments. There is no increment which will happen on those items because it will cause more problems to Kenyans.

The only sector which is still growing despite COVID-19 is general agriculture. Therefore, we have saved fertilisers, all agricultural implements and pesticides from being taxed. They would have gone higher if we had agreed to these proposals. In order to save tourism and the transport sector, we have also saved several proposals from being implemented.

We have, as Parliament, been accused in one way or the other that we are not responding to profit loss and, therefore, saving Kenyans. We are aware that several businesses have closed. These include banks, hotels, the transport sector like *matatus,* which have been parked because of restrictions on movement. The airlines have grounded their aircraft and all that. We know that some Kenyans have taken loans. Therefore, we are proposing several amendments to the Banking Act to protect enforcement of securities which people put in place when taking loans. That is so that banks do not sell properties during the COVID-19 period.

We are also suspending listing on Credit Reference Bureau (CRB) so that members who are not able to repay loans during this period are not affected. We will be proposing measures to safeguard employees against being sacked. Therefore, we are proposing that employers do not sack employees at this time. Even if they are not able to pay, they should enter into agreements to have employees go on unpaid leave. I urge this House to really support these amendments, which we will be moving in the afternoon.

Finally, because of time, I thank my Committee, the Speaker, the Clerk and the Leader of the Majority Party for their support during this time. My thanks also go to the Cabinet Secretary for the National Treasury and his team for their support during the processing of this Bill.

I assure this House that we are aware of the fears you have. We have taken those fears into account to safeguard the interests of the Government in raising revenue and also the interests of Kenyans.

With those remarks, I second the Bill.

Hon. Deputy Speaker: Very well. Well done.

(Question proposed)

Rightfully and for two reasons, the first shot goes to the Leader of the Minority Party. He is a good financial expert and, at the same time, the Leader of the Minority Party. So, he has a right.

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Attachment III

CONTRIBUTION OF THE LOCAL PHARMACEUTICAL MANUFACTURING SECTOR IN KENYA

Example of Contribution of Local Manufacturer vs Importer

A Local Manufacturer with an average turnover of KES 1.5b would employ over 350 employees. For a similar turnover, an Importer/Distributer would employ roughly 50 employees. This is a clear indication that the revenue contribution to the government from Local manufacturers is much higher than from Importers of Medicines.

Taxes collected through local manufacturers:

1) Corporate Tax
2) More PAYE – As local manufacturers employ more people for their operations, the government collects equally more income tax.
3) More Employment leads to more indirect revenue collection by the government as more people have the spending power which leads to higher tax collection from retailers and more VAT collection by the government for taxable commodities. This further leads to less budget allocation by the government on social welfare thereby enabling the government to channel these funds towards development projects that will lead to increased revenue collection in future.
4) Locals Pharmaceutical Manufacturers export their medicines thereby increasing the government's foreign reserve. On the other hand, the foreign revenue reserve is depleted by imports of finished products.
5) Supporting a Stable Local manufacturing sector contributes attracts investors leading to growth in economy and makes a country self-sufficient and also become an export hub. On the other hand, if a country becomes an import hub, there is a limited scope for future growth as it leads to migration of skilled citizens due to limited opportunities which also has a negative effect on essential services.
6) Countries that have been hardest hit at the moment due to the CoVID-19 pandemic are countries which do not have a strong local manufacturing sector and those that are financial and travel hubs. Countries such as Germany, India, China, USA amongst others have taken economical hits but are able to remain afloat as they developed and strengthened their manufacturing sectors though long term sustained development policies and as a result also give sufficient stimulus packages to their corporates and unemployed citizens due to the right choices they made in the past over the years.

FUND MANAGERS
Association

Fund Managers Association
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Email: admin@fma.co.ke
PIN P051354887Q

Private & Confidential

Clerk of the National Assembly
Parliament Buildings
Parliament Road
PO Box 41842 – 00100
Nairobi

31st May 2021

Dear Sir,

FUND MANAGERS ASSOCIATION MEMORANDUM: RETIREMENT BENEFIT ACT AMENDMENT OF SECTION 23 OF NO. 3 1999

We refer to the above subject and thank you for the opportunity for the Fund Managers Association (FMA) to make submissions on the proposed Retirement Benefit Act for consideration by the National Assembly.

The Fund Managers Association was formed in 2008 with the objectives of promoting integrity and professionalism in the market, educating members' employees, clients, intermediaries and other stakeholders as well as effectively lobbying regulators.

Our Members Are:

- African Alliance Asset Management
- Absa Asset Management
- Apollo Asset Management
- Britam Asset Managers
- NCBA Investment Bank
- CIC Asset Management
- Co-op Trust Investment Services
- Dry Associates Investment Bank
- Fusion Investment Management
- GenAfrica Asset Management
- Genghis Capital
- Madison Investment Managers
- Old Mutual Investment Group
- Sanlam Investments East Africa
- ICEA Lion Asset Management

The members of the Association whose combined Pension Assets Under Management is currently at about Kshs 1.3 Trillion, appreciate the government efforts to streamline this industry and has taken note of the proposals.

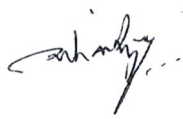
Our Submission:
Under the proposed Retirement Benefit Act amendment of section 23 of No 3 1999, we recommend to define post-retirement medical funds to include pooled funds. As currently drafted, it only allows individual funds to have a post retirement fund.

Hence the full definition should read: "post-retirement medical fund " means a fund established within a scheme, **or a pooled fund which aggregates a number of schemes into which** contributions are made and from which the costs of medical benefits can be met as may be determined in accordance with the medical fund rules".

This will benefit the industry as pooled funds have economies of scale leading to better investment returns, lower costs and can attract suitably skilled staff and help alleviate old age poverty by meeting medical costs to members.

We would be delighted to provide any clarifications that you may require regarding our submission

Yours sincerely



Einstein Kihanda
Chairman – Stakeholders Committee, Fund Managers Association

31 May 2021

The Clerk, Kenya National Assembly

Parliament Buildings

P.O. Box 41842-00100

Nairobi Kenya

Email: clerk@parliament.go.ke

Dear Sir,

RE: CIVIL SOCIETY SUBMISSIONS ON NATIONAL GOVERNMENT FINANCE BILL FOR FY 2021/22

This submission is made by members of *Okoa Uchumi* Coalition, an initiative of civil society organizations interested in Kenyan public finance management issues. More specifically, *Okoa Uchumi* is interested in tax matters as proposed by the Finance Bill 2021, published on 5 May 2021, which sets out the National Treasury's revenue raising measures for the financial year 2021/2022.

The East African Tax and Governance Network (EATGN), National Taxpayers Association (NTA), The Institute for Social Accountability (TISA) and Tax Justice Network Africa (TJNA) worked to analyse the bill and are therefore giving their proposals in this joint memorandum to the National Assembly's Departmental Committee on Finance and National Planning, herein attached to this correspondence.

The Finance Bill 2021 has been analysed in the context of the fiscal consolidation program and its linkage to public debt. Our analysis has also focused on the need for fair taxation, thereby making the following considerations, namely:

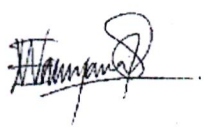
1. The impact of proposed tax amendments should be clearly set out to ensure that gains made by increasing tax revenues are not reversed by reduction in economic activity.
2. Taxes should be equitable so that an increasingly unjustified burden should not be placed on the poor.
3. Tax exemptions should not be arbitrary and discretionary as this increases the scope for tax abuse and reduced government revenue.

Thank you for your consideration,

Yours sincerely,

Leonard Wanyama, Coordinator, EATGN,

on behalf of *Okoa Uchumi* Coalition



Date: 31 May 2021

REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY- FIFTH SESSION
FINANCE BILL, 2021 (NATIONAL ASSEMBLY BILL NO. 18 OF 2021)

FINANCE BILL, 2021 (NATIONAL ASSEMBLY BILL NO. 18 OF 2021)

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
1.	**Clause 7** Section 16 of the Income Tax Act is amended in subsection (2) by— (a) deleting paragraph (j) and substituting therefore the following new paragraph-- (j) gross interest paid or payable to related persons and third parties in excess of thirty per cent of earnings before interest, taxes, depreciation and amortization of the borrower in any financial year: Provided that - (i) any income which is exempt from tax shall be excluded from the calculation of earnings before	Include new provision. This paragraph shall not apply to micro small and medium size enterprise.	The Finance Bill proposes to expand the thin capitalization rules to henceforth apply to all businesses using debt financing. Prior to this, thin capitalization rules were limited to foreign controlled entities. Under the proposed rule, where a business obtains debt financing, the amount of interest expense that it can deduct is limited. The new proposal seeks to limit the amount of interest expense allowed as a deduction to 30% of the Earnings Before Interest, Taxes, Depreciation and Amortization (EBITD). Further, any payment that is economically equivalent to interest and expenses

	interest, taxes, depreciation and amortization; and (ii) this paragraph shall apply to— (A) interest on all loans; (B) payments that are economically equivalent to interest; and (C) expenses incurred in connection with raising the finance.		incurred in connection with raising the finance will be subject to the restricted deduction. The proposal is in line with international reforms in taxation which are aimed at reducing the avenues for tax evasion through structuring of financing arrangements. This proposal will impact all business that rely on debt financing, by restricting how much interest expense they can deduct and consequently, increase the cost of financing businesses using debt. Though informed by the need to curb tax leakages through employment of complex tax structures, this proposal is untimely, considering that many businesses are debt laden following difficult environment in 2020. It is also likely that businesses that were adversely affected will need to acquire additional financing for their operations and limiting how much interest can be deducted is punitive. The proposal is likely to particularly to have an adverse impact on small and micro enterprises. Micro small and medium enterprises constitute 80% of the business in Kenya[1] with small and micro

[1] Kaberia, S. K., & Muathe, S. M. (2020). Effect of Covid-19 Pandemic on Performance of Women Owned Micro, Small and Medium Enterprises in Kenya. International Journal of Social Science Studies, 9(1), 7. doi:10.11114/ijsss.v9i1.5089.

			enterprises in Kenya contributing up to 40% of the GDP.[2] These entities play a major role in creating employment with the sector estimated to employ about 14 million people.[3] Most of these enterprises are owned by women with the International Finance Corporation estimating at one in three are owned by women globally. As it stands, micro and small enterprises face challenges in obtaining credit from the formal sector. Thus, they are often forced to get credit at much higher interest rates. The Covid 19 pandemic exacerbated the situation since most of the businesses were adversely impacted and had reduced or no revenues in some cases. Accordingly, since most financial institutions base interest rates on past performance, most are unlikely to qualify for financing or when they do qualify, the loans are offered at much higher interest rates. Thus, by limiting the amount of interest that they can deduct, this provision is likely to have an adverse impact on their already repressed revenues. The same is likely

[2] Wakiaga, P. (n.d.). The Focus on SMEs is a welcome Intervention [Web log post]. Retrieved May 28, 2021, from https://kam.co.ke/the-focus-on-smes-is-a-welcome-intervention/

[3] Kaberia, S. K., & Muathe, S. M. (2020). Effect of Covid-19 Pandemic on Performance of Women Owned Micro, Small and Medium Enterprises in Kenya. International Journal of Social Science Studies, 9(1), 7. doi:10.11114/ijsss.v9i1.5089

			to be felt by the youth who also find themselves in the same position.
2.	**Clause 21 (b)** *21. The First Schedule to the Value Added Tax Act, 2013 is amended—* *(b) in Part II, by adding the following new paragraphs immediately after paragraph 31- 32. The exportation of taxable services.*	Delete proposal on removal of exported services from zero rated supplies to exempt supplies by deleting Clause 21(b) from the Finance Bill 2021.	The Finance Bill proposes to change the VAT status of exported services from zero rated to exempt. This is likely intended to deter accumulation of VAT refunds which remain unpaid to exporters. This proposal will impact exporters of taxable services who previously could claim back all input tax incurred on their purchases. Should this proposal be adopted, exporters of taxable services will be required to absorb the cost of input VAT which will increase their cost of doing business. This proposal is a departure from international best practices as guided by the OECD, where exports are zero-rated.
3.	**Clause 22 (b)** *22.The Second Schedule to the Value Added Tax Act, 2013 is amended— (b) by deleting paragraph 13A.*	Delete proposal on the removal of ordinary bread from zero rated to exempt by deleting Clause 22(b) from the Finance Bill 2021.	The Finance Bill proposes to change the status of ordinary bread from zero rated to exempt. This will increase the retail cost of ordinary bread as manufacturers shift the tax to final consumers. Where goods are exempted rather than zero-rated, it means that input VAT incurred cannot be deducted. Thus, where the manufacturers have incurred input

			VAT on things like electricity and obtaining other supplies, these costs will be absorbed by the manufacturer who will likely pass it on to the consumer. Whereas in the case of zero-rating, the input VAT would be deductible and thus, the government would refund the manufacturer the cost of input VAT incurred along the chain. Bread is widely consumed by many households in Kenya as it is an affordable option for breakfast for many households and lunch option for many informal sector workers who cannot afford to buy hotel food. Removal of ordinary bread for zero rated supply to exempt, and consequent increase in its price will impact many households including the poor and informal sector workers. The move is inequitable as it is likely to impact the poor more as they will spend a larger portion of their income on purchasing bread as compared to those with greater income. This is likely to have an even greater impact of women and youth who comprise a greater percentage of the poor in Kenya. 48 percent of the youth in Kenya are deemed to be poor with female led households comprising a greater percentage of

REPUBLIC OF KENYA
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OFFICE OF THE
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P. O. Box 30582
NAIROBI

Our Ref. No. MOE/CONF/2/5/1

Date: 2ND JUNE, 2021

Ms. Leah, warigia
Please deal
3/6/21

Mr. Michael R. Sialai, EBS
Clerk of the National Assembly
Parliament Buildings
P.O. Box 41842 – 00100
NAIROBI

D/DC 3/6/21

Dear Michael,

RE: FINANCE BILL, 2021 – KENGEN'S PROPOSALS FOR CONSIDERATION

Reference is made to the attached copy of #letter Ref. CF/MOE/TAX/SM/nk/06 dated 28th May, 2021 from the Managing Director, Kenya Electricity Generating Company (KenGen) on the above captioned subject.

The purpose of this letter, therefore, is to forward KenGen's proposals for various items of the Finance Bill to facilitate the consideration of the same in the Legislation of the requested proposal.

Yours Sincerely

Dr. Eng. Joseph K. Njoroge, **CBS**
PRINCIPAL SECRETARY

NATIONAL ASSEMBLY
RECEIVED
02 JUN 2021
CLERK'S OFFICE
P. O. Box 41842, NAIROBI

COPY TO:

Hon. Charles Keter, EGH
Cabinet Secretary
Ministry of Energy
Nyayo House
Nairobi

Dr. Julius Muia, CBS
Principal Secretary
National Treasury
Treasury Building
NAIROBI

MINISTRY OF ENERGY
RECEIVED
31 MAY 2021
PRINCIPAL SECRETARY

MANAGING DIRECTOR'S OFFICE

KenGen
Kenya Electricity
Generating Company PLC

Our Ref: CF/MOE/TAX/SM/nk/06

Date: 28th May 2020

Dr. (Eng.) Joseph Njoroge, CBS
Principal Secretary
Ministry of Energy
Nyayo House, 23rd Floor
P.O Box 30582
NAIROBI

Dear Dr. Eng. Njoroge,

FINANCE BILL, 2021-KENGEN'S PROPOSALS FOR CONSIDERATION

We refer to the National Assembly Notice (copy attached) dated 21st May 2021 inviting the public to give their proposals to the Finance Bill, 2021 (copy attached).

The Finance Bill 2021 has tax proposals which if passed into law, will have adverse tax impact on KenGen. Further, some of our tax submissions on laws that adversely affect KenGen were not considered in the Bill. The following is a summary of the enclosed tax submissions to the Clerk of the National Assembly:

1. **Definition of infrastructure bond:** We have noted that the definition did not include issuance of infrastructure bonds by government agencies to finance their projects. Further, the listing of strategic public infrastructure facility excludes energy projects which are also strategic and financed through infrastructure bond. Therefore, this proposal will result in implementing government agencies being constrained with expensive financing and thus, delay implementation of projects.

2. **Compensating Tax:** Section 7A levies compensating Tax on dividends that are distributed from un-taxed income but does not exclude dividends paid by a company owned by the Government. This creates cashflow strain impairing delivery of projects.

3. **Transitional provision on VAT exemptions:** There is an error in the proposal to exempt taxable goods supplied to a person who had a contract with the Government prior to 25th April 2020 as the wording seems to have missed the point on implementation of energy projects. This proposal requires the approval of the Cabinet Secretary for Energy.

4. **VAT Exemption:** No VAT exemption for taxable supplies for implementation of power generating projects.

5. **Public interest projects:** The Bill proposes to exempt any such goods that are in the public interest whose value is not less than Kes 5 Billion from RDL and IDF. The minimum cost of our projects especially the geothermal exploration and drilling projects contribute to reduction in cost of power is less not than KShs 300 Million. The threshold proposed is too high for KenGen projects to be eligible for this exemption.

We would like to request for the Ministry of Energy intervention in appealing to The National Assembly to consider our tax proposals to the Finance Bill 2021.

We would like to register our appreciation for all the support that Ministry of Energy has continually accorded KenGen

Yours Sincerely

REBECCA MIANO (MRS.), MBS
MANAGING DIRECTOR & CEO

KenGen

KENYA ELECTRICITY GENERATING COMPANY LIMITED PLC

TAX SUBMISSIONS ON THE FINANCE BILL, 2021

TO THE CLERK OF THE NATIONAL ASSEMBLY

KENGEN TAX SUBMISSIONS ON THE FINANCE BILL, 2021

The Finance Bill 2021 was published on 5th May 2021 and tabled in Parliament on 11th May 2021.

From our review of the bill, we note that some of the proposals in the bill will adversely affect KenGen if they are passed into law. In this regard, we would like to seek the committee's indulgence in taking into consideration KenGen's proposals as summarized below:

	Provision in the Current Tax Law	Issue of concern	Proposed amendment	Justification
A.	**INCOME TAX CAP 470**			
1.	No definition of the Infrastructure bond	The Bill proposes to define the infrastructure bond issued by government. We have noted that the definition did not include issuance of infrastructure bonds by government agencies to finance their projects. The listing of strategic public infrastructure facility excludes energy projects which are also strategic and financed through infrastructure bond. This proposal will lead to taxation of interest on infrastructure bonds floated for implementation by government agencies. This will lead to the implementing agencies being constrained with expensive financing and thus, delay implementation of projects.	Amend the proposed definition of infrastructure bond to read as follows: *"infrastructure bond" means a bond issued by the Government* ***or State-Owned Agency*** *for the financing of a strategic public infrastructure facility including a road, hospital, port, sporting facility, water and sewerage system, a communication network* ***or an energy project;"***	Implementation of energy projects is capital intensive. This requires sourcing of financing from the public or development partners in form of loans, equity, infrastructure bonds. The proposed amendment to include energy sector projects in the listing of strategic public infrastructure will result into: i. The energy sector will be able to undertake more projects as the public will fund the project without fear of being taxed on interest earned on the infrastructure bond. ii. The sector will be able to deliver affordable electricity to the economy without passing of the increased borrowing costs (factoring the tax element) to the consumer through increased tariffs.

	Provision in the Current Tax Law	Issue of concern	Proposed amendment	Justification
2.	Section 7A levies compensating Tax on dividends that are distributed from un-taxed income but does not exclude dividends by a company with the Government as the majority shareholder.	The exemption of power producing companies from the provisions of compensating tax was dropped by the Tax Laws (Amendment) Act, 2020. The government being majority shareholder in state owned agencies, payment of compensating tax is double payment as dividends go to government who is also the Exchequer collecting the taxes. This in effect negates the tax incentives provided for the capital-intensive energy sector and leads, to cashflow strain to the sector players.	Amending the proviso to Section 7A of the Income Tax Act by including: *"This section shall not apply to.... Dividends paid by company with the Government of Kenya shareholding of at least 45%."*	The power sector is highly regulated, and the tariff charged for electricity to consumers is highly subsidized. Further, most players are in a tax loss position due to tax incentives and the provision on compensating tax will claw back these incentives. The proposed amendment to exclude power producers from the provision of Compensating Tax on the following grounds: iii. There will be no loss of revenue to the Government since the dividends will be paid into the consolidated fund as the government has shareholding in the power sector. iv. The players cash flow will not be constrained and will meet fixed costs such loan repayments whose default might lead to recall of loans from the sector. v. The power sector will be able to undertake more projects and utilize tax incentives without fear of the same being clawed back in form of compensating Tax. vi. The sector will be able to deliver affordable electricity to the economy without passing of the tax to the consumer through increased tariffs. vii. It will attract more investors in this sector through Public Private Partnerships (PPP).

	Provision in the Current Tax Law	Issue of concern	Proposed amendment	Justification
B.	**VALUE ADDED TAX ACT 2013**			
3.	No transitional provisions on VAT exemption for existing agreements with the Government before 25th April 2020.	The proposed transitional provision to exempt taxable goods supplied to a person who had a contract with the Government prior to 25th April 2020 seems to have missed the point on implementation of energy projects as the proposed VAT exemption requires the approval of the Cabinet Secretary for matters relating to energy.	To amend the wordings of the exemption to read as follows; 114. *taxable goods supplied* ***by*** *persons that had an agreement or contract with the Government* ***of Kenya or any Government Agency implementing energy projects*** *prior to 25th April 2020 and the agreement or contract provided for exemption from value added tax;* *Provided that this exemption shall apply to the unexpired period of the contract or agreement and upon recommendation by the Cabinet Secretary responsible for matters relating to energy.*	The amendment will capture the contracts that are entered into with Government and its agencies that had been drastically affected by the removal of the exemption from Value Added Tax Act. This will release their cashflows to undertake expansion of projects. Further it captures the spirit of the exemption of energy projects that are undertaken by Government agencies and not necessarily the Government itself.
4.	Taxable supplies imported or purchased for construction of power plants are currently subject to VAT	The Tax Laws (Amendment) Act 2020 dropped the exemption of taxable supplies imported or purchased for the construction of a power generating plant.	Amend the First Schedule to the Value Added Tax Act, 2013 in Part I by inserting the following paragraph in proper numerical order; *Taxable supplies, excluding motor vehicles, imported, or purchased for direct and exclusive use in the construction of a power generating by a company, to supply electricity to the national grid approved by Cabinet Secretary for National Treasury*	The introduction of VAT on taxable supplies imported or purchased for the construction of a power generating plant will increase the cost of power in the following ways: i. The cost of constructing a power plant is huge and hence power producers finance the projects through debt facilities. The removal of the exemption mid-way of the projects leads to cash-flow constraints that were not budgeted for.

	Provision in the Current Tax Law	Issue of concern	Proposed amendment	Justification
			upon recommendation by the Cabinet Secretary responsible for energy.	ii. The introduction of VAT will increase the cost of the supplies for the construction of the power plants. iii. The power generators will pass on the increased cost of power to the off-taker and eventually the ultimate user will bear the cost increasing the electricity tariff. This is in direct conflict with the Government efforts to reduce the cost of power to spur manufacturing.
C	**MISCELLANEOUS FEES & LEVIES ACT**			
5.	Goods imported for public interest projects are not exempt from Railway Development levy and Import Declaration Fee.	The Finance Bill 2021 proposes to exempt any such goods that are in the public interest whose value will not be less than KES 5 Billion from RDL and IDF	Amend the Second Schedule to the Miscellaneous & Levies Act, 2016; (i) In Part A, paragraph (xxvi); and (ii) In Part B, paragraph (x) by substituting the KES 5 Billion value to KES 300 Million to read as: *"such other goods the exemption of which the Cabinet Secretary may determine is in the public interest, or to promote investment and the value of which shall not be less than three hundred million shillings"*	Public interest projects are mostly not commercial in nature since the objective is the provision of public goods. Therefore, it behooves if the cost of these investments be kept to the minimum while providing maximum value to the public. The reduction of the threshold for the exemption of the goods intended for public interest projects will reduce the cost of such projects and broadening the scope of the projects that qualify.

Appendix I(a): Memoranda on changes in the Finance Bill 2021

Item	Clause	Issue with the clause	Proposed amendment	Justification
1.	Request to exempt fees and commissions earned on loans from Excise Duty **Section 25(c) of the Finance Bill:** **Proposed taxation of fee and commission earned in respect of a loan**	The Finance Bill proposes to amend the definition of 'other fees' as provided for in the Excise Duty Act (EDA) under part III of the interpretation schedule by deleting the words '*fees or commissions earned in respect of a loan.*' As it currently stands, other fees are defined to include any fees, charges or commissions charged by financial institutions relating to their licensed activities but does not include interest on loan or return on loan or fees or commissions earned in respect of a loan. Effectively this means that fees and commission earned on loans are not within the purview of excise duty.	We propose deletion of the proposed change to part III of the interpretation schedule to the Excise duty Act	The definition of "other fees" as contained in the EDA was amended in 2019 to exclude fees or commissions earned in respect of a loan from the ambit of fees subject to excise duty. The amendment was meant to provide clarity on the type of fees that are subject to excise duty following several disputes between the KRA and taxpayers. The effect of the amendment was to explicitly exclude fees such as loan processing and commitment fees were not subject to excise duty. The proposed deletion of the words *"fees or commissions earned in respect of a loan"* will bring back ambiguity given that the EDA does not define interest, which has forced the courts and Tax Appeals Tribunal to adopt the definition in the Income Tax Act (ITA). In the ITA, interest is defined to include all charges levied on a loan which would include the charges that the Finance Bill seeks to delete. The imposition of excise duty on fees and commissions earned on loans will lead to an increase in the cost of borrowing, which is

Item	Clause	Issue with the clause	Proposed amendment	Justification
				likely to affect access to credit.
2.	Request to exclude banks and financial institutions licensed under the Banking Act from the provisions of the proposed Section 16 (2) (j) which restricts the amount of interest that taxpayers can deduct when computing their tax liability. **Section 7(a) of the Finance Bill:** **Proposed change to interest deduction**	The Finance Bill proposes to amend the Income Tax Act by deleting the current provision which restricts the deductibility of interest payments to the highest amount of all loans held by the company and which exceed the greater of three times the sum of the revenue reserves and the issued and paid up capital of all classes of shares of the company. The current provision recognizes the unique nature of the banking business and has specifically excluded the banks from the interest restriction. The proposed change limits interest deduction to 30% of earnings before interest, taxes, depreciation and amortization (EBITDA). However, there is no exclusion for banks even though the interest expense makes up approximately 60% of the total bank expenses.	We propose an amendment to the proposed change to Section 16(2)(j) of the income Tax Act (ITA) and include a sub-paragraph (iii) as follows: *(iii) this section shall not apply to banks or financial institutions licensed under the Banking Act.*	Banks perform an intermediation role through use of customer deposits to give loans on which they earn interest. The banks pay interest on the customer deposits, with the expense comprising over 60% of the bank expenses. The proposed restriction will severely impact the operations of banks, diluting the banking sector's role in economic growth. It also appears that the inclusion of banks in the provision is an oversight given the provision in the immediate section 7(b) which deals with deemed interest and proposes the following change to Section 16(2)(ja): *An amount of deemed interest where the person is controlled by a non-resident person alone or together with not more than four other persons and* ***where the company is not a bank, or a financial institution licensed under the Banking Act.*** We request that Section 16(2)(j) be amended to exclude banks similar to the provision under the current provision and also under Section 16(2)(ja).
3.	Request to retain the time for record keeping under the Tax Procedures Act 2015. **Section 28(a) of the Finance Bill:**	The Finance Bill proposes to increase the period that taxpayers are required to maintain documents from the current five years to seven years. This also increases the period that the KRA can audit back years from five to seven years. The increase in the number of years that are open for audit substantially increases uncertainty for businesses.	We propose that the provision in the Finance Bill 2021 to amend Section 23 of the Tax Procedures Act be deleted.	Increasing period for record keeping from 5 years to 7 years has an implication of cost to the taxpayers during these difficulty times. This proposal will reduce uncertainty for taxpayers and encourage the KRA to better utilize the investments that it has made in technology and data analytics.

Item	Clause	Issue with the clause	Proposed amendment	Justification
	Proposed change of time for record keeping	This change is inconsistent with the investments that the KRA has made in technology which allow it to spot inconsistencies in taxpayer filings immediately they occur.		In the Finance Act, 2020 the Government introduced a Voluntary Tax Disclosure Programme (VTDP) encouraging taxpayers to self-declare all tax arrears going back five years from 1 July 2020. Under the program, persons who make a self-disclosure and pay the principal tax liability receive a waiver of the penalties and interest. The five years period was chosen to coincide with the statute of limitation under the current legislation. Extension of the statute of limitations creates a situation where some years could fall outside the VTDP program, exposing taxpayers to penalties and interest.
4.	Request to clarify the scope of the applicability of income tax on businesses conducted over electronic networks **Section 3(a) of the Finance Bill:** **Proposed taxation on business conducted through electronic networks**	The proposed change to Section 3 (2) (ca)of ITA provides for the taxation of income accruing from a business carried out over the internet or on electronic network including through a digital marketplace. The provision seeks to widen tax bracket to include other online business that would not constitute a digital marketplace. However, it has not provided for a clarification as to which businesses would be exempt from the charging of tax on the income provided through electronic networks and through the digital marketplace. This contradicts with the Income Tax (Digital Service Tax) Regulations 2020 which clearly sets out which businesses are exempt from the application of Digital Service Tax (DST).	We propose an introduction of a new subsection 3 (2) (cb) under the ITA as follows: '*The following services shall not be deemed to be digital services or services provided through an electronic marketplace for purposes of Section 3 (2) (cb)* *(a) online services which facilitate payments, lending or trading of financial instruments, commodities or foreign exchange carried out by:* *(i) a financial institution specified under the Fourth Schedule to the Act; or* *(ii) a financial service provider authorized or approved by the Central Bank of Kenya; and*	It is important for the ITA to specifically set out the exemption of the financial institutions from DST as set out in the Income Tax (Digital Service Tax) Regulations 2020 in order to avoid any misunderstanding as to the taxability of the services provided by the banks.

<table>
<tr><th>Item</th><th>Clause</th><th>Issue with the clause</th><th>Proposed amendment</th><th>Justification</th></tr>
<tr><td></td><td></td><td></td><td>(b) online services provided by Government institutions.'</td><td></td></tr>
<tr><td>5.</td><td>Request to rescind the change proposing to delete taxable services from the list of zero-rated supplies.

Section 20(b) of the Finance Bill:

Proposed change of VAT status for export of service from zero rated to exempt</td><td>The Finance Bill, 2021 proposes to transfer the export of taxable services from the zero-rated to tax exempt category. Following this change, exporters of services will continue not to charge VAT to their customers. But will now not be entitled to claim the input VAT they incur to provide their services. Further, the exporters will be exposed to reverse VAT on services they procure from other countries to make their supplies.

Many international organisations which have made Nairobi the regional centre for their Africa operations operate under a cost-plus model where they invoice for their services based on the full cost of their operations plus a mark-up determined in accordance with the Kenya transfer pricing provisions.

Under the current VAT provisions, these organisations are allowed a deduction of input VAT incurred to make the supplies. Under the proposed changes, they will be forced to absorb the input VAT into their cost base. Further for the services they procure from outside Kenya they will be forced to account for reverse VAT which they are not allowed a deduction since their services are exempt.

Below is an example of the implications of the change, using an example of a regional business that imports services from outside Kenya to deliver an engagement that covers multiple jurisdictions. Assume a cost base of KES 1,000,000 and mark-up of 10%.

<table><tr><th></th><th>Current regime</th><th>Proposed regime</th></tr></table></td><td>Propose to delete the following proposals in the Finance Bill 2021:

a) Under Section 21(b), delete the proposed introduction of a paragraph 32 – The exportation of taxable services. This section introduces export of services under the exempt supplies category

b) Delete Section 22(a), this section removes the exportation of taxable supplies from the zero-rated supplies category

The above changes will retain the export of services as a zero-rated supply.</td><td>Kenya has struggled over many years on the application of the zero-rating to exported services. This lack of clarity has led to numerous disputes between taxpayers and the KRA with the issue still to be conclusively resolved.

The Finance Bill 2021 proposal to transfer export of services from the zero-rated not only fails to provide the much-needed clarity but also negatively impacts Kenya's aim of being the undisputed regional hub for services.

Our proposal to retain the export of services under the zero-rated category is important if Kenya is to be able to compete with other African Countries for Services Exports and retain its position as a regional hub for the following reasons:

a) It ensures that the Kenyan VAT legislation is consistent with international norms on taxation of internationally traded services. One of the important tenets of VAT is the principle of neutrality. This provides that businesses should not bear the cost of VAT. To ensure that this happens, the export of services is zero-rated to allow businesses to claim the input VAT they incur to make the supplies. The effect of the above is that the ultimate consumer bears the full cost of VAT and that it is only applied once at the end of a supply chain.</td></tr>
</table>

Item	Clause	Issue with the clause	Proposed amendment	Justification

Cost base	1,000,000	1,000,000
Reverse VAT	-	160,000
Cost base	1,100,000	1,160,000
Deduct claimable VAT	-	-
Cost base	1,000,000	1,160,000
10% Mark-up	100,000	116,000
Revenue	**1,100,000**	**1,276,000**
Less costs	(1,000,000)	(1,160,000)
Taxable profit	100,000	116,000
30%	30,000	34,800

Summary of incremental cost:

Cost item	KES
Non-deductible input VAT	160,000
Impact on non-deductible VAT on mark-up	16,000
Incremental corporation tax	4,800
Total	**180,800**
As a percentage of original cost	18.1%

The proposed change will lead to an 18% increase in the cost of doing business in Kenya.

b) The proposed change will increase the cost of doing business for services businesses based in Nairobi to service international clients by over 18%. These organizations include regional service centres, business process outsourcing organisations (BPOs), consultants, translators etc. This is likely to drive such businesses out of the country which contradicts the stated government policy of seeking to establish Nairobi as a regional service centre.

c) The proposed changes conflicts with international best practice both globally and regionally. It will make Kenya the only country in the region that exempts from VAT, rather than zero-rates export of services. Tanzania, Uganda, Rwanda and even South Africa which are competing with Kenya to be regional service centres zero-rate the export of taxable services.

d) Kenya exports both goods and services. Under the VAT Act, the export of goods will remain zero-rated with the exporters eligible for refund of their input VAT, in addition to a waiver of the requirement to account for reverse VAT. The Finance Bill proposal to transfer services to the exempt category is discriminatory especially taking into account the fact that Kenya does not have substantial exports of goods and seeking to grow its export muscle through the growth of the services industry.

Should the proposals be confirmed into law, the consequences are likely to be:

Item	Clause	Issue with the clause	Proposed amendment	Justification
		The above example would also apply to services that the organisations procure locally for their regional business.		a) A reduction in the budget for the regional service organizations to reduce the impact of VAT; or b) Increased contracting from outside the country; or c) Shifting of operations out of Kenya; or d) Transfer of operations to Special Economic Zones. The net impact of the above movements will be a reduction in employment opportunities and tax contributions in form of PAYE and corporation tax. In the long term, Kenya's position has a regional hub will be severely damaged.

Appendix I(b): Memoranda on new proposals for inclusion in the Finance Bill 2021

Item	Clause	Issue with the current provision	Proposed amendment	Justification
1.	Proposal to amend the definition of Management and Professional fees and Royalty under Section 2 of the Income Tax Act to exclude interchange and scheme fees. **Section 2 of the Income Tax Act: Definition of Management and professional fees**	Credit and debit cards are an important component of commerce due to the security associated with carrying a card rather than cash and the ease of transacting digitally including accessing government services through portals such as e-Citizen. To issue cards, banks make investments in terms of automated teller machines and point of sale (PoS) systems. They also subscribe to memberships in the card company networks that facilitate global card transaction. The three prominent card companies are VISA, MasterCard and American Express (AmEx). When a person makes a purchase at a merchant, a small deduction is made from the purchase price and shared among the bank that issued the card, that which issued the PoS and the card companies. The deduction helps to ensure that the three parties continue to invest to make the network secure. The sharing of the deduction among the banks is an interchange fee while the payment to the card company is a scheme fee. A recent court ruling deemed these payments to be management/professional fees and royalty payment respectively. This interpretation exposes the deduction to tax which will increase the cost of transacting using cards. We propose a change to the definition of professional/management fees and royalties to exclude interchange fees and scheme fees respectively.	We request an amendment Section 2 of the Income Tax Act on the definition of management or professional fees and royalties to include the words in italics: **"management or professional fee"** means any payment made to any person, other than a payment made to an employee by his employer, as consideration for any managerial, technical, agency, contractual, professional or consultancy services however calculated. ***This shall not include interchange and card transaction fees arising from card transactions, money transfer, payments and or any dealing with money by whatever means.*** **Royalty** Include the following proviso at the end of the definition of royalty. ***"provided that royalty shall not include scheme and subscriptions fees paid to card clearing companies."***	While cards are one of many payment channels, increased taxation of this payment channel has made it very expensive especially because banks have been forced to shoulder the tax burden. This has negatively impacted the investments by banks to increase the use of the cards as a payment channel. Increasingly banks are moving to other online channels some of which are still not compatible with global electronic commerce. Removal of the cards from the exposure to both withholding tax and VAT will align the treatment of card transactions to other payment channels and retain the commercial rationale for continued investment in card infrastructure.

Item	Clause	Issue with the current provision	Proposed amendment	Justification
2.	Request to rescind the provision on charging VAT on insurance agency, brokerage and securities brokerage reinsurance businesses **First Schedule to Value Added Tax Act, 2013** **VAT on Insurance Agency, brokerage and securities reinsurance**	The Tax Law Amendment Act, 2020 provided for the charging of VAT at the rate of 16% on insurance agency, brokerage and reinsurance business.	We request that the Finance Bill 2021 be amended by making the following proposed change by adding to Part I of the First Schedule to VAT Act: *'insurance agency, brokerage and reinsurance business'*	Insurance cover is becoming a necessity in this country as such charging of VAT on the insurance business will have an impact increasing cost on insurance during these tough times. Further, it is important to note that insurance penetration in Kenya is below 3% and any additional tax load on premiums would stifle the growth of this sector and push the insurance firms deeper into loses due to the low uptake from the populace.
3.	Request to amend the period within which the Commissioner is required to render an objection decision **Section 51(11) of the Tax Procedures Act, 2015**	Section 51(11) of the TPA provides that the Commissioner may make an objection decision within sixty days from the date of receipt of the notice of objection or any further information the Commissioner may require from the taxpayer. Linking the objection decision to the receipt of information that the Commissioner may require provides a loophole that can be used to extend the period indefinitely. For instance, if the commissioner requests for information on the fifty-ninth day, the period resets and the 60-day count starts again. This process can go on indefinitely delaying the resolution of disputes.	We propose the Finance Bill 2021 be amended by adding a new Section 51(11) to the TPA as follows: *The Commissioner shall make the objection decision within sixty days from the date of receipt of the notice of objection failure to which the objection shall be deemed to be allowed.* *Provided that prior to the expiry of the sixty days, the Commissioner may by writing to the taxpayer extend the period by an additional thirty days where there are ongoing discussions between the taxpayer and the Commissioner to resolve the tax dispute.*	Taxpayers are entitled to service that is expeditious, efficient, lawful, reasonable and procedurally fair. The proposed amendment will protect the taxpayers from extended tax audits while making provision for genuine instances where there are ongoing discussions between the taxpayer and the KRA. Further, before issuing an assessment the Commissioner has an unlimited time to go through the taxpayer documents which when added to the sixty days for review of the objection makes the additional time unnecessary.

Item	Clause	Issue with the current provision	Proposed amendment	Justification
4.	Request to reduce the Withholding Tax (WHT) rate on dividends paid to non-residents. **Paragraph 3(d) of the Third Schedule to the Income Tax Act, Cap 470**	The Finance Act 2020 increased the WHT rate on dividends paid to non-residents from 10% to 15%. The increase was a counter action to the reduction of the local Corporate Income Tax (CIT) rate from 30% to 25% to help local businesses during the Covid-19 pandemic. Even though, the CIT has been reinstated to 30% with effect from 1 January 2021, the WHT rate has remained at the higher rate of 15%.	We propose amendment of Paragraph 3(d) of the Third Schedule to the ITA by substituting *"fifteen" with the word "ten."*	Kenya competes with other countries in the region for foreign Direct Investments and it is in the interest of the country that businesses set up locally to provide employment and markets for local businesses. The change of the withholding tax adopted earlier in the year has made it less attractive for businesses to set up locally. This situation is aggravated by the coming into force of the Africa Continental Free Trade Area which will make it easier for companies to set up in countries with favourable income tax regime but have access to markets across Africa. In order to order to attract companies that will seek to diversify from the traditional manufacturing hubs of Asia, a review of the WHT rate is important in order to attract such businesses to set up in Kenya.

Item	Clause	Issue with the current provision	Proposed amendment	Justification
5	Request to rescind provision on charging VAT on transfer of businesses **First Schedule to Value Added Tax Act, 2013** **VAT on transfer of business as a going concern**	The Tax Law Amendment Act, 2020 provided for the charging VAT at the rate of 16% on the transfer of business as a going concern. This has significantly increased the cost of restructuring businesses.	We propose that transfer of business as a going concern be listed under Part I of the First Schedule to VAT Act as an exempt supply.	This will help businesses which will likely suffer the consequences of COVID-19 and require to restructure their businesses in the post-COVID period.

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Ref: KTA/PAR/001/2021

Date: 31st May, 2021

The Clerk,
House Committee of Finance,
Parliament Building,
NAIROBI

Dear Madam,

RE: FINANCE BILL 2021: PROPOSAL TO REMOVE "EXPORTATION OF GOODS OR TAXABLE SERVICES FROM ZERO RATED SCHEDULE AND INCLUDE THEM IN THE EXEMPT SCHEDULE".

We wish to draw your attention to the above proposal in the 2021 Finance Bill that is to come into effect on 1st July 2021.

If the above proposed amendment comes into effect it will have very serious and adverse impact on the costs of transportation and subsequently cost of Kenyan Manufactured goods exported/transported to the EAC region by Kenyan road and railway transporters.

By listing exportation of goods or taxable services in the exempt schedule the impact is that input VAT claim will be restricted to a proportion of vatable sales over total sales less exempt sales.

Currently, exportation of goods or taxable services are listed under the zero-rated schedule and as a result input VAT is claimed in full. The result of restricting input VAT claim is that the unclaimed VAT amount is added to the cost of the export service.

The EAC countries apart from Kenya have all zero-rated exportation of goods or taxable services. This is in line with the standard treatment in the world.

IMPACT OF THIS AMMENDMENT TO THE INDUSTRY & KENYA ECONOMY.

1. Kenyan Transporters involved in exports transportation to the EAC countries are better off moving to Uganda or Tanzania and still load the same consignments, but pay taxes in those countries as this will enable them compete and operate in an affordable manner compared to transporters in those EAC countries.

2. Cost of exportation of goods and services will immediately increase as the unclaimed input VAT becomes part of the Cost.

3. Transporters from Uganda, Tanzania and the EAC region in general will be advantaged over Kenyan transporters as they can claim the full input VAT. It will be cheaper for importers in those countries to engage non-Kenyan transporters to come to Kenya and collect their goods.

4. While the Kenya government is seeking to reduce VAT refunds, this amendment will have the effect of reducing taxes received by the government and unemployment will increase. The opposite will happen to our neighboring countries; an increase in employment and increased collection of taxes from transporters that were initially operating from Kenya and consequently, improving their economies.

The above amendment goes against existing world treatment of exportation of goods or taxable services.

WE REQUEST PARLIAMENT AND TREASURY TO REVERSE THE PROPOSAL IMMEDIATELY AND SAFEGUARD KENYA TRANSPORTERS AND OUR ECONOMY.

Yours sincerely,
For: Kenya Transporters Association Limited



Newton Wang'oo
CHAIRMAN

C.c - Hon. Abdulswamad Shariff Nassir
Area Member of Parliament.

NATIONAL ASSEMBLY
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2 June 2021

MICHAEL R. SIALAI, CBS
Clerk of the National Assembly,
Main Parliament Buildings
P.O. Box 41842 – 00100
Nairobi.

D/DC 3/6/21

Mr. Leah Wanjiru
Please Read

Dear Sir,

RE: <u>PROPOSED EXCISE DUTY ON TOBACCO-FREE NICOTINE CONTAINING ORAL POUCHES IN THE FINANCE BILL 2021 WOULD MAKE OUR MANUFACTURING INVESTMENT COMMERCIALLY UNVIABLE</u>

We write in response to calls for submission of memoranda on the Finance Bill (National Assembly Bill No.18 of 2021) published on 21st May 2021.

We welcome the Government's decision not to increase excise duty rates on cigarettes for the Financial Year 2021/22 as reflected in the Finance Bill 2021. This decision, accompanied by intensified efforts targeted at combating the trade in tax-evaded illicit cigarettes to seal tax revenue leakages, will ensure the sustainability of Government revenues from the tobacco industry and level the playing field for legitimate industry players to operate.

However, we note with concern that the Finance Bill 2021 recommends an excise rate of KSh. 5,000 per kg for tobacco-free nicotine containing oral pouches (against our proposed rate of KSh. 757 per kg). If not reviewed urgently, the proposal will result in our factory not being commercially viable and we shall be left with no choice but to relocate the factory to an alternative location within the BAT Group.

Based on current experience, over-taxation of novel products such as electronic cigarettes resulted in the foreclosure of the category, discouraged investment by legitimate industry players and led to the sale of tax evaded products in the category, thus denying Government revenue.

Therefore, we wish to reiterate our proposals which are intended to safeguard our investments in the manufacturing industry and broaden the revenue base for Government in a sustainable and predictable manner as follows:

1. **Tobacco-free nicotine containing pouches: Excise at KSh. 757 per kg.**
2. **Electronic Cigarettes: Zero excise duty on devices and KSh. 5 per millilitre of nicotine containing refills**
3. **Excise stamp proposal: KSh. 0.5 per stamp for tobacco free containing nicotine pouches and Cartridge for use in Electronic Cigarettes.**
4. **Cigarettes: No increase in excise duty rates and effect the inflation adjustment once every two years, with no inflation adjustment in FY 2021/2022.**

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Parliament Departmental Committees

OUR PROPOSALS IN DETAIL

1. Tobacco-free nicotine containing pouches: Excise at KSh. 757 per kg.

Informed by evolving consumer demand, we rolled out an investment of KSh. 2.5 billion in a new state of the art factory to manufacture tobacco-free nicotine-containing oral pouches – the first of it's kind in Africa – for both the domestic and export markets. The investment is intended to deliver:

- KSh. 75 billion (est.) in export revenue from Africa and beyond over the next five years;
- KSh. 1.5 billion in import duty from raw materials used in manufacturing;
- Support for over 50,000 Kenyan businesses within our extended value chain; and
- Over 80 additional direct jobs for Kenyans.

Some of the key considerations in the BAT Group's decision to invest in Kenya included:

- The Government's commitment to manufacturing as part of the Big Four Agenda making it an attractve destination for foreign direct investment;
- A conducive regulatory and fiscal framework that supports the establishment of the category and our ability to recoup our investment;
- Access to The East African Community (EAC) and Common Market For East and South Africa (COMESA) trade blocs allowing for the expansion of our already significant export foortprint in the region;
- Our 100+ year heritage and commitment to Kenya as a strategic manufacturing hub.

Tobacco-free nicotine-containing oral pouches is relatively new in the Kenya market. The proposed excise rate of KSh. 5,000 per kg is excessively high and will:

- Result in the foreclosure of our manufacturing investment;
- Make the category commercially unviable and stifle the growth of the category;
- Lead to growth of tax-evaded products on the black market such as is the case with the electronic cigarettes.

A comparative analysis of other jurisdicitions where tobacco-free nicotine-containing oral pouches are sold provides some instructive policy insights for a sustainable fiscal framework for Kenya:

Market	Excise Structure	Excise vs Cigarettes
United Kingdom		0%
Canada		0%
Austria		0%
Pakistan		0%
Ukraine		0%
Sweden	Specific, by pouch weight	9%

Indonesia	Ad valorem on banderol	11%
Norway	Specific, by pouch weight	28%

Our Proposal for Consideration in the Finance Bill 2021

Review the proposed excise duty rate and definition for tobacco-free nicotine containing pouches:

- **Amend "PART III –INTERPRETATION OF SCHEDULE" of the Excise Duty Act, 2015, by inserting the following proposed definition and excise duty rate:**

Current Description	*Proposed Description*	*Current Rate of Excise Duty (Finance Bill 2021)*	*Proposed Rate of Excise Duty (Finance Bill 2021)*
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	Products containing nicotine or nicotine substitutes intended for 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	KSh. 5,000 per kg	KSh. 757 per kg

Justification

Tobacco-free nicotine containing oral pouches are a new product category that is only available in a limited number of countries. Being new, sales are currently very small compared to those of factory-made cigarettes.

The right fiscal framework will support growth of the category, securing future revenues for the Government and allowing us to recoup our significant investment in manufacturing.

2. Electronic Cigarettes - Zero excise duty on devices and KSh 5 per millilitre of nicotine containing refills

There is an opportunity for the Government to generate new revenue streams by developing an appropriate fiscal framework for electronic cigarettes.

The current excise rates for electronic cigarettes introduced in 2015 and which has continually been adjusted for inflation, stands at KSh. **3,974.08 for Electronic Cigarettes** and KSh. **2,649.74 for cartridges**. The over-taxation of electronic cigarettes is beyond the commercially reasonable pricing point for these

products and have to-date prevented the commercialization of the category in Kenya by legitimate industry players and led to the sale of tax evaded products.

Cartridge units are not uniform as they usually contain varying amounts of liquid. The practice in most jurisdictions is to apply an excise rate per millilitre but only on nicotine containing liquids. Furthermore, most jurisdictions do not impose any excise duty on vaping devices. We recommend that Kenya adopts this approach to drive sustainable growth of the category and generate revenue.

Our Proposal for Consideration in the Finance Bill 2021

Review the current excise duty rates and definition for electronic cigarettes:

- **Amend "PART III –INTERPRETATION OF SCHEDULE" of the Excise Duty Act, 2015, by inserting the following <u>proposed definitions and excise duty rates</u> in proper alphabetical sequence:**

Current Description	*Proposed Description*	*Current Rate of Excise Duty (Finance Bill 2021)*	*Proposed Rate of Excise Duty (Finance Bill 2021)*
Electronic cigarettes	Electronic cigarettes	KSh. 3,974.08 per unit	Zero Excise Duty on Device
Cartridge for use in electronic cigarettes	Cartridge for use in electronic cigarettes Cartridge unites are not uniform as some may contain more liquids than others.	KSh. 2,649.74 per unit	KSh. 5 per millilitre of nicotine refilling cartridges

Justification

This will allow the government to rein in the current illicit trade in electronic cigarettes, facilitate investments by legitimate industry players and broaden the revenue base for Government.

3. **Excise stamp proposal – KSh. 0.5 per stamp for tobacco free containing nicotine pouches and Cartridge for use in Electronic Cigarettes.**
   - **Amend the Schedule in the Excisable Goods Management System (EGMS) Regulations, 2017, by inserting the following fees for stamps per below:**

SCHEDULE
Excise Stamps Fees

Category of excisable goods	*Current Fees (KSh.)*	*Proposed Fees (KSh.)*
Cartridge for use in electronic cigarettes		0.5 per stamp

Products containing nicotine or nicotine substitutes intended for 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		0.5 per stamp

Justification

This will enable the category to be established in the market since sales are still very small.

4. **Cigarettes – No increase in excise duty rates and effect the inflation adjustment once every two years - with no inflation adjustment in FY 2021/2022.**

   - **No increase in excise duty rates for Financial Year 2020/21, maintaining the current rates in the Finance Act 2020.**

Description	Rates of Excise
Cigarette with filters (Hinge lid and soft cap)	KSh. 3,312.96 per mille
Cigarettes without filters (plain cigarettes)	KSh. 2,384.24 per mille

   - **Effect the Inflation adjustment once every two years - with no inflation adjustment in FY 2021/22**

Conclusion

We believe that the implementation of the above measures will help **address current challenges facing businesses and stimulate their recovery; protect lives and livelihoods and generate more opportunities for Kenyans** while **fostering a secure and conducive business environment to promote investment growth, business recovery and jobs creation.**

We are available to discuss the above further at your earliest convenience.

Yours faithfully,

For British American Tobacco Kenya plc.

CRISPIN ACHOLA
MANAGING DIRECTOR

TATU
CITY

Our Ref: TCL/NA/02062021

2nd June, 2021

The Clerk of the National Assembly
Republic of Kenya
P.O. Box 41842-00100
Main Parliament Building
Parliament Road,
Nairobi.

Dear Sir,

RE: SUBMISSION OF WRITTEN MEMORANDA ON THE FINANCE BILL 2021 (NATIONAL ASSEMBLY BILL NO.18 OF 2021)

This has reference to your newspaper advertisement on public participation and submission of memoranda on the Finance Bill 2021 (hereafter referred to as "The Bill") pursuant to which Tatu City Special Economic Zone (SEZ) hereby submits this Memorandum.

About Tatu City Special Economic Zone (Tatu City SEZ)

Tatu City SEZ is a 5,000-acre new city development that is Kenya's first operational SEZ, a flagship Vision 2030 private sector development and a Special Planning Area. Tatu City SEZ is in the category of projects of Strategic National Importance pursuant to The Physical and Land Use Planning (Classification of Strategic and Inter-county Projects) Regulations, 2019. Currently at Tatu City, more than 60 companies – including some of the largest Kenyan and international industrial groups – are operational or under development; two schools are open and educating about 3,000 students daily, and more than 3,000 homes and apartments are occupied or under construction. Tatu City has a population of over four thousand people, a number that includes residents, employees and general workers at construction sites. Investments at Tatu City range between US$ 20 million to US$ 50 million.

PROPOSED AMENDMENTS TO THE FINANCE BILL, 2021

1. **Amendment of the First Schedule of the Income Tax Act**

THAT, the First Schedule to the Income Tax Act be amended by inserting the following paragraphs:

Part I

"Dividends received by special economic zone enterprises, developers and operators licensed under the Special Economic Zones Act."

"Dividends paid by Special Economic Zone Enterprise, developers or operators to any non-resident person."

2. **Amendment of the Second Schedule to the Income Tax Act**

THAT, the Second Schedule of the Income Tax Act in be amended by inserting the following paragraphs:

"A. Capital expenditure on buildings and machinery for use in a Special Economic Zone

Subject to this Schedule, where capital expenditure is incurred on the construction of a building or on the purchase and installation of machinery by or for a Special Economic Zone Enterprise for use by the enterprise in carrying out the business activities for which it was licensed, the enterprise shall be entitled to an investment deduction, equal to one hundred percent of the capital expenditure, against the gains or profits of that enterprise in the year in which the building or machinery is first used."

"B. Capital expenditure on buildings and machinery for use in a Special Economic Zone outside Nairobi and Mombasa Counties

Subject to this Schedule, where capital expenditure is incurred on the construction of a building or on the purchase and installation of machinery by or for a Special Economic Zone Enterprise located outside Nairobi and Mombasa Counties, for use by the enterprise in carrying out the business activities for which it was licensed, the enterprise shall be entitled to an investment deduction, equal to one hundred and fifty percent of the capital expenditure, against the gains or profits of that enterprise in the year in which the building or machinery is first used."

Memorandum of reasons

The SEZ program was established by the Government through the enactment of the Special Economic Zones Act, 2015, to attract Foreign Direct Investment and to fast track implementation of the economic pillar under the Vision 2030 blueprint. Amongst the fiscal incentives to promote and facilitate investment by global and local investors within the SEZ scheme for both domestic and foreign markets included the granting of investment deductions to investors within SEZs for the purpose of enhancing economic growth, export promotion and employment generation for poverty eradication.

During the enactment of Tax Laws (Amendment) Act 2020 necessitated by the need to mitigate the economy from the adverse effects of Coronavirus pandemic, Treasury proposed to Parliament the removal of various fiscal incentives among these SEZ incentives.

At the moment, about US$ 500million worth of incentives are on hold at Tatu City owing to the uncertainty that the removal of incentives created among investors. The best global practice is to ringfence the fiscal incentives available to SEZs to guarantee certainty that incentives are not used to lure investors, and take them away midstream. Whereas Tatu City SEZ is already past take off stage, public SEZs such as Dongo Kundu SEZ and Naivasha SEZ are likely to suffer from reduced investor confidence if these Covid-19 mitigation measures are not reversed quickly. Reinstatement of investment deductions under the SEZ scheme will also align the Kenyan SEZ scheme with similar schemes done by other members of the East Africa Community and give impetus to the growing attraction of Kenya as the leading investment destination in Africa.

Yours faithfully,

Preston Mendenhall
Chief Operating Officer
Tatu City SEZ

kenya flower council
QUALITY ASSURED

28th May 2021

Mr. Michael Sialai, EBS,
The Clerk,
The National Assembly,
NAIROBI.

D/DC
11/6/21

Dear Mr. Sialai,

RE: KFC MEMORANDUM ON FINANCE BILL 2021

Leah Mwaura
pls facil. take up
14/6/21

Greetings from the Kenya Flower Council (KFC).

The Kenya cut-flower sub-sector hereby submits a memorandum on the key areas for amendment in the proposed Finance Bill 2021. that we believe, if not revised will impact negatively on the growth and recovery of the sector.

Here attached, we enclose a summary of our Memorandum highlighting issues of concern and corresponding recommendations.

not attached

KFC is the representative body for the cut-flower and ornamentals growers and exporters in Kenya. The industry employs over 200,000 people directly, 1 Million people indirectly and impacts over 4 million livelihoods.

We look forward to a favorable response.

Yours faithfully,

Clement Tulezi
CHIEF EXECUTIVE OFFICER

Deputy Director/In-charge
RECEIVED
14 JUN 2021
Directorate of Departmental Committees

cc Hon. Ukur Yatani, Cabinet Secretary, National Treasury
cc Hon. Julius Muia – Principal Secretary, National Treasury
cc Ms. Carole Karuga – CEO, Kenya Private Sector Alliance
cc Ms. Phyllis Wakiaga – CEO, Kenya Association of Manufacturers

NATIONAL ASSEMBLY
RECEIVED
10 JUN 2021
CLERK'S OFFICE
P. O. Box 41842, NAIROBI

ASHFORD CONSULTANTS
AUDIT | TAX | CONSULTING

Our Ref: ACL/NA/020221

02 June 2021

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Clerk of the National Assembly
Clerks Chambers
National Assembly
P.O. Box 41842 – 00100
NAIROBI

Attn: Serah M. Kioko

Dear Madam,

RE: TAX INCENTIVE INITIATIVES FOR PRIVATE SECOR INVESTMENT IN THE PORT OF MOMBASA, LAMU ,NAIROBI AND NAIVASHA ENVIRONS TO SUPPORT THE STANDARD GAUGE RAILWAY TO INCREASE IN FREIGHT VOLUMES.

Informed by the opportunities provided with the introduction of the Standard Gauge Rail ("SGR"), it is proposed that the Government should encourage and incentivise the private sector to make investments in new solutions in the Port of Mombasa and Lamu and the hinterland, specifically in the Nairobi and Naivasha environs by creating an accommodative environment with minimal barriers of entry.

With suitable conditions, the Private Sector will be expected to invest in new state of the art bulk handling facilities. The newly developed facilities are to be linked to the SGR, thereby creating a dedicated 'hub' of bulk imports and provide the relevant agencies the ability to consolidate and hold adequate stocks for emergencies.

Extraordinary investments will be required to be deployed for the construction of SGR sidings at both the loading and discharge points, in a symbiotic relationship to process cargo evacuation from the ports of Mombasa and Lamu and delivery at the new inland terminals. However, this is only feasible if there is an in tandem investment in additional vessel discharge capacity and buffer storage to increase efficiency in ship-turnaround and berth occupancy.

The equipment for handling the dry bulk cargoes will be a major modernisation milestone in the port from the archaic conventional methods.

Measures by Ministry of Industrialization, Trade and Enterprise Development have already been put in place to incentivise private investment such as, the acquisition of 900 acres of land by Kenya Railways Corporation ("KRC") from East African Portland Cement Ltd ("EAPC") to be made available to the Private Sector for development of specialised and bulk cargo handling facilities.

However, despite the availability of land, to attract significant investments more than Kenya Shillings Ten Billion and a minimum storage capacity of one hundred thousand metric tons that would make an immediate impact on SGR throughput when operational, Government of Kenya will need to consider exemptions on Value Added Tax ("VAT"), Import Declaration Fees ("IDF"), Railway Development Levy ("RDL") and Merchant Shipping Levy ("MS") and an Investment Deduction of 150%.

A case in point is the investment deduction that was introduced in the Business Laws Amendment Act 2020 in a bid to incentivise investors to be drawn in the expansion of these facilities. Section 24E (1) of the Second Schedule to the Income Tax Act that deals with provisions relating to capital allowances was added to factor in "*where capital expenditure of at least five billion shillings is incurred on the*

construction of bulk storage and handling facilities for supporting the Standard Gauge Railway operations of a minimum storage of one hundred thousand metric tonnes of supplies, there shall be deducted, in computing the gains or profits of the person incurring the expenditure for the year of income in which the bulk storage facilities were first commenced or used a deduction referred to as an investment deduction.

(2) The amount of the investment deduction under sub-paragraph (1) shall be equal to one hundred and fifty per cent of the capital expenditure."

The Tax Laws Amendment Act, 2020 that became effective on 27th April 2020, repealed the Second Schedule to the Income Tax Act, replacing the same with a varied provision to what previously existed. The Second Schedule encompasses the impetus for investors which could be claimed in the form of Investment Deduction, Wear and Tear Allowances, Farm Works Deduction, and or Industrial and Commercial Building Allowances.

Despite the repeal of the Second Schedule, the Act saved the provisions of paragraph 24 E of the repealed Schedule to continue to be in force until 31st December 2021. This meant to support investors in bulk storage and handling facilities supporting the Standard Gauge Railway operations.

It can be well assumed that an investor incurring capital expenditure of at least five billion shillings on the construction of bulk storage and handling facilities for a minimum storage of one hundred thousand metric tonnes of supplies would not have achieved to do so in the one-month time frame. The decision to make such an investment would also need more time and without the lack of this incentive the uptake would have definitely been debatable. The extended time frame would allow investors in the field ample time to complete their projects as envisaged by the tax incentive.

It is however imperative to note that COVID 19 disrupted any activities undertaken and not only were investment decisions in this area put on hold, but all investments decisions of any nature were put on hold as the world economy was unstable. Now that activities have slowly begun resuming, we feel that the timeline of 31st December 2021 will not be sufficient for any investors to undertake this project as they are likely not to complete the project within this timeframe and hence benefit from the same until they first put the facilities to use.

Such storage facilities are critical to the success of the SGR, and the significant investments being made at the port of Mombasa and Lamu. The LAPSSET Corridor Program is part of the Kenya Vision 2030 Strategy which is the national long-term development policy that aims to transform Kenya into a newly industrializing, middle-income country providing a high quality of life to all its citizens by 2030 in a clean and secure environment. The Vision comprises of three key pillars: Economic; Social; and Political. The Economic Pillar aims to achieve an average economic growth rate of 10 per cent per annum and sustaining the same beyond 2030. Such public private partnerships are critical to the success of achieving this economic growth.

A new 32 Berth port at Lamu costing US$ 480M with a berth 1 throughput of 400,000.00 TEUs and hinterland links through road will require storage facilities to supplement its operations. The Government has already invested significantly in this facility and His Excellency the President launched this facility recently in Lamu and this will certainly attract private investments by providing these tax incentives.

We must also not ignore other benefits that will arise from these investments. The threshold set will mean that the facilities will be of significantly large sizes thereby guaranteeing benefits that come with economies of scale. A larger facility will translate to a spread of the costs in terms of handling, transportation, and storage. This will translate to sufficient storage facilities for the country and even that at reasonable costing, placing the country at a very competitive place in the region.

This will attract business from landlocked neighbouring countries advancing Kenya's ports and capital as a regional hub. This will in turn boost the rail and road network of the country boosting economic activities owing to the backward and forward linkages these activities will create.

It is also important to appreciate that most of these facilities are storage facilities for agricultural products and manufacturing raw materials. Lower storage and handling costs for these products will reduce the prices for these commodities making them more affordable and accessible to the common mwananchi.

This initiative will boost our steps toward achieving the President's Big Four agenda. The Big Four is an economic blueprint that was developed by the government to foster economic development and provide a solution to the various socio-economic problems facing Kenyans. One of the four items that the government seeks to deliver on is 100% food security and nutrition commitment. It seeks to achieve this by increasing availability of staple foods, such as maize, potatoes, and rice that will only be achievable through such activities undertaken under a private/public partnership.

Aside from large scale crop production, the government also aims to boost the capacity of small-scale food producers. This will be done by providing more affordable locally blended fertiliser to farmers and waiving duty for the importation of cereal drying equipment and bags. Again, these fertilizers are key commodities that will be housed in these storage facilities.

Availability of proper houses is another issue affecting many Kenyans, and thus it is not surprising to find housing in the Big 4 Agenda. To ensure every Kenyan has access to comfortable houses, the government plans to build at least 500,000 low-cost houses in a partnership scheme with the private sector. Aside from offering low-income Kenyans with access to housing, the scheme will help to create over 300,000 jobs, while providing a good market for local manufacturers and suppliers. Clinker and other raw materials are key raw materials that could also benefit from this initiative.

With sufficient storage facilities that delivers these commodities when required, this is not an unachievable target.

Conclusion

We hope that you have forward our above submission compelling. We therefore propose that **Subsection (6) of section 133 of the Income Tax Act is amended by deleting the expression "31st December, 2021" and substituting therefor the expression "31st December, 2022"**.

It is imperative that the Government devices all possible mechanisms to reboot the economy following the devastating effects like by COVID 19. In fact, the FY 2021/22 budget is inclined towards laying a foundation for sustainable and resilient post COVID -19 economic recovery and return Kenya's economy to a steady and sustainable growth trajectory. This is one of the rafts of measures that must be incorporated in a bid to support the same.

We remain at your disposal should you have any queries or require any further clarification on the above.

Yours Sincerely

For: Ashford Consultants Limited



Zaki Sheikh
Partner

Cc: **Hon. Justin Muturi, EGH**
Speaker of the National Assembly
National Assembly
P.O.Box 41842 – 00100
NAIROBI

SANAABIL
Consulting Ltd

Ref: SCL/TAS/002

1st June 2021

Clerk of the National Assembly
Office of the Clerk
Main Parliament Buildings
P.O Box 41842 – 00100
Nairobi

Dear Sir,

OPPURTUNITIES TO RAISE ADDITIONAL REVENUES:
-INTRODUCTION OF EXCISE DUTY ON INTERMEDIATE PRODUCTS – PAINT AND RESIN INDUSTRY
-RAISING EXCISE REVENUE FROM BANKS AND TELECOMMUNICATION COMPANIES
-ADVANCE TAX ON MOTORCYCLES

Kenya Vision 2030 is the long-term development blueprint for the country and is motivated by a collective aspiration for a better society by the year 2030. The aim of Kenya Vision 2030 is to create, "a globally competitive and prosperous country with a high quality of life by 2030." It aims to transform Kenya into, "a newly-industrializing, middle income country providing a high quality of life to all its citizens in a clean and secure environment."

The Kenya Vision 2030 is based on three pillars namely economic, social and political, that are critical in achieving the desired transformation by 2030. The pillars are anchored on key foundations of macroeconomic stability, continuity in governance reforms, enhanced equity and wealth creation opportunities for the poor, infrastructure, and energy amongst others.

Deepening and expansion of both regional and continental markets, in particular, the operationalization of the East African Community Common Market Protocol, provides a unique opportunity for Kenya to re-assess the fundamental facets of the nation's trade regime with a view to ensuring its competitive growth.

The absences of a coherent legal, regulatory and institutional framework able to efficiently guide, manage and stimulate both trade and related industrial development has, over the years, been a challenge in trade and industrial promotion. The current trade and related industrial development laws and regulations are scattered in a myriad of statutes and regulations some of which are not operationalized.

It is imperative for the East African Community (EAC) to operationalize the EAC Trade Remedies Committee as envisaged by Article 24 of the Protocol creating the Customs Union as read with Section 137 of the East African Community Customs Management Act (EACCMA). This will ensure that unfair competition from dumping and subsidized products from foreign will suffer counterveiling measures. This will work to protect domestic markets from unfair trade practices by establishing an effective trade remedy regime. The Paint and Resin industry for instance, is significantly affected by cheap imports flowing from Egypt.

Since late 2014, the Egyptian government has been undertaking motivated plans to resolve impediments to Egypt's investment landscape. To achieve that, the government adopted a multi-pillar strategy, working on different levels and scopes to restore investors' confidence. This includes sound economic reforms like the Export Subsidy Program. The export subsidy program is a program

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sponsored by the Ministry of Trade, Industry and SMEs. The program was established to create an incentive for Egyptian companies to push for more exports. The subsidy ranges from 1-10% of the total value of exports. The table below is a summary of imports done for one of the raw materials utilized in the paint, resin and shoe polish manufacture - alkyd HS code 3907.50.00 in 2019, as per statistics held with the Kenya Association of Manufacturers. The second table is a summary of the imports for other products.

COMPANY	COMESA |TONS|	REST OF WORLD |TONS|
ASL LIMITED	365.60	0.00
BASCO PRODUCTS KENYA LTD	0.00	**2.10**
BRENNTAG KENYA LIMITED	0.00	5.25
CRAFTSMAN ENTERPRISES (K) LTD	0.00	22.70
CROWN PAINTS KENYA PLC	425.03	30.40
DESBRO (KENYA) LIMITED	23.22	0.00
GALAXY PAINTS AND COATINGS LTD	15.20	0.00
GAMMA UNIVERSAL LIMITED	4.16	0.00
IDEAL MANUFACTURING CO LTD	14.25	0.00
INKSON INDUSTRIAL CO. LTD.	0.00	13.30
KAMDEV ENTERPRISES LTD	281.81	160.05
KANSAI PLASCON KENYA LIMITED	395.39	0.00
KENYA ADHESIVE PRODUCTS LIMITED	43.70	0.00
KOMAL MANUFACTURERS LIMITED	52.20	0.00
MAROO POLYMERS LIMITED	85.65	0.00
METRO PLASTICS (K) LTD.	**110.01**	0.00
MULBERRY SOLVENTS LIMITED	66.40	0.00
NAYAN PRODUCTS (KENYA) LIMITED	74.94	0.00
NEUCE KENYA PAINT INDUSTRY LIMITED	0.00	10.38
POLYCHEM SPECIALITY CHEMICALS LIMITED	727.90	0.00
SEWECO PAINTS LIMITED	288.75	0.00
SHIVAM ENTERPRISES LIMITED	197.60	0.00
SOMOCHEM (KENYA) LIMITED	91.44	0.00
TAWAZON CHEMICAL COMPANY EA LIMITED	0.00	30.40
UCHUMI CHEMICALS LIMITED	60.80	0.00
TOTALS	3324.05	274.59

The Volume and C+F Value of Imports of Resins Based on Hs Codes

HS CODE	CATEGORY			2020 7CM MONTHS	
		QUANTITY (TONS)	Y AM F IN USD	QI ANTITY(TONS)	VALUE IN USD
3907.99.00	SATURATED POLYESTER	2,926.47	4,876,242.29	2,142.42	3,864,480.64
3907.91.00	UNSATURATED POLYESTER	1,901.28	3,117,186.15	1,527.76	2,602,16 L81
3907.50.00	ALKYD	3,749.69	4,230,545.08	2,691.83	3,314,801.63
3905.91.00	EMULSIONS - V.A.M	1,797.64	1,716,735.19	2,028.92	3,125,319.81
3903.20.00	EMULSIONS - STYRENEACRYLIC	13,800.06	15,983,520.88	13,124.89	13,696,809.94
3905.19.00	HOMOPOLYMERS	956.64	906,889.95	738.11	967,573.70
3906.10.00	ACRYLIC	108.86	126,282.26	8.90	14,809.18
3906.90.00	EMULSIONS - B. A.M	13,615.06	15,749,574.21	11,974.14	12,229,596.37
	TOTAL IMPORTS	**38,855.69**	**46,706,976.01**	**34,236.97**	**39,815,553.08**

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The above is clear evidence of the business we are losing out to other countries. The challenge becomes that these consumers have access to raw materials especially from countries like Egypt that are part of the Common Market for Eastern and Southern Africa (COMESA) and hence penetrate our Kenyan market duty free and furthermore enjoy an additional export duty subsidy. These privileges place them at a competitive advantage thereby compromising our local manufacturers as they are able to reduce their prices considering the subsidy they are provided with in their country.

The manufacturing companies have the full capacity to supply the entire requirements for these projects however they are hindered from operating at full capacity or even growing themselves because despite having the market, they are restricted in supplying to this market. This essentially translates to:

a) Lack of competitiveness for our local manufacturers occasioned by this inefficient trade facilitation infrastructure;
b) Weak and fragmented supply chains from producers to suppliers and consumers that only work to further downgrade our industrialization aspirations as a country;
c) The National Government clearly is failing to protect its domestic market and industries from unfair trade practices and threats that are arising from dumping and subsidies from the foreign companies looking to satisfy demand of these projects that our local manufacturers could otherwise satisfy;
d) We lose more employment opportunities that could have been created by these manufacturing entities, some of which are also enhancing the skill set of our youth through their advanced technological production processes; and
e) "Central Bank loses grip on the Kenyan shilling" the headline to an article in one of the leading newspapers on Wednesday, September 23, 2020. The article further states that the "Kenyan Shilling continues to weaken as KES 108 is the amount that the Central Bank of Kenya has quoted the shilling at against the US dollar". A quick fix to this matter would be to export more than we import into the country. Best way to do this would be to support our local manufacturers to satisfy our internal requirements and build our Brand Kenya by promoting "Buy Kenyan Build Kenyan".

We urgently need to promote development of our local manufacturers to enhance domestic market access of Brand Kenya products and also encourage this through these Government and Private Sector procurement programs. As such we must develop mechanisms for safeguarding sensitive sectors and negotiate appropriate exemptions from tariff bindings and reductions commitments. Considering that we may not be able to promptly address his issue at the EAC level immediately, we must design incentives package for facilitation, production and competitiveness for SMES engaged in domestic trade at the domestic level as this matter is being addressed at the EAC level.

As such we propose for the introduction of excise duty for imports of the following products so that we can curb the penetration of subsidies from countries like Egypt.

HS Code	Category	Proposed Rate
3907.91.00	Unsaturated Polyester	10%
3907.50.00	Alkyd	10%
3905.91.00	Emulsions V.A.M	10%
3903.20.00	Emulsions – Styrene Acrylic	10%
3905.19.00	Homopolymers	10%
3906.90.00	Emulsions B.A.M	10%

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Further, there is an opportunity to raise revenue from sectors that have performed very well during the pandemic. This include Banks, Mobile telephony companies, and motorcycle owners.

To this end, we recommend additional taxes in form of excise on banks and teleco companies. For motorcycle owners, the government can impose advance tax under the income tax act Section 12A.These measures will raise tens of billions of shillings for the government instead of looking at Bread.

Conclusion

It is important to note that even the World Trade Organisation (WTO) that Kenya is also a member of, identifies with import restraints as trade remedies. The most commonly used are antidumping measures to counteract unfairly low prices. The WTO Agreement on Antidumping deems that goods are "dumped" when companies export them at prices lower than those at which they sell in their home market. Dumping is not illegal in itself; it becomes illegal as soon as it results in injury to local businesses in the importing country.

It is therefore important that we take cognizance of the situation we are in and support our local manufacturers, as necessary. This is the only true path to growing our economy.

Should you have any queries or require further clarification on the above, please do not hesitate to contact us.

Yours Faithfully

Amina Ali Mohamed
Lead Consultant

Cc: The Cabinet Secretary
Ministry of Finance & National Treasury

Our Ref: FB/02062021/SAK

2nd June 2021

The Clerk
The National Assembly
Office of the Clerk
Main Parliament Building
Nairobi

Dear Sir,

ADDITONAL MEMORANDA
THE FINANCE BILL, 2021
CHALLENGES OF THE PAINT INDUSTRY – EXCISE DUTY ACT, MISCELLANOUS FEES & LEVIES ACT

We write to you in response to your invitation in print media on 20th May 2021, for public participation and submission of memoranda on The Finance Bill 2021(National Assembly Bill No.8 of 2021). We thank you for this opportunity and wish to submit our additional memoranda on the same for your consideration.

Background

Excise tax on illuminating kerosene was introduced in 2016 with the main aim being to curb increased adulteration of fuel in Kenya which denied oil marketers and the Government their revenues. Simultaneously, it is important to appreciate that kerosene is one of the most important raw material in the manufacture of resins, paints and shoe polish. The excise tax increased the cost of production very significantly making the products uncompetitive against imports from Common Market for Eastern and Southern Africa (COMESA) and other partners states of the East African Community (EAC). The Finance Act, 2017 took cognizance of this fact and allowed refund of the excise tax.

The Existing Legislation – The Excise Duty Act

Section 15 of The Excise Duty Act requires that where a person makes the use of illuminating kerosene to manufacture goods in Kenya that are not excisable goods; then this person must obtain a license or be registered by the Commissioner to undertake such an activity.

Section 29 1 (b) of the Act further provides for refund of excise duty that has been paid in respect illuminating kerosene that have subsequently been used by a licensed or registered manufacturer to manufacture unexcisable goods. An excerpt of the same is provided below for your ease of reference.

PART VI — REFUNDS

29. Refunds

(1) If excise duty has been paid by a person on excisable goods manufactured in, or imported into, Kenya, the Commissioner shall, on written application by the person, refund the excise duty paid if satisfied that—

(a) before being consumed or used in Kenya—

(i) the goods have been damaged or stolen during the voyage or transportation to Kenya;
(ii) the goods have been damaged or destroyed while subject to excise control;
(iii) the buyer has returned the goods to the seller

(b) the excise duty has been paid in respect of spirits or illuminating kerosene that have subsequently been used by a licensed or registered manufacturer to manufacture unexcisable goods.

(2) A licensed person may apply to the Commissioner for a refund of excise duty if the person has accounted for and paid excise duty on excisable goods or excisable services but has not received any payment from the purchaser for the goods or services, and the Commissioner may refund the excise duty if satisfied that payment for the goods or services has not been received.

The industry along with Kenya Association of Manufacturers (KAM) have engaged the Kenya Revenue Authority (KRA) to formalize the process of registration of manufacturers using illuminating kerosene as an industrial input, so that manufacturers can apply for the long outstanding refunds. A pilot scheme was initiated by KRA, in which some companies were to be audited for the purpose of ensuring that all the checks and balances necessary were in place before opening the portal all the manufacturers. This process has however not yielded any results as the KRA systems are not designed to envisage use of excisable products in the form of raw materials by manufacturers of non-excisable products. To date, after almost five years, no manufacturer has been refunded a single coin.

The Existing Legislation – The Miscellaneous Fees & Levies Act

Furthermore, The Finance Act, 2018 introduced through The Miscellaneous Fees & Levies Act, an Anti-Adulteration levy of KES 18 per litre on Illuminating Kerosene. This is levied at the point of importation to curb adulteration of fuel by unscrupulous traders. Considering the challenges the levy created to the manufacturers, The Finance Act, 2019 provided for refund of this levy to all manufacturers who use illuminating kerosene as an input.

Section 8A (3) of the Act provides for a refund of this levy on written application by the importer where the Commissioner is satisfied that the levy was paid in respect of illuminating kerosene that has subsequently been used by a licensed or registered manufacture to manufacture paint, resin or shoe polish.

This provision again has proven to be a challenge to the industry considering that the levy can only be refunded through an application made by the importer. It is administratively difficult for the manufacturers to have access to details as to whether these importers have received the refunds on their behalf.

What this means

It is important to note that the paint, resin and shoes polish industry has been significantly disadvantaged by infiltration of products that are manufactured within the East African Community that meet the Rules of Origin Criteria as envisaged by Article 14 of the Protocol Creating the Customs Union as read with the East African Community Rules of Origin Regulations. In addition, manufacturers in the COMESA region will take advantage of this high cost of manufacture of these products in the country thus rendering our local manufacturers out of business as thee goods are entering the Kenyan market duty free and are not subject to such excise duty in their respective home countries.

There is an additional cost that the local paint, resin and shoe polish manufacturers in Kenya have to bear unless refunded, which as highlighted above, has not happened to date. In the meantime, of course this has proven to cause key cashflow constraints to the manufacturers who are struggling amid these tough economic times.

Our Proposed Amendment

To this end, we humbly request for the following amendments to the Excise Duty Act and the Miscellaneous Fees & Levies Act to cushion this industry from the pains earlier pointed out.

a) Amendment to the Second Schedule of Excise Duty Act to provide for exemption from Excise Duty on Kerosene supplies to manufacturers using illuminating kerosene as an input. This will be done in such quantities as the Commissioner may approve. This additional provision will ensure that KRA implements the necessary controls in relation to consumption of illuminating kerosene considering that illuminating kerosene can be used as an adulterating product.

b) Amendment of Section 8A of the Miscellaneous Fees & Levies Act to provide for an exemption from anti adulteration levy for manufacturers using illuminating kerosene as an input. This is currently set at the rate of KES 18 per liter of the customs value. This will also be set in such quantities as the Commissioner may approve.

The above amendments will allow the paint, resins and shoe polish industry to access illuminating kerosene as necessary and KRA will also retain the necessary controls.

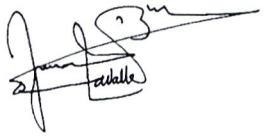
Conclusion

To recover from the effects of the pandemic, there is need to create a conducive business environment that drives the competitiveness and productivity of the local industries. There is need to carry out tax reforms that encourage investments and eventually expand the government's revenue base without harming businesses and creating a stumbling block to business continuity.

We trust that you will find our submission both comprehensive and compelling. If you have any issues that require more clarification, please do not hesitate to contact us.

We thank you for your support and look forward to a favorable response.

Yours faithfully



Hadi Sheikh
Lead Consultant


The Finance
Bill, 2021
Memoranda
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29th May 2021

The Clerk
The National Assembly
Office of the Clerk
Main Parliament Building
Nairobi

Dear Sir

Submission of Memoranda

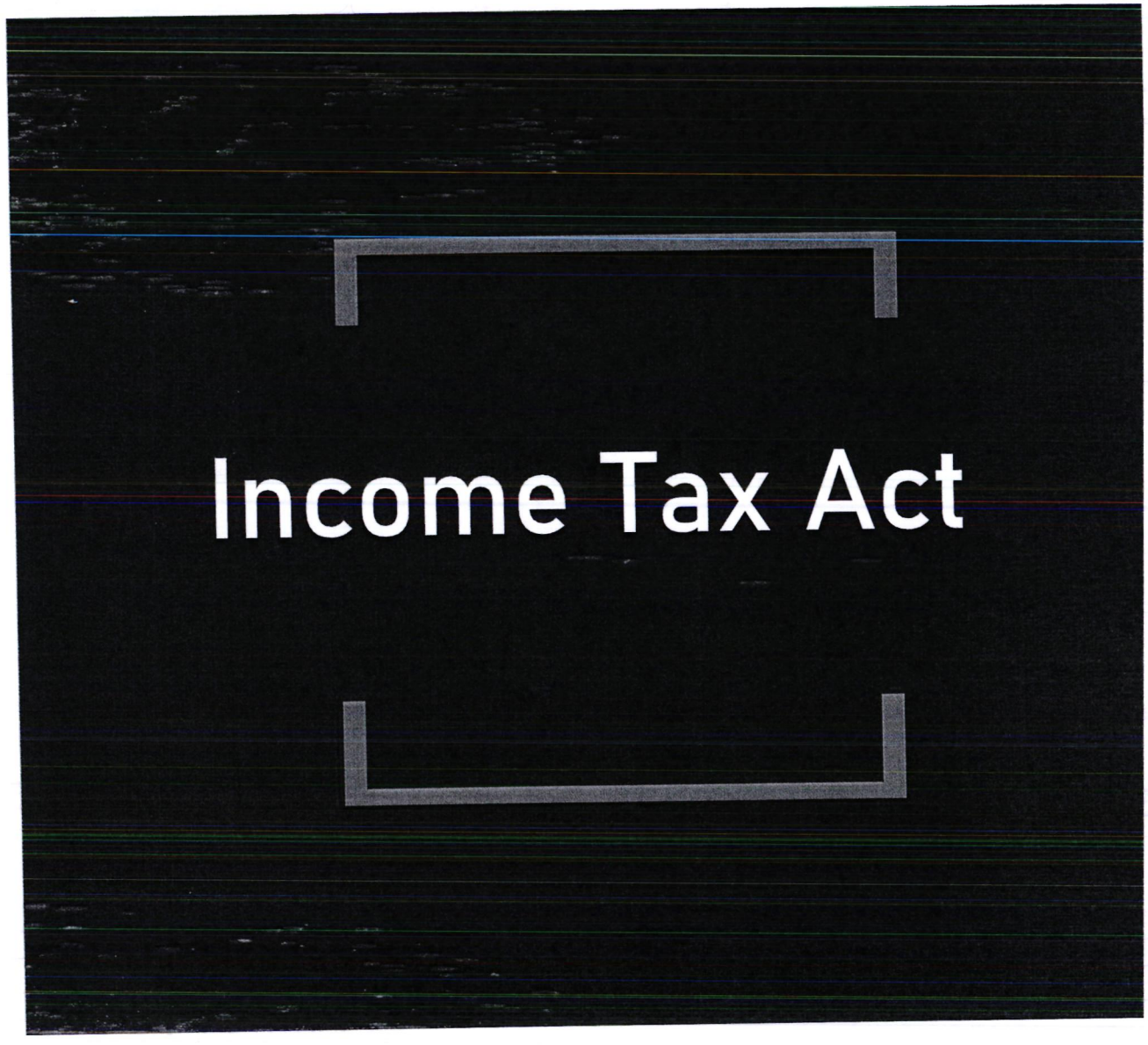
Finance Bill, 2021(National Assembly Bill No.8 of 2021)

We write to you in response to your invitation for public participation and submission of memoranda in line with your advert in print media on 21st May 2021. We thank you for this opportunity and would like to put forth our submissions on The Finance Bill, 2021(hereinafter referred to as "the Bill") in the ensuing pages of this document for your consideration.

We trust that you will find our overall approach both comprehensive and compelling. If you have any questions or require more clarification, please do not hesitate to contact us.

Yours sincerely,

Hadi Abdullahi
Lead Consultant


Income Tax Act

Investment Deduction Allowance

The Finance Bill, 2021 proposes to amend the basis for claiming investment allowance on the 50% balance from first year from reducing balance to straight line with effect from 1st July 2021.

The Finance Bill, 2021 also proposes to amend the definition of "manufacture" to expand the scope of electricity generation and distribution qualifying for investment allowance to any generation and distribution of electricity as opposed to limiting it to just electricity generated for supply and distribution through the national grid as was initially provided for in the Tax Laws Amendment Act, 2020.

The Finance Bill, 2021 in respect to Civil works, proposes to add the following to what will constitute civil works:

a) roads and parking areas
b) railway lines and related structures
c) water, industrial effluent and sewerage works
d) communications and electrical posts and pylons and other electrical supply works
e) security walls and fencing

The 2021 Finance Bill amendments in the definitions provide investors more avenues to claim capital allowances in respect of investments made for instance, for manufacture in respect of generation and distribution of electricity will enable manufacturers generating electricity for their own use to enjoy investment allowance. This is an encouraging move to spur much needed investments in the country and we recommend more such moves by the Government.

One of the key strategies for any Government to build its economy is to encourage investment, both local and foreign. One such incentive was introduced through the Finance Act, 2009 that provided for deduction of capital expenditure incurred on the construction of a building or purchase and installation of machinery outside the City of Nairobi or the Municipalities of Mombasa or Kisumu whereof the value of the investment is not less than two hundred million shillings.

This was a positive move that saw significant urban - rural migration further enhancing the rural markets through creation of more opportunities and decongesting the urban markets. However, the Tax Laws (Amendment) Act, 2020 that took effect in April 2020 clawed back this incentive leaving the investment deduction allowance at a rate of 50 % in the first year of use and the residual value at the rate of 25% per year on reducing balance across the spectrum.

This amendment took away the stimulus that would ideally spur growth outside the urban areas. It is understandable that the infrastructure is already developed in these major cities and hence no investor would been keen to move to a less developed area that would only work to increase its costs of operation unless there is an incentive that assists to drive these costs down.

It is important to appreciate that large scale manufacturers devoted significant resources to major projects situated outside these satellite towns and now looking to expand and grow your operations. As such, tax incentives like the 150% investment deduction could provide significant tax savings allowing the same to be reinvested in the various plants.

We highly recommend an additional amendment to this provision introducing an enhanced rate of investment deduction of 100% allowance. This allowance can apply to investors who have invested in excess of KES 10 billion for the years 2020, 2019 and 2018 and outside these municipalities and also investors who have set up in the special economic zones. This will ensure that tax revenue are not eroded and this incentive is only provided to those who are willing to invest in major projects that will have an impact on the economy.

It is important to recognise that projects of this magnitude are usually undertaken for a longer period of time. Construction of significant projects must have started in the earlier periods with these manufacturers budgeting with this tax incentive. It would be unfair to deny them of the same abruptly and as such it would be advisable to reinstate the same for the big players who have invested significantly. This will encourage them to continue growing their industries and also growing the vicinity they operate in.

On the same note, it is also important to encourage investment schemes operationalised by the Government. Special economic zones are a clear evidence of the benefit that public- private partnerships can yield. Most of these zones are designated outside the outside the satellite cities thereby:

- Creating significant forward and backward linkages thereby providing a platform for several players of the economy;
- Developing the infrastructure and other social amenities in those areas;
- Development of Agro based industries which is a key source of income in our country;
- Development of infrastructure based industries such as steel, cement etc;
- Transfer of technology and knowledge through labour;
- Assist in decongestion of urban areas;
- Assist with creation of employment opportunities; and
- Assist with reduction of the infrastructure strain currently experienced in the urban areas; amongst others.

As evident, we must encourage the manufacturers and investors in the special economic zones through provision of such tax incentives.

Minimum Tax

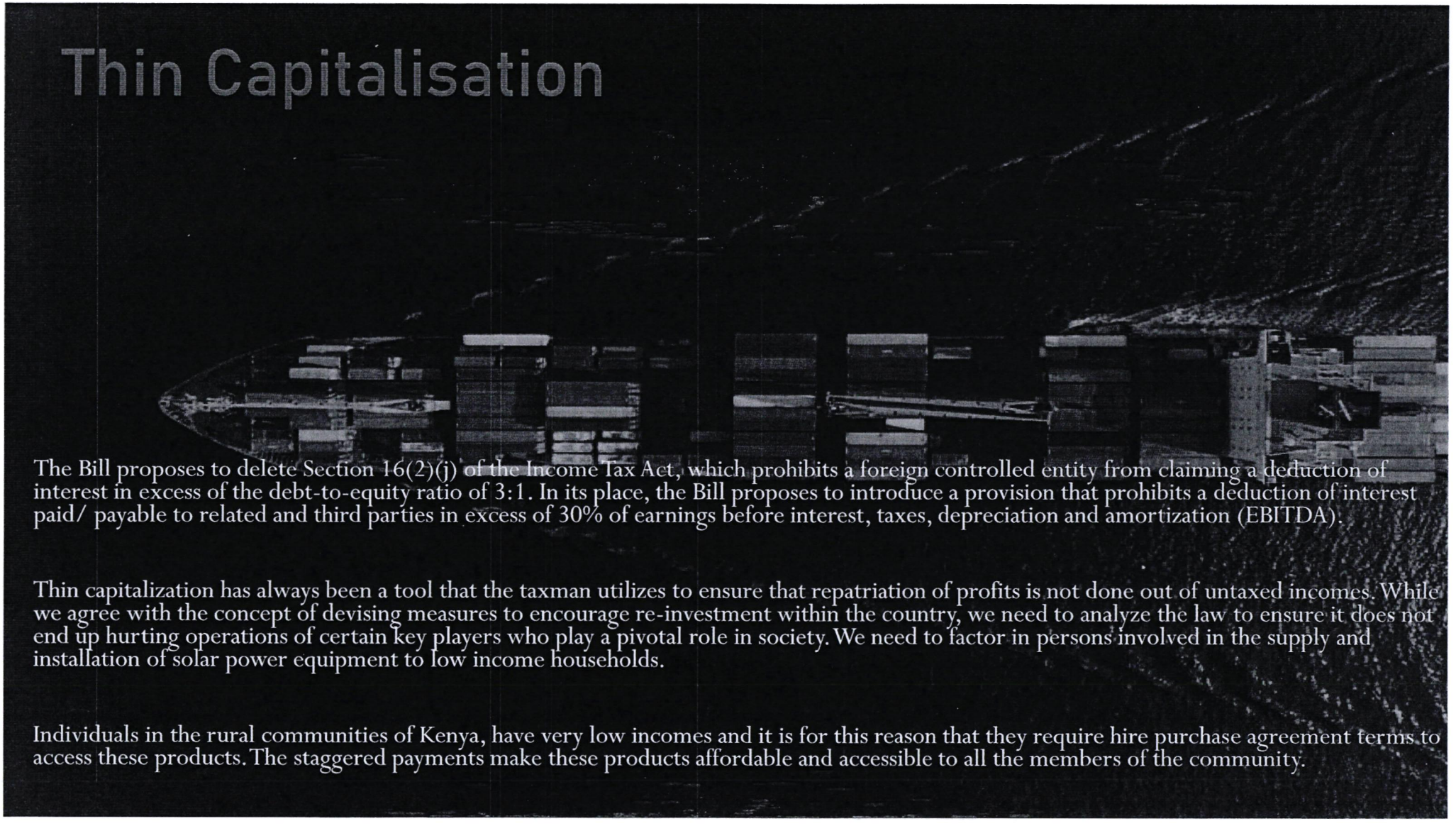
Minimum tax was introduced through the Finance Act, 2020 with an aim to have all taxpayers contribute to the Exchequer and consequently for the infrastructure and other Government services utilized by all Kenyans. While the intention as set out by the Cabinet Secretary in his Budget speech inclined towards loss making entities, this tax is set to affect all taxpayers including entities that are in taxable profit positions.

More debates and analysis of this new tax law have uncovered the need for special considerations/ exclusions for certain sectors or businesses. Considering the key role that the aforementioned investors in the special economic zones and in the manufacturing sector play, which again is key to the backbone of our economy, we propose for an exemption from this minimum tax. This exemption can be available to manufacturers who have invested in excess of KES 10 billion in the preceding four years to 2020.

As for the investors in the special economic zones, the Third Schedule to the Income Tax Act provides that SEZ developers, operators and enterprises shall be subject to income tax on their income at the corporate tax rate of ten per cent (10%) for the first ten (10) years of operation, and thereafter fifteen per cent (15%) for the next ten (10) years of operation. This is obviously advantageous compared to the usual tax on income of companies at the corporate tax rate of thirty per cent (30%) .

It is therefore safe to assume that these players invested in these special economic zones fully aware that they are to reap certain tax benefits. You will agree that the effect of the above incentive will be negated where minimum tax is still due and payable by these players. Setting up in a special economic zone comes with additional expenses as one has to invest in the infrastructure and develop the area. This cost must be compensated in one way or another.

Thin Capitalisation



The Bill proposes to delete Section 16(2)(j) of the Income Tax Act, which prohibits a foreign controlled entity from claiming a deduction of interest in excess of the debt-to-equity ratio of 3:1. In its place, the Bill proposes to introduce a provision that prohibits a deduction of interest paid/ payable to related and third parties in excess of 30% of earnings before interest, taxes, depreciation and amortization (EBITDA).

Thin capitalization has always been a tool that the taxman utilizes to ensure that repatriation of profits is not done out of untaxed incomes. While we agree with the concept of devising measures to encourage re-investment within the country, we need to analyze the law to ensure it does not end up hurting operations of certain key players who play a pivotal role in society. We need to factor in persons involved in the supply and installation of solar power equipment to low income households.

Individuals in the rural communities of Kenya, have very low incomes and it is for this reason that they require hire purchase agreement terms to access these products. The staggered payments make these products affordable and accessible to all the members of the community.

The Off-grid electrification continues to improve livelihoods for millions of Africans. This is by drawing benefits of modern energy services such as - lighting, communication, cooling which would otherwise be elusive if they waited for the national grid. The contribution of off-grid electricity is significant and its adoption in most developing countries in Africa as a suitable option and strategy to attain universal electrification is evident. In Uganda for example, self-generation from Off grid technologies contributes more than half of the current electrification rate.

According to a recent study conducted by the Kenya Renewable Energy Association in liaison with UKaid and other parties on the "Economic Impact Assessment on Removal of Tax Exemptions on Stand-Alone Solar Products" in Kenya, just over half of households now have access to grid-electricity – although this falls to just 26% in rural areas. As shown in Figure 1 in the table below, in rural areas more households now rely on off-grid solar technologies as their primary source of lighting than are connected to the grid (30% compared to 26% respectively). There is still a significant gap to reach the universal access targets, particularly in rural areas where 46% of the population still relies primarily on paraffin, and gas lamps, torches, batteries, wood and candles.

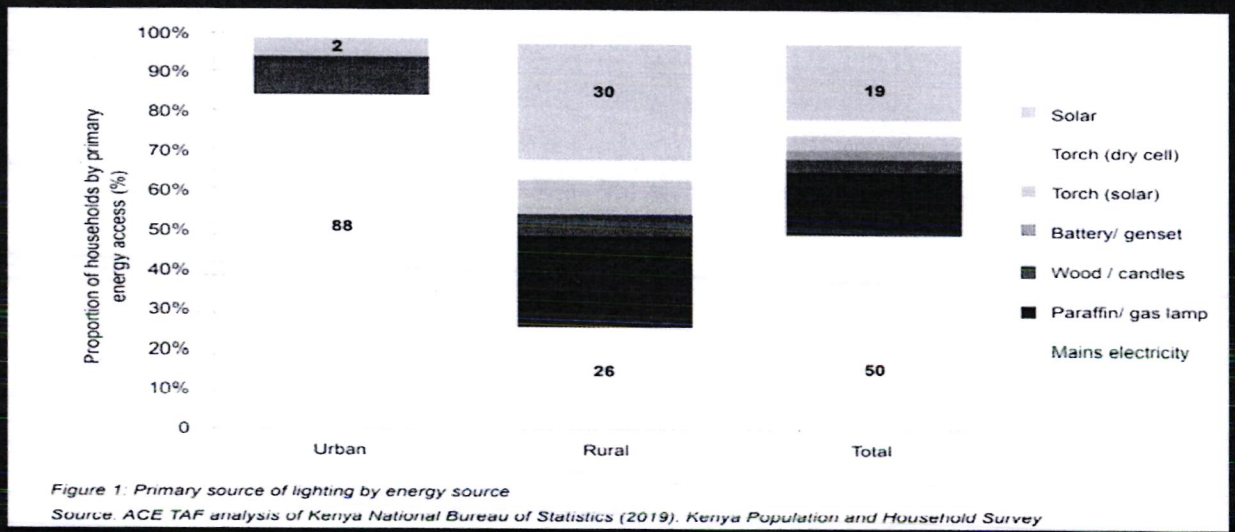


Figure 1: Primary source of lighting by energy source

Source: ACE TAF analysis of Kenya National Bureau of Statistics (2019). Kenya Population and Household Survey

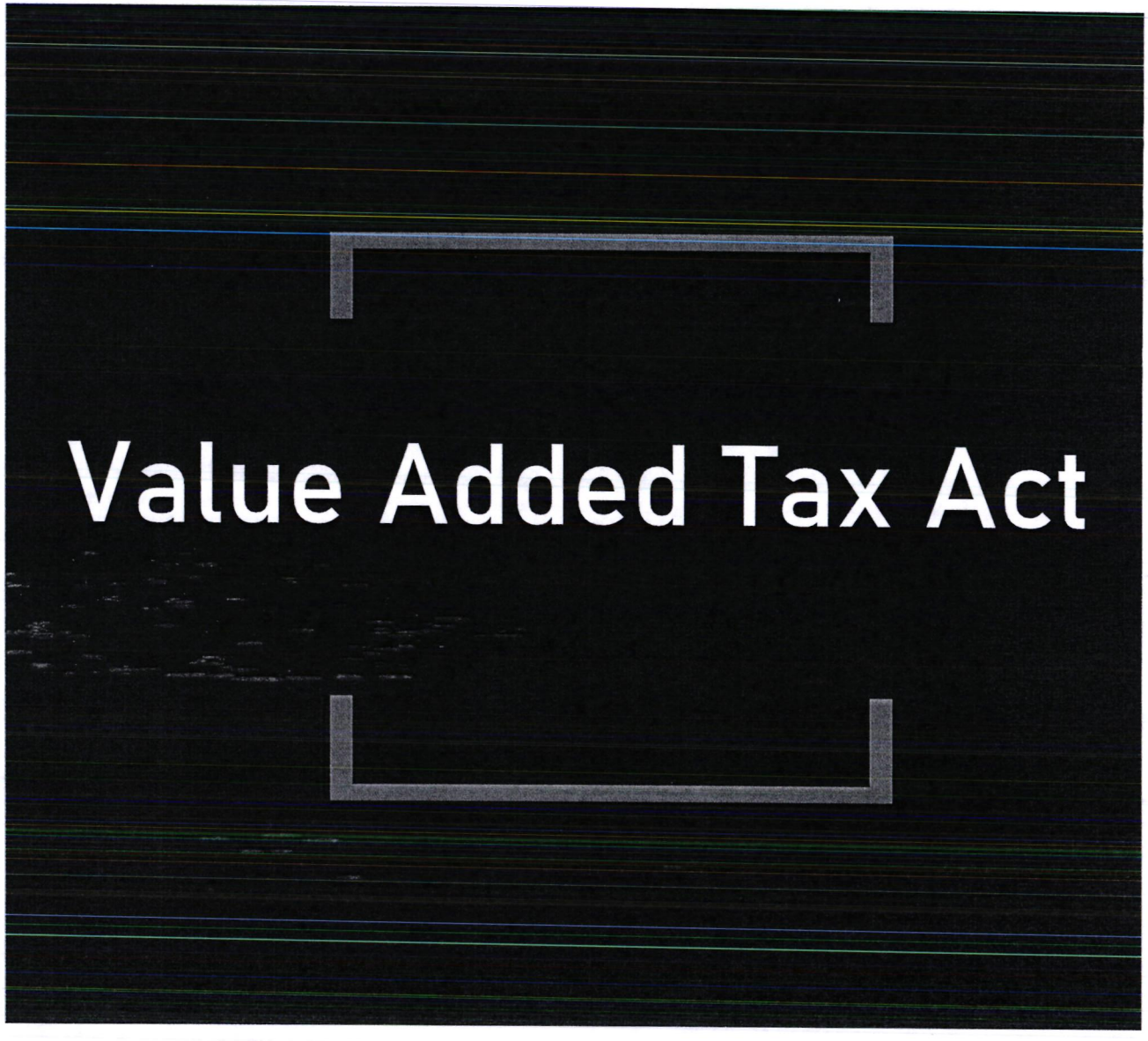
On December 6, 2018, the Government launched the Kenya National Electrification Strategy (KNES). KNES was set up to provide a roadmap to achieving universal access to electricity for all Kenyans by 2022.

With the help of the geospatial tool, the strategy identified least-cost options for bringing electricity to households and businesses throughout the country. The strategy recognizes the key role played by off-grid options, mini-grids and stand-alone solar systems that complement grid extension and intensification. Above all, it highlights the crucial role that the private sector has been and will need to play in providing off-grid solutions for Kenyan homes, businesses and community service centres in remote parts of the country.

Universal access to electricity is a key requirement for meeting Kenya's development goals under Vision 2030 of becoming a newly industrialized and middle-income country. Kenyan households and businesses will need competitively priced, reliable, safe and sustainable energy to deliver on its Big Four Agenda priorities: affordable housing, manufacturing, food security, and universal healthcare. As you will note in our submission in the ensuing pages of this document, sustainable energy is a key to achievement of all these priorities.

Solar products play a critical role in delivering electricity access for all, especially for hard-to-reach, low-income Kenyan households. Considering the market segment that these companies serve, it is important that these companies rely on debt which they then extend in form cheap loans. In some cases, this is from foreign institutions considering the high domestic interest rates. The introduction of this additional interest expense will subsequently result in the increase in price of solar equipment which will then, mostly, be transferred to the consumer. This will culminate into a reduction in sales of solar products especially by low-income households in Kenya due to the increased price of all solar powered equipment including the basic solar powered lights.

It is therefore imperative that Amend the Bill by inserting the following further provision under clause 7 of the Bill iv) Income of an enterprise that supplies solar power equipment to low-income households shall be exempted from the provisions of this section.


Value Added Tax Act

Exportation of Taxable Services

Proposed reclassification of VAT Status from Zero Rated to Exempt

The Tax Legislation

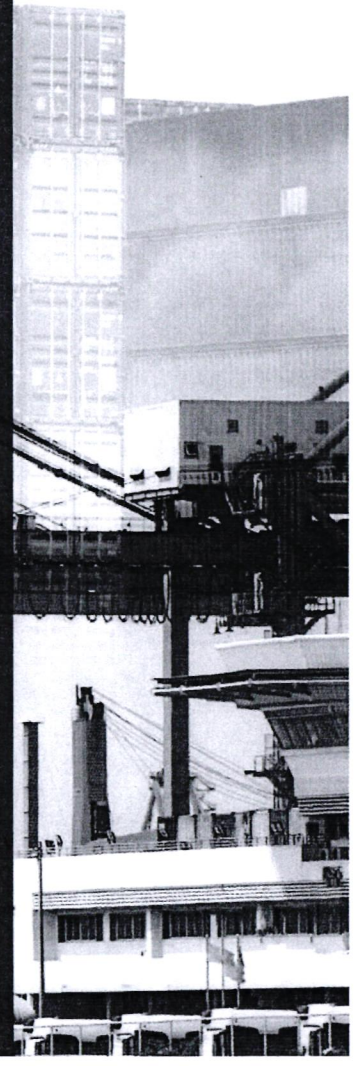
Provisions provided under Section 17 (6) of the VAT Act which we quote below:

"Subject to this Act, if a taxable supply to, or a taxable import by, a registered person during a tax period relates partly to making taxable supplies and partly for another use, the input tax deductible by the person for acquisitions made during the tax period shall be determined as follows—

(a) full deduction of all the input tax attributable to taxable supplies;
(b) no deduction of any input tax which is directly attributable to other use; and
(c) deduction of input tax attributable to both taxable supplies and other uses calculated according to the following formula:

$$A \times \frac{B}{C}$$

Where - A is the total amount of input tax payable by the person during the tax period on acquisitions that relate partly to making taxable supplies and partly for another use; B is the value of all taxable supplies made by the registered person during the period; and C is the value of all supplies made by the registered person during the period in Kenya."



It is very clear from the above that the principles to be applied is to segment the input VAT into three different components:

- the component relating directly to the taxable supplies – this would be claimable in full;
- the component relating directly to the exempt supplies – this would not be deductible; and
- the component relating to both taxable and exempt supplies – this would have to be apportioned on the basis of the above formula.

Furthermore, regulations contained in Section 17 (7) of the VAT Act states that, "If the fraction of the formula in subsection (6) for a tax period— (a) is more than 0.90, the registered person shall be allowed an input tax credit for all the input tax comprising component A of the formula; or (b) is less than 0.10, the registered person shall not be allowed any input tax credit for the input tax comprising component A of the formula.

What this Means

As evident, the exemption will make exportation of services more expensive as the input tax that would otherwise be deductible for VAT purposes must be recharged in the cost of the supply. A case in point is the transport sector which will be hardest hit by this provision. We expound on this below.

How this will affect us

Nairobi currently enjoys the privileges that come with being the regional hub for most of the African market. Most multinational companies have been using Kenya as a launching pad of their ventures into the African markets due to the added benefits that Kenya has to offer. Our affiliations to the developed countries and local set up of prominent world organizations like the United Nations, presence of a high number of international embassies are some of the factors that have always placed Kenya at a higher level than our neighbours. Kenya then acts as a distribution and logistics hub from where all these commodities are transported and supplied to other African countries. The Northern Corridor is a busy and an important transport route to the East and Central Africa countries of Burundi, Eastern DR Congo, Kenya, Rwanda, South Sudan and Uganda. The main Northern Corridor transport network is connected to our Port of Mombasa and includes a road network and railways belonging to Kenya Railways Corporation. This just goes to emphasize the strategic role we play as a country in the region.



We do expect all these multinationals to be more opportunistic and on the lookout for best offers in the global market to support their international trade especially after the dent that COVID-19 has had on the global economy.

The added cost introduced by the unclaimable input VAT will only translate to an extra charge for provision of the service. An increment in transportation costs further translates to an increased cost of Kenyan manufactured goods exported/transported to the region by Kenyan road and railway transporters. The Organisation for Economic Cooperation Development, that Kenya is also a member of, provides under its international VAT/GST guidelines on neutrality, that the *application of VAT to international trade is based on the destination principle. This means that exports are free of VAT and imports are taxed on the same basis and at the same rate as local production. This destination principle is sanctioned by World Trade Organization rules*. The guidelines further provide that "*Free of VAT" may be termed zero-rated, exempt with credit, or some other local terminology. Whatever the description used, the effect should be the same – no VAT is added by the supplier, but the supplier is entitled to input tax credits, to the extent that the jurisdiction allows, in respect of such supplies*.

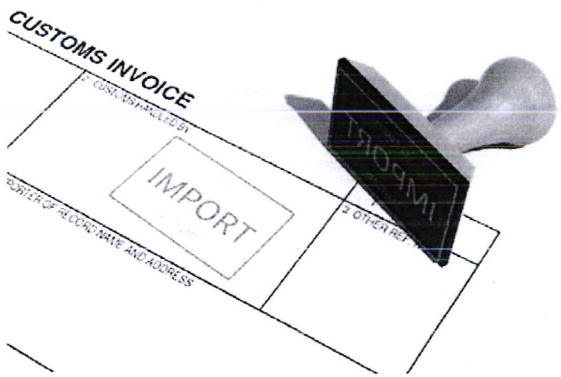
It is also important to appreciate that all the other Partner States of the East African Community have, just like Kenya had since introduction of the VAT Act, classified exports of goods and services at a zero rate. Multinational manufacturers established in Kenya to serve the African market and Kenyan transporters involved in exports transportation are better placed to move operations or loading to neighboring countries like Uganda and Tanzania where they are allowed to claim these expenses giving them a higher return on their investments and making them more competitive as compared to Kenyan players.

Giving our Transportation Business Away

One can argue that it may not be plausible for existing manufacturers to relocate existing factories easily however the severity of the matter will be immediately felt by the transportation sector. It is very easy to discontinue existing transportation contracts with Kenyan transporters who will charge a higher transportation fee (owing to the additional cost to cater for the blocked input VAT) to and engage non-Kenyan transporters who could be mobilised to come into Kenya to collect commodities for export.

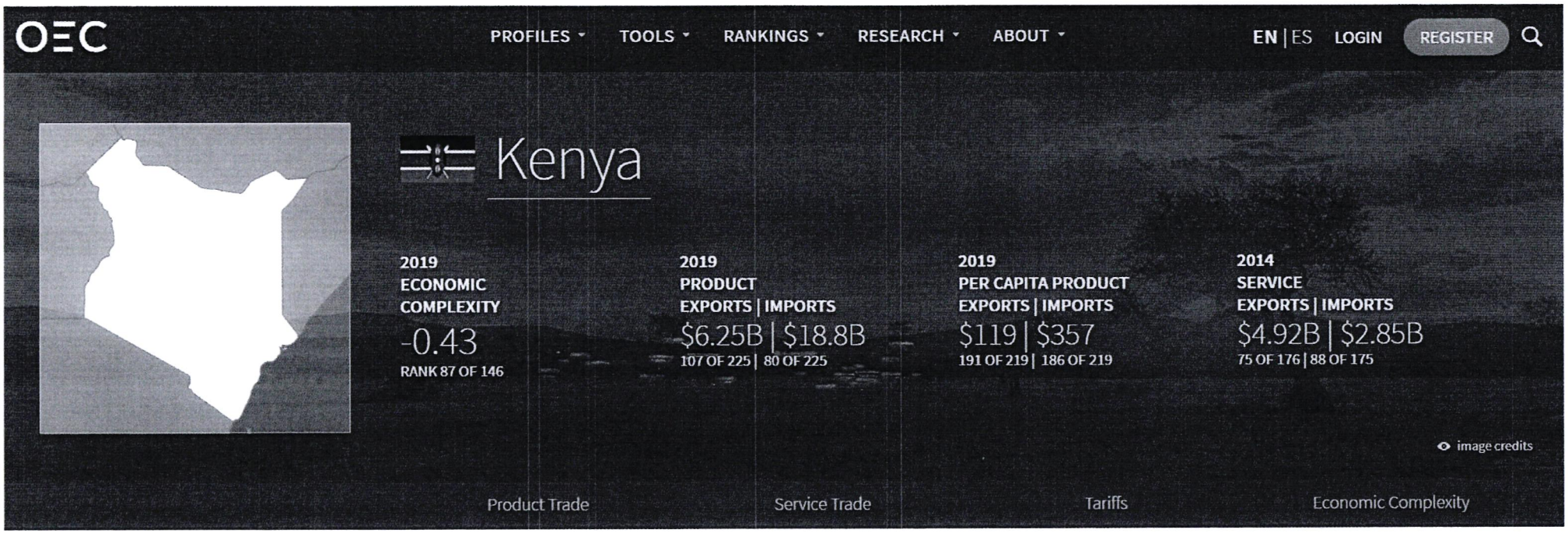
The high tax rates and lack of support make cost of doing business in the country high and could translate to making our neighbours appear more favourable as highlighted above. Risk of losing this key industry to our neighbours will have detrimental effects to its contribution to the GDP and of course to other sectors e.g., Manufacturing, Horticulture, Employment etc.

A quick online search from the Observatory of Economic Complexity which is a platform providing international trade data states that in 2019 Kenya was the number 63 economy in the world in terms of GDP (current US$) and number 107 in total exports. As per the same source, the top exports of Kenya are Tea ($1.13B), Cut Flowers ($616M), Refined Petroleum ($404M), Coffee ($224M), and Titanium Ore ($143M).



The key data to highlight is that the source states that Uganda is listed as Kenya's number one export country ($619M). It is very clear the mode of transportation that these exports are conducted with. In 2019, Kenya exported a total of $6.25B, making it the number 107 exporter in the world. During the last five reported years the exports of Kenya have changed by $13.6M from $6.24B in 2014 to $6.25B in 2019. It is very important to appreciate the quantum of exports these transporters facilitate.

Please see in the ensuing pages, excerpts of the same for your ease of reference.

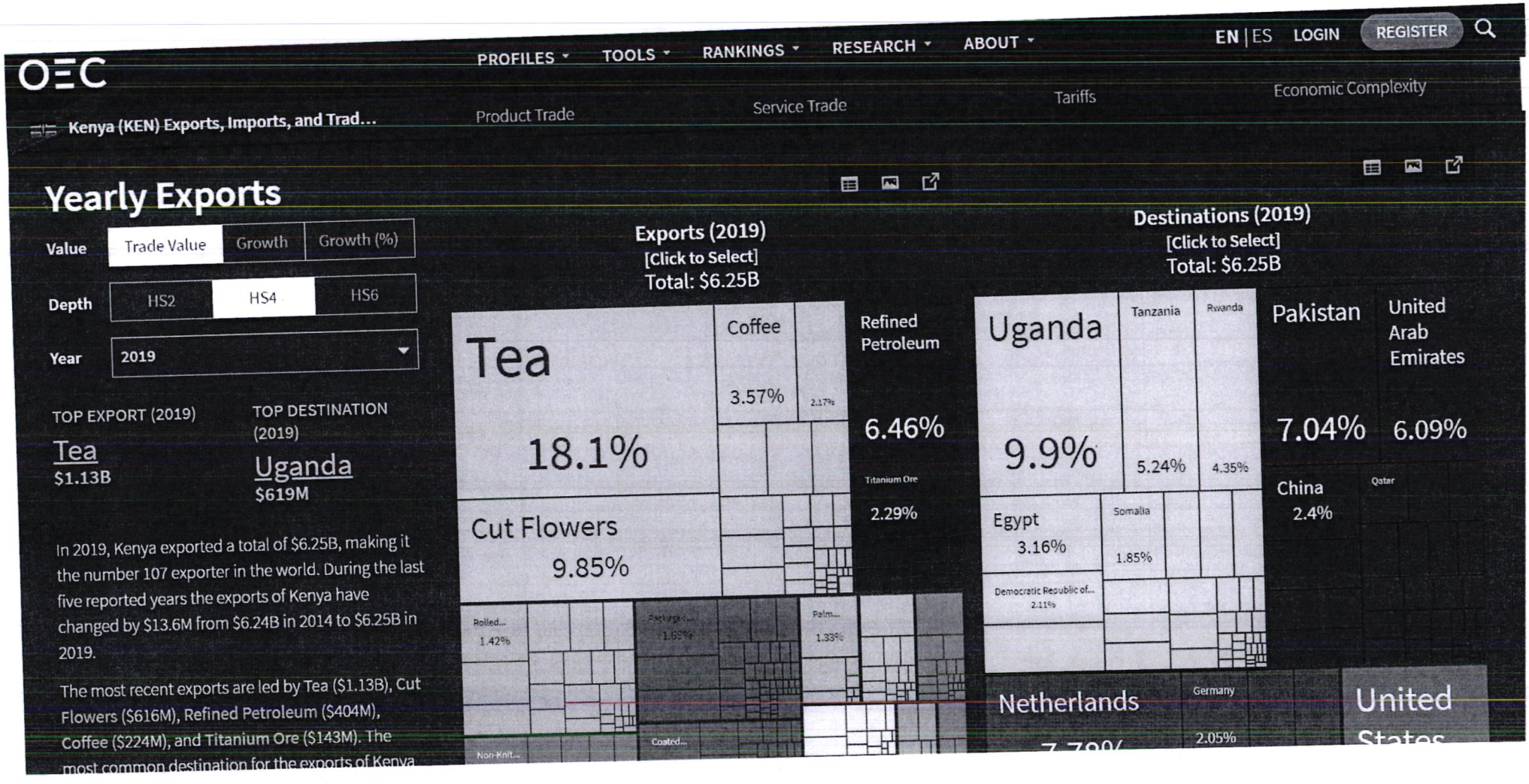


About

Overview: In 2019 Kenya was the number 63 economy in the world in terms of GDP (current US$), the number 107 in total exports, the number 80 in total imports, the number 146 economy in terms of GDP per capita (current US$) and the number 87 most complex economy according to the Economic Complexity Index (ECI).

Exports: The top exports of Kenya are Tea ($1.13B), Cut Flowers ($616M), Refined Petroleum ($404M), Coffee ($224M), and Titanium Ore ($143M), exporting mostly to Uganda ($619M), United States ($546M), Netherlands ($487M), Pakistan ($440M), and United Kingdom ($387M).

Location: Kenya borders Ethiopia, Somalia, South Sudan, Tanzania, and Uganda by land.



WESTMINISTER CONSULTING

The National Treasury already benefits from revenue collection through taxation of gains or profits generated from these transport companies being set up in Kenya. The sector is also a significant contributor to the Exchequer for every litre of fuel consumed considering that fuel is the main input utilised and consumed in very significant quantities. We highlight in the table below the current taxes and levies imposed on some of the petroleum products consumed by these players.

Type	Import Duty	Excise Duty KES/Litre	VAT	Road Maintenance Levy	Petroleum Development Levy KES/Litre	Current Rate of Import Declaration Fee	Railway Development Levy	Remission KES/Litre	Adulteration Levy KES/Litre
Motor Spirit (Gasoline) Regular	-	21.5227	8%	18.00	5.40	3.50%	2.00%	0.45	-
Motor Spirit (Gasoline) Premium	-	21.9530	8%	18.00	5.40	3.50%	2.00%	0.45	-
Aviation Spirit	-	21.9530	8%	-	0.40	3.50%	2.00%	0.45	-
Special Boiling Point & White Spirit	-	9.3793	8%	-	-	3.50%	2.00%	0.30	-
Other Light Oils and Preparations	-	9.3793	8%	-	-	3.50%	2.00%	0.30	-
Partly refined (including topped crudes)	-	1.6000	8%	-	-	3.50%	2.00%	0.30	-
Illuminating Kerosene (IK)	-	11.3710	8%	-	0.40	3.50%	2.00%	0.45	18.00
Other Medium oils and preparations	-	5.8483	8%	-	0.40	3.50%	2.00%	0.30	-
Gas Oil (automotive, light, amber for high speed engines).	-	11.3710	8%	18.00	5.40	3.50%	2.00%	0.30	-
Diesel Oil (industry heavy, black for low speed marine and stationery engines).	-	4.0827	8%	-	0.40	3.50%	2.00%	0.30	-
Other Gas Oils	-	6.9517	8%	-	0.40	3.50%	2.00%	0.30	-
Lubricating oils	25%		14%	-	-				-
Lubricating greases	25%		14%	-	-				-

The industry is the highest contributor of excise revenue and the road development levy amongst other taxes and levies and depicted in the table. Loss of business means loss of revenue to the Exchequer.

These organizations also fuel our economic growth through their investments in projects and creation of employment opportunities in the country. On average every truck employees one driver and two turn boys. Their facilities will be a host to an entire administrative team and an entire mechanical department to ensure smooth running of operations. Considering the large players in the industry deploy at least one thousand trucks, it is not difficult to gauge the families dependant on this sector. Any redundancy will have a direct impact on thousands of Kenyans.

We cannot afford to lose such prime contributors to our economy and there is need for National dialogue to exclude these transporters from this proposed amendment.

Our Proposed Amendment

We propose that the zero-rate status of exported transport services should be maintained.

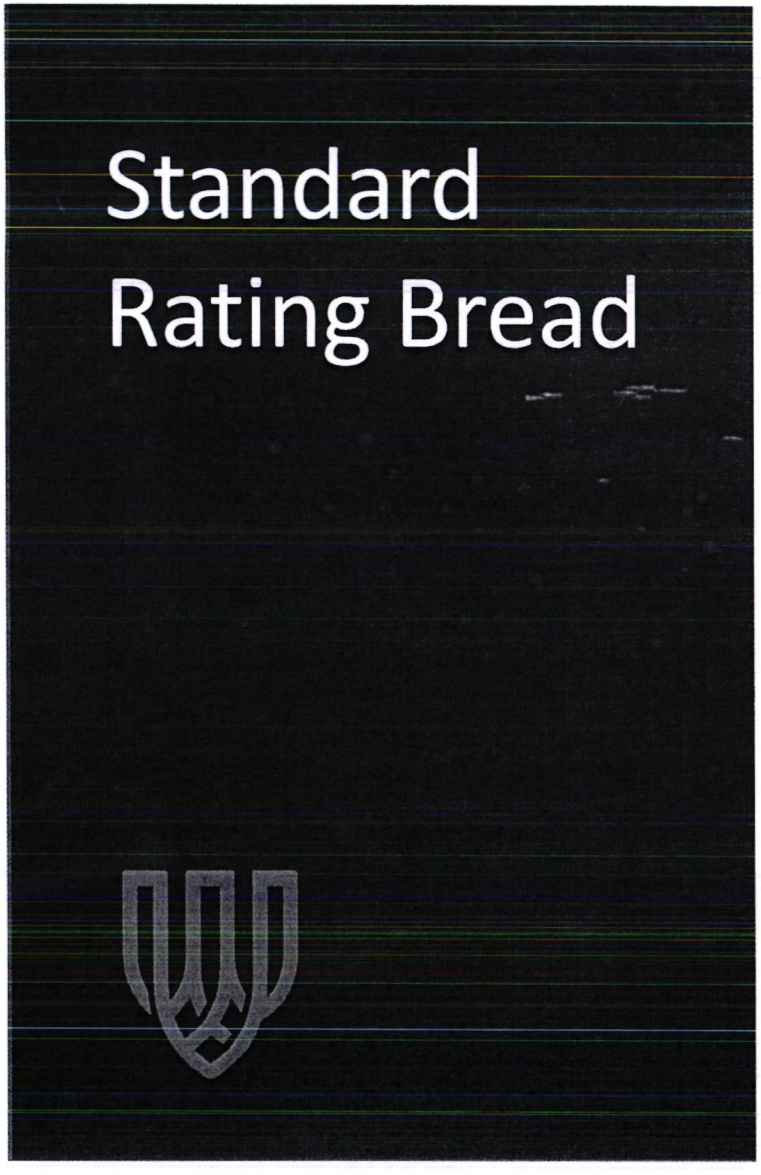
Parliamentary Approval to Issue Regulations - Section 67 (2)

The Finance Bill, 2021 proposes to delete section 67 (2) of the VAT Act that requires the Cabinet Secretary for National Treasury & Planning to seek parliamentary approval prior to issuing any regulation in respect to VAT.

Although the proposed provision may facilitate faster decision making and passing of regulations, it puts the common citizen at the risk of punitory regulations as there will be no audit of those regulations by the National Assembly.

The amendment is also contradicting the Statutory Instruments Act that requires such regulations to be presented before Parliament and if not presented, it shall cease to have effect immediately after the last day that it was supposed to be presented. It thus removes parliaments constitutional right for the approval, and this may result in the regulations lacking legal effect unless there is parliamentary approval of the same.

We propose that section 67 (2) is maintained to ensure that there is parliamentary oversight in relation to regulations for the better carrying out of the VAT Act, 2013.



The Finance Bill, 2021 proposes deletion of Section 13A to the Second Schedule of the Value Added Tax Act, 2013, that provides for zero rated supplies which currently covers the supply of ordinary bread. This will translate to bread being taxed at the standard rate of 16%.

Bread is considered as a basic commodity by Kenyans and is largely consumed as a staple food by persons who can be categorized as living within the poverty level. Kenya is ranked the third poorest lower-middle-income country globally in a new study released by the World Bank. The World Bank State of Economic Inclusion Report 2021 has shown that more than forty per cent of Kenyans currently live in extreme poverty.

The minimum wage for a general labourer including cleaner, sweeper, gardener, children's ayah, house servant, day watchman, messenger is currently set at KES 7,240.95 in certain areas. This translates to a daily income of roughly KES 241. As such, ordinary bread is one of the cheapest food commodities that a large portion of Kenyans rely upon to feed themselves and their families, currently retailing at between KES 50 and KES 55 per 400 grams loaf. Despite this, it is fair to say majority of Kenyans are barely even able to afford this.

The economic and social disruptions induced by the Covid-19 pandemic eroded progress in poverty reduction in Kenya.

In November 2020, the World Bank in a Kenya economic update noted that the pandemic pushed an extra two million Kenyans into poverty and increased poverty levels by four percentage points. "Kenya's poor population was predominantly rural and less well educated pre-Covid-19, however, the shock of Covid-19 created a new group of 'newly' poor who tend to be urban with household heads who are younger and more educated," notes the report.

Manufacturers in this industry have always appreciated the nature of this commodity with it being considered it a basic necessity thereby retaining prices over the years. It is however imperative to understand the main cost centers that could affect the pricing of these products.

i. Fuel

Bread being a basic commodity, manufacturers must invest significantly in distribution of this product all over the country. The shelf life of this commodity ranges between 2 -3 days which means that this is a constant and significant cost for the manufacturer. Fuel is a key component and the greatest expense in terms of distribution of the commodity. Please see below some excerpts of the maximum retail prices as set by the Energy & Petroleum Regulatory Authority.

ANNEX I

15th May 2020 - 14th June 2020				
		MAXIMUM PUMP PRICES		
	TOWNS	Super Petrol (PMS)	Automotive Diesel (AGO)	Kerosene (IK)
		KShs/L	KShs/L	KShs/L
1	**Mombasa**	**80.85**	**75.88**	**77.29**
2	Kilifi	81.56	76.59	78.00
3	Likoni Mainland	81.20	76.23	77.65
4	Kwale	81.20	76.23	77.65
5	Malindi	81.76	76.81	78.21
6	Lungalunga	81.91	76.95	78.36
7	Voi	82.31	77.36	78.76
8	Taveta	83.73	78.77	80.18
9	Lamu	84.14	79.18	80.59
10	Hola	84.42	79.46	80.88
11	**Nairobi**	**83.33**	**78.37**	**79.77**
12	Thika	83.33	78.37	79.77
13	Machakos	83.57	78.60	80.01
14	Kajiado	83.74	78.78	80.20

EPRA
Energy & Petroleum Regulatory Authority

PUBLIC NOTICE

Pursuant to Section 101(v) of the Petroleum Act No. 2 of 2019, Legal Notice No 106 of 2010 and Legal Notice No. 26 of 2012, the Energy & Petroleum Regulatory Authority (EPRA) has calculated the maximum retail petroleum prices, which will be in force from **15th May to 14th June 2021**

A. MAXIMUM RETAIL PETROLEUM PRICES (INCLUSIVE OF VAT)

	15th May 2021 - 14th June 2021	MAXIMUM PUMP PRICES		
		Super Petrol (PMS)	Automotive Diesel (AGO)	Kerosene (DPK)
	TOWNS	KLS/L	KLS/L	KLS/L
1	**Mombasa**	**123.95**	**105.27**	**95.46**
2	Kilifi	124.66	105.98	96.17
3	Likoni Mainland	124.31	105.62	95.82
4	Kwale	124.31	105.62	95.82
5	Malindi	124.87	106.19	96.38
6	Lungalunga	125.02	106.34	96.53
7	Voi	125.42	106.75	96.93
8	Taveta	126.84	108.15	98.34
9	Lamu	127.25	108.57	98.76
10	Hola	127.54	108.85	99.05
11	**Nairobi**	**126.37**	**107.66**	**97.85**
12	Thika	126.37	107.66	97.85

	15th May 2021 - 14th June 2021	MAXIMUM PUMP PRICES		
		Super Petrol (PMS)	Automotive Diesel (AGO)	Kerosene (DPK)
	TOWNS	KLS/L	KLS/L	KLS/L
75	Timboroa	127.14	108.70	98.92
76	Nandi Hills	127.09	108.66	98.87
77	Kaiboi	126.95	108.52	98.73
78	Kaimuru	127.45	109.01	99.23
79	Jaldeboi	127.80	109.36	99.58
80	Suboti	127.42	109.04	99.25
81	Chepareria	128.11	109.67	99.89
82	Lomut	129.72	111.28	101.50
83	Burgich	128.52	110.08	100.30
84	Sugot	129.65	111.21	101.43
85	Lodwar	131.08	112.64	102.86
86	Kakuma	132.67	114.24	104.45

WESTMINISTER
CONSULTING

As evident from the above, the cost of fuel (taking Super Petrol as an illustration) has increased by 35% from May last year to May this year. A 35% increment in fuel cost translates to an increased cost in distribution costs. Any further increments will again have to be factored in the price of the commodity.

ii. Wheat

It is estimated that a tonne of wheat flour, which is the main ingredient to make bread increased from KES 25,300 to KES 33,000 representing a 30 percent raise in the past few months. This resulted in manufacturers, after many years of the constant prices, to only recently, increase the ex-factory price of bread as these constant increases in world wheat and other raw material prices could not be manageable at the older prices.

The zero-rate status of bread is what enabled manufacturers to claim input VAT which was the reason for stability in the price of bread over the last few years. As evident from the above, manufacturers will not be in a position to absorb this additional costs and will have to eventually pass it on to the consumer. The introduction of 16% VAT on this commodity will further increase the average price of a 400gram loaf of bread by approximately KES 8 – KES 10 thereby making it unaffordable to majority of Kenyans. The reverse effect of this, is that the demand for bread will fall drastically as the taxes will reduce the gross margins of manufacturers forcing them to close down permanently further leading to loss of jobs.

Bread will transit to be a luxury item only affordable by the middle class and rich members of our society. It is important for taxation to be just and equitable. As such we must adopt policies that will tax the rich and not strain the poor who are barely making ends meet.

Our Proposed Amendment

We propose that bread is maintained under the zero-rating schedule.

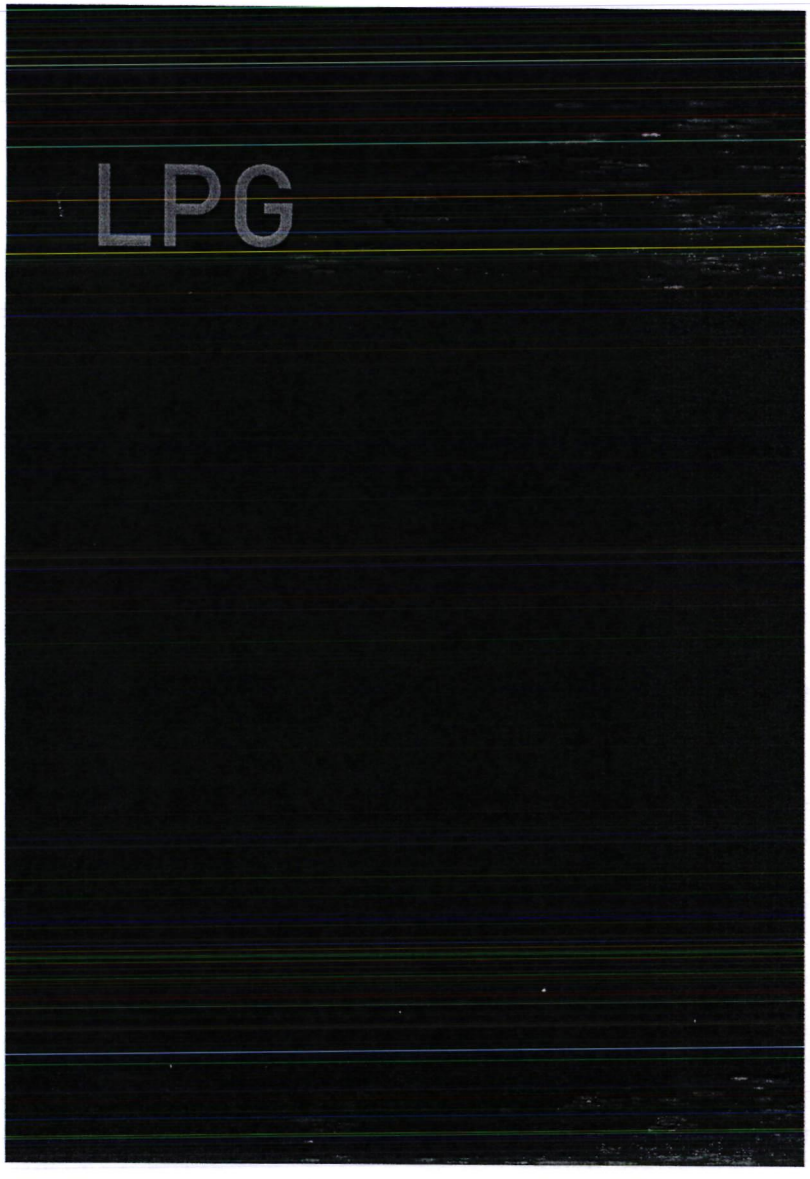
Others

The Finance Act 2020 amended the Second Schedule to the VAT Act (Zero Rated supplies) by deleting the supply of Liquefied Petroleum Gas (LPG) including propane (with effect from 1 July 2021). LPG henceforth shall be subject to VAT at the standard rate of 16%.

Universal access to modern energy services by 2030 is one of the three goals of the Sustainable Energy for All for which Kenya is a part of and in a bid to deal with the problem of traditional sources (wood, charcoal, or kerosene) of cooking energy, Kenya's government set a long term goal of having households adopt clean cooking fuels which include Liquefied petroleum gas (LPG).

Kenyan households have since June 2016 been enjoying low cooking gas prices after the Treasury scrapped the tax on LPG to cut costs and boost uptake among the poor who rely on dirty kerosene and charcoal for cooking. The reintroduction of VAT on cooking gas will consequently reverse gains made in weaning households off dirty fuel.

Several stakeholders, among them the Energy and Petroleum Regulatory Authority, have stated that a more expensive LPG would push many households to biomass sources like wood and charcoal.



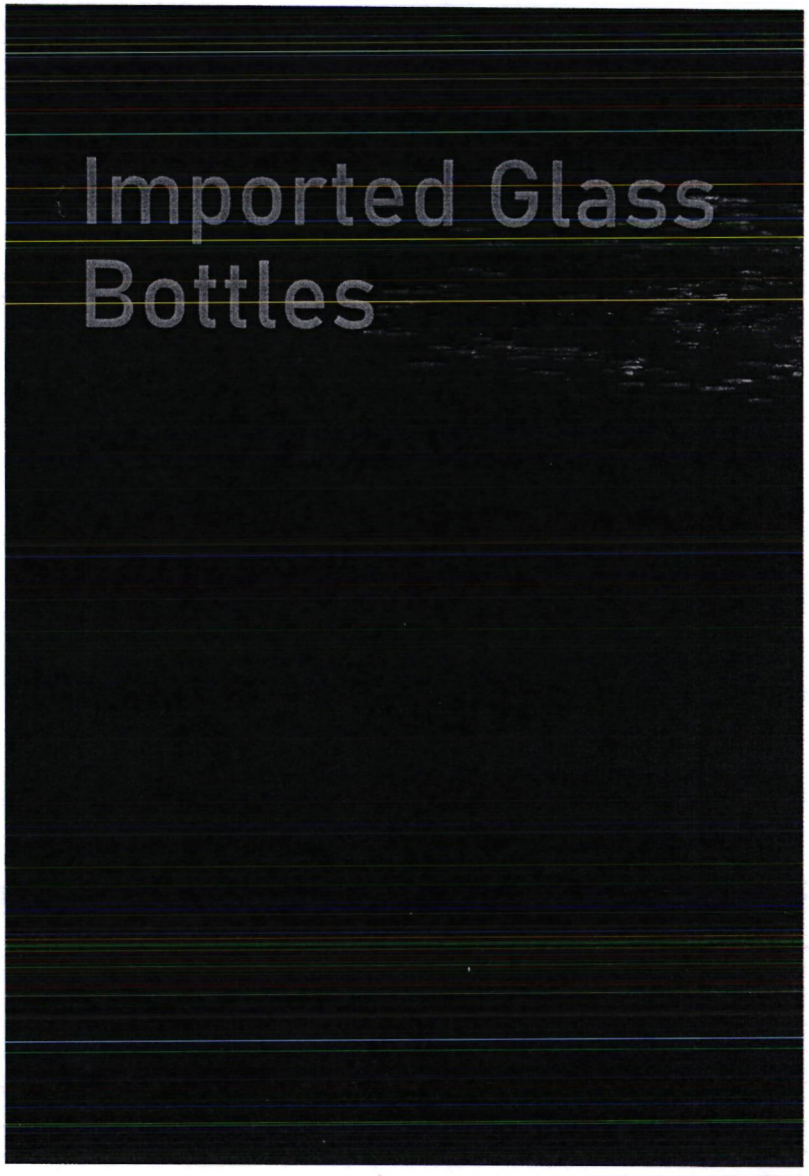
It is important to note that LPG is already relatively expensive to the cost of competing fuels in Kenya. As a result, the rise in the cost of cooking gas is expected to pile pressure on families that are struggling to foot daily bills due to job losses and drastic cuts in earnings in the wake of the COVID 19 pandemic.

Our Proposed Amendment

We propose that an amendment is made to the second schedule of the VAT Act under the Finance Act 2021, to delete the supply of LPG from standard rated supplies. It is important to take into account that until the retail price of LPG has been brought down substantially, it is unlikely that lower-income Kenyans will sustainably switch to LPG and subsequently affecting the country's goal to achieve clean cooking by 2030.

Excise Duty Act





The Proposed Amendment

The Bill proposes to amend the rates of imported glass bottles (excluding imported glass bottles f packaging of pharmaceutical products) from 25% to 0%. The Bill further proposes to delete the d "imported glass bottles (excluding imported glass bottles for packaging of pharmaceutical produc the Excise Duty Act.

The Implication

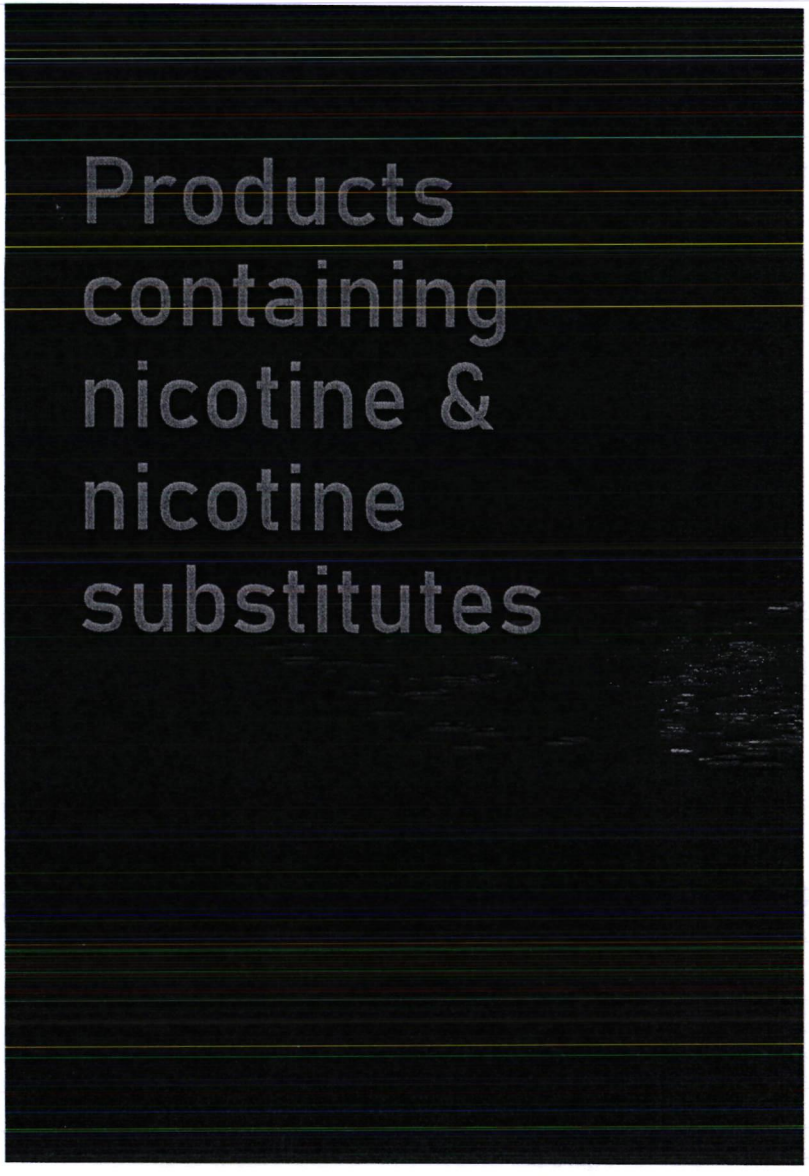
This deletion will have a negative impact on Kenyan glass bottle manufacturers who have been exp unfair trade practices from countries within Common Market for Eastern & Southern Africa (CO India, China among others that offer subsidies. A case in example being the Export Subsidy Progra sponsored by the Ministry of Trade, Industry and SMEs in Egypt. Law No.155/2002 was signed to the Export Development Fund (EDF) to create an incentive for Egyptian companies to push for n exports. The subsidy ranges from 1-10% of the total value of exports.

It is imperative to note that the raw materials utilized by glass bottle manufacturers are almost on percent locally procured. This will therefore instigate a chain reaction in the local supply chain aff only the glass manufacturers, but the players of the forward and backward linkages created by the

We would like to mention that where this amendment was instigated by the Tanzania case against East African Court of Justice, a prudent way of addressing this would have been to define the tern "imported" to exclude goods that are manufactured withing the East African Community that mee of Origin Criteria envisaged by Article 14 of the Protocol Creating the Customs Union as read wi African Community Rules of Origin Regulations.

We also call upon the National Treasury and the Ministry of Industrialization, Trade and Enterprise Development to implement the Trade Remedies Act as a matter of urgency. This will assist to curb penetration of dumped and subsidized products from foreign states into Kenya. Our textile industry, agro based industries, steel industry, glass industries that are thriving have been vulnerable to cheap imports. There is dire need to implement the Trade Remedies Act by imposing countervailing measures such as anti dumping and suspended duties to protect these local manufacturers from unfair competition.

We propose that an amendment is made to define the term "imported" to exclude goods that are manufactured within the East African Community to cater for glass bottle manufacturers in the region who look to export their products to Kenya. This will eliminate the preferential treatment to locally manufactured glass bottles in Kenya which are now subject to anti-dumping duties against similar products from Tanzania and the other EAC partner states.



The Proposed Amendment

The Bill proposes to introduce an excise of KES 5,000 per kg on products containing nicotir substitutes intended for inhalation without combustion or oral application but excluding me products approved by the Cabinet Secretary responsible for matters relating to health and o manufactured tobacco and manufactured tobacco substitutes that have been homogenized ar reconstituted tobacco, tobacco extracts and essences.

The Implication

This can be construed to expand the tax base by adding more products that contain nicotine nicotine substitutes as there was no excise tax on such products under Kenya's excise laws.

Nicotine pouches are marketed as a safer alternative for smoking addicts who want to quit t but are addicted. The industry players on their part argue that this would mean that excise d nicotine pouches would be more than twice the excise paid on cigarettes which would make product unviable.

More recently, BAT Kenya, a global multinational in Kenya Launched non-tobacco nicotine the Kenyan Market under the brand called Lyft. BAT further rolled out investment of 2.5 bi new factory within Kenya to produce the nicotine pouches for the market. The factory is ex deliver an estimated KES 75 billion in dollar generating export revenues to the nations GDI support the creation of over numerous highly skilled jobs opportunities for Kenyans.

The potential impact of this tax hereof is substantial as it will not motivate smokers to seek safer and less harmful options. It will also have an economic impact whereby BAT will not be able to go back to the market with the product which could result in job losses and lost revenue opportunities associated with the new investment.

We propose that the current structure is retained so that these nicotine pouches are cheaper compared to cigarettes and other harmful products thereby encouraging use of the same.

On the same lines, it would be wise to set up a more predictable way of taxing these products. While we agree that we have a social responsibility to minimize consumption of these products, we must not negate the economic impact these manufacturers have on the economy. Their contribution deserves more predictability so that they can plan their business better with increased certainty. As has been the case for some time now, this and the alcohol industry are the main industries overburdened with excise taxes and related levies. There are large backward and forward linkages created by these industries such as the farmers who place significant reliance on the performance of these industries.

pwc

The Chairperson and Members
Departmental Committee on Finance and National Planning
Main Parliament Building
P.O. Box 41482 - 00100
Parliament Road
Nairobi, Kenya

Sent via email to clerk@parliament.go.ke

Attention: Clerk of the National Assembly

31 May 2021

Dear Sir,

Subject: In the matters under consideration by the National Assembly – The Finance Bill, 2021 (National Assembly Bill No. 18 of 2021)
Submissions of representations for exemption from Value Added Tax ("VAT") of taxable goods supplied to fisheries and fish processors on behalf of Victory Farms Limited

Pursuant to Article 118(1)(b) of the Constitution of Kenya and pursuant to Standing Order 127(3), The Departmental Committee on Finance and National Planning, now considering the Finance Bill, 2021 ("the Bill"), has called for public participation and involvement in the legislative process.

PricewaterhouseCoopers Limited ("PwC", "us", "we") are pleased to submit a memorandum on behalf of our client, Victory Farms Limited ("Victory Farms"), proposing an exemption from VAT on taxable goods supplied to fisheries and fish processors.

We would be grateful for an opportunity to appear before the Committee to deliberate with our proposal and recommendations. Should you wish to discuss further, please do not hesitate to contact Nicholas Kahiro or the undersigned on +254 20 285 5000 at your convenience.

Yours faithfully,
For and on behalf of PricewaterhouseCoopers Limited

Maurice Mwaniki
Associate Director

CC:
The Cabinet Secretary
The National Treasury & Planning
Treasury Building
Harambee Avenue
Nairobi

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1. Background

1.1. Victory Farms

Victory Farms is an aquaculture fish farm founded in 2016. In just five years, Victory Farms, based in Roo, Homa Bay, is the largest fish producer in East Africa. The company is also sub-Saharan Africa's fastest-growing fish farm. The company currently sells an average of 25 metric tons of fish a day, equivalent to more than 20 million high protein meals per year. 95% of the fish produced at Victory Farms is supplied to low-income communities.

Victory Farms is a vertically integrated aquaculture business, owning hatchery ponds, deep water cages, a processing plant, and cold chain distribution to mass markets in Nairobi and Western Kenya. Below is a description of Victory Farms' supply chain:

a) Hatchery – The company has a hatchery on the shores of Lake Victoria, where local tilapia species are bred. The fish stay within the hatchery until they are a few inches in length.

b) Cage production – The fish is taken by boat to large, offshore cages on the lake. Victory Farms ensures that there is consistent supply through smart stocking schedules.

c) Transport – Following harvest, the fish is gutted, cleaned, and immediately iced to preserve the quality. The fish is then transported in refrigerated trucks to distribution hubs in Western Kenya and Nairobi.

d) Cold storage – The fish is kept in commercial refrigeration units to maintain freshness and quality.

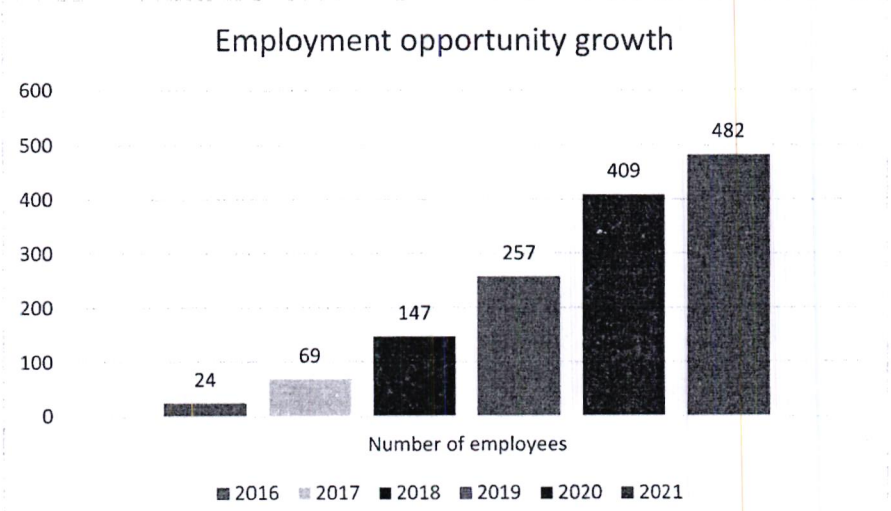
e) Delivery – The fish is delivered to Victory Farm customers through sales branches in Western Kenya and Nairobi. Western Kenya branches are primarily located in smaller towns and cities, enabling them to serve one of the fastest growing demographics in Kenya. The Nairobi sales branches are located in low income neighbourhoods and cater primarily to market women who cook and resell the fish.

Victory Farms only sells fish in the local market. In the long term, the company has plans to start exporting fish making it a potential foreign exchange earner for Kenya. The company's mission is to build a commercial farm that can feed the 2 billion Africans with affordable, accessible and healthy protein over the next two decades, while also taking extensive measures to protect and restore the environment in which the farm operates.

1.1.1. Victory Farms' contribution to the economy

a) Employment

When Victory Farms started operations in Kenya in 2016, they had 24 employees. The number of employees has grown over the last five years to reach 482 employees. Victory Farms is the largest employer in Homabay, and 70% percentage of their workforce are women. Below is graph showing the employment opportunities Victory Farms has created over the last five years.



In addition to creating direct employment, Victory Farms has created indirect employment in their supply chain. They supply about 6500 market women with fish for sale through the company's retail branch network in Western Kenya and Nairobi. .

b) Taxes

On average, Victory Farms pays on average KES 4 million per month in Pay As You Earn ("PAYE") to the exchequer. Since 2016, the company has paid KES 116 million in PAYE and this figure will continue to grow as it employs more and more people.

c) Solution to 'sex for fish trade'

Difficulty in accessing fish has led to the practice colloquially known as 'sex for fish' between fishermen and vulnerable women fish sellers. The 'sex for fish' trade has been a means for women fish sellers to get supplies for their business. This practice of 'sex for fish' has long been one of the main factors driving the spread of Human Immunodeficiency Virus ("HIV") and Acquired Immunodeficiency Syndrome ("AIDS") among the fisherfolk living along Lake Victoria. Victory Farms provides an alternative source of fish to the women fish sellers, enabling them to shun trading sexual favors in exchange for fish. Victory Farms has thus empowered women fish sellers who would normally depend on men for their fish supplies.[1]

[1] https://www.the-star.co.ke/news/big-read/2019-06-28-is-tilapia-caging-solution-to-sex-for-fish-trade/

d) Creating shared value

Victory Farms has invested over KES 3 million in community projects such as rescue boats and life jackets, infrastructure development, education scholarships, solar lights and potable water supply. Victory Farms budgets annually for such projects.

2. Aquaculture in Kenya

2.1. Aquaculture contribution to the Kenyan economy

2.1.1. Definition of Aquaculture

Aquaculture involves cultivating freshwater and saltwater aquatic life under controlled conditions. The Food and Agriculture Organisation of the United Nations ("FAO") defines aquaculture as:

> *"Aquaculture is the farming of aquatic organisms, including fish, molluscs, crustaceans and aquatic plants.* ***Farming implies some form of intervention in the rearing process to enhance production, such as regular stocking, feeding, protection from predators, etc.*** *Farming also implies individual or corporate ownership of the stock being cultivated. For statistical purposes, aquatic organisms which are harvested by an individual or corporate body which has owned them throughout their rearing period contribute to aquaculture, while aquatic organisms which are exploitable by the public as a common property resources, with or without appropriate licences, are the harvest of fisheries."* (Emphasis ours)

Aquaculture is contrasted with 'capture fisheries' which is also known as 'wild fisheries'. Capture fisheries refers to all kinds of harvesting of naturally occurring living resources. Capture fisheries do not involve control in any meaningful way and the aquatic life needs to be "captured".

2.1.2. Aquaculture production in Kenya

According to the Economic Survey 2020, fishing and aquaculture contributed a paltry 0.5% to Kenya's Gross Domestic Product ("GDP") as of 2019. The Kenya Agricultural and Livestock Research Organization estimates that aquaculture currently employs over 50,000 Kenyans along the fish value chain who are engaged in aquaculture inputs and production, post-harvest handling and processing, services provision, marketing, and trade.

Fish catch from aquaculture stood at 18.5 thousand tonnes, accounting for only 12.8 % of the country's fish output in Kenya. Production of fish through aquaculture has declined by 23% from peak production in 2014 which stood at 24 thousand tonnes.[2] The decline in production has been attributed to inadequate water retention capacity of ponds in some counties, poor extension services, inadequate capacity support, poor husbandry practices, low quality and quantity of fish farm inputs, poor marketing infrastructure, dependency syndrome on government/donor support and lack of value

[2] Obiero K, Meulenbroek P, Drexler S, Dagne A, Akoll P, Odong R, Kaunda-Arara B, Waidbacher H (2019) The Contribution of Fish to Food and Nutrition Security in Eastern Africa: Emerging Trends and Future Outlooks.

addition.[3] This underscores the need to continually invest in the sector and enact tax policies that nurture sustainable growth in production.

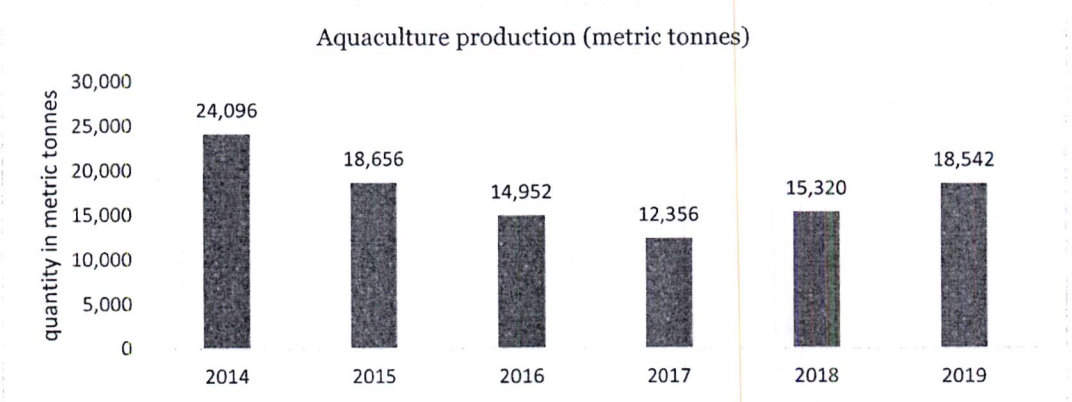


Figure 1: Aquaculture production 2014 – 2019

2.1.3. Fish Consumption in Kenya

Fish in particular, is a cheaper source of protein, healthy fats, and unique essential nutrients and therefore has a vital role in addressing food and nutrition insecurity in Kenya. Fish provides high-quality essential amino acids, omega-3 fatty acids, minerals, especially iron, zinc, and vitamins. As such, fish is widely recognized as "nature's superfood". Fish are a source of high quality protein that contributes to nearly 20% of global animal protein intake. Fish has a low feed conversion rate meaning the amount of feed required for fish is much less than that of other animal proteins for example Tilapia can be produced using just 20% of the feed required to produce an equivalent volume of beef. Fish is thus a healthy, more efficient and sustainable source of protein than beef, pork and poultry.

The Budget Policy Statement 2021 estimates the per capita fish consumption in Kenya as 4.6 kg per capita per year. Kenya's per capita fish consumption is lower than Africa's per capita fish consumption, which stands at 10.1 kg per capita, and further, than the global level which stands at 19.8 kg per capita.[4] The share of fish in Kenya's animal protein intake declined from 10 percent in the early 1990s to 8 percent in the early 2010s. The share of fish in Kenya's animal protein intake is again much lower than the global average (20%).

Kenya's domestic fish production has been a primary factor affecting its fish consumption; that is, an increase (or decrease) in its domestic fish production tends to drive up (or down) its per capita fish consumption.[5] The downward trend in production through wild capture and aquaculture will not lend much support to maintaining the already low consumption in Kenya. Lower production has led to

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[3] Mary A. Opiyo, Esther Marijani, Patriciah Muendo, Rezin Odede, William Leschen & Harrison Charo-Karisa (2018) A review of aquaculture production and health management practices of farmed fish in Kenya.

[4] The Contribution of Fish to Food and Nutrition Security in Eastern Africa: Emerging Trends and Future Outlooks.

[5] Obiero, Kevin & Cai, Junning & Abila, Richard & Ajayi, Oluwafemi. (2019). Kenya: High Aquaculture growth needed to improve food security and nutrition.



reliance on imported frozen fish, which put competitive pressure on domestic fish production. Imported frozen fish is smaller and less nutritious due to the preservation techniques used hence consumers pay more for less.

2.2. How aquaculture interacts with Kenya's macroeconomic policies

2.2.1. Aquaculture as an enabler of the Big Four Agenda

The Big Four Agenda is the Government's set of priority programs and reforms to foster economic development and provide solutions to various socio-economic problems facing Kenyans. The Big Four Agenda was integrated into the Third Medium Term Plan of Kenya's long-term development blueprint – the Kenya Vision 2030. Vision 2030 aims to transform Kenya into an industrialized middle-income country, offering a high quality of life to all Kenyan citizens.

The Big Four Agenda is hinged on four pillars: food security and nutrition, universal healthcare, affordable housing, and manufacturing. The United Nations' Committee on World Food Security defines food security as *"a situation in which all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life"*. In the Big Four Agenda, the Government seeks to ensure 100% food and nutrition security through expansion of food production and supply, reduction of food prices to ensure affordability and support of value addition in the food processing value chain. One of the specific initiatives identified by the Government to ensure food security is enhanced large-scale production through aquaculture. Increased aquaculture can contribute to ensuring food and nutrition security through:

(i). **Increasing food availability** - Increased aquaculture production will enhance the overall food supply for the general population. Aquaculture can provide year-round fish supplies which will satisfy the growth in fish demand and reduce pressure on wild fish stocks, which are highly susceptible to climate change. In addition to being used directly as human food, fish can also contribute indirectly to food availability when used as a source of feed (fishmeal) for poultry/livestock feeds.

(ii). **Increasing access to food** - The aquaculture value chain can positively contribute to employment creation, poverty alleviation, and income generation. Aquaculture can give opportunities to food-insecure households, providing them a critical source of income and livelihood.

(iii). **Increasing nutrition security** – Increased fish supply through aquaculture will provide a cheap source of sufficient protein containing all essential amino acids, fatty acids, vitamins, and minerals required for a healthy diet. Increased consumption of fish can reduce the risks of both malnutrition and non-communicable diseases. Fish produced through aquaculture has more constant nutrient composition than wild catch fish, whose environment, food and access to food varies during the year. By controlling the composition of aquaculture feeds and other inputs, healthy fish and healthful fish products with the optimal nutritional composition can be supplied.

In the 2021 Budget Policy Statement, fisheries and aquaculture are among the programmes the Government is prioritizing to facilitate the attainment of food nutrition and security in the Medium-Term Expenditure Framework ("MTEF") period 2021/2022 and 2023/2024. In the MTEF period, it is intended for aquaculture production to grow to 84 thousand metric tonnes and for fish consumption to increase from 4.6 kg to 10 kg per capita per year. Considering the foregoing, the National Assembly should consider tax policies that will foster growth and investment in aquaculture and facilitate the achievement of the food and nutrition security pillar of the Big Four Agenda.

2.2.2. The Blue Economy and economic growth

The Third Medium Term plan identifies the blue economy as one of the sectors that have a high potential of spurring economic growth and development. The blue economy refers to sustainable use of aquatic and marine spaces and encompasses aquaculture. The Third Medium Term plan recognizes that despite the availability of natural resources for use that can develop the blue economy, such resources have not been developed to full capacity.

As highlighted before, fisheries and aquaculture only contribute 0.5% to Kenya's GDP. In 2016, FAO estimated that Kenya's aquaculture potential stood at 1.14 million hectares of farming area with capacity to produce 11 million tonnes of fish worth well over 750 billion Kenyan shillings (about USD 7.3 billion) per annum. Apart from increased fish production, aquaculture can potentially contribute to the economy due to its forward and backward linkage to other productive sectors of the economy such as the manufacturing and service sector. Subsequent growth of the aquaculture industry will also lead to a marked growth in the manufacturing and trade industry in the next few years as it grows to keep up with the demand to supply quality equipment and feed to a then robust aquaculture industry. This growth will also be directly experienced by service providers who provide logistics, cooling and storage services to aquaculture producers. The potential contribution of aquaculture to the economy justifies friendly tax policies.

2.3. Challenges facing aquaculture in Kenya

2.3.1. High cost of inputs

The production of fish through aquaculture tends to be capital and resource intensive. Aquaculture requires highly specialized inputs which are often expensive. The cost of inputs for fisheries and fish processors constitute up to 75% of the total expenses of many companies in the industry; with VAT especially at the current 16% being a substantial portion of that cost. Inevitably, these high costs are passed on to consumers making fish more unaffordable. Removal of VAT on these inputs is one of the suggestions made to improve access and to increase investment in aquaculture.

2.3.2. lack of adequate cold storage facilities

Fish is a delicate food that spoils easily and can become unsafe. Therefore, it must be refrigerated from the time it is caught until it is cooked. Many fish farmers do not have adequate access to cold storage facilities or inputs such as cooler boxes to preserve the fish. With the right cooling infrastructure and access to cheaper cooling equipment (deep freezers and cooler boxes), more fish would make it to the market and fish farmers would earn more for their catches.

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2.3.3. *Competition from cheap imports*

To meet the market demand for consumption fish, Kenya imports fish from Uganda, the rest of Africa, Europe and China. Fish imported from China is especially cheap making it difficult for Kenyan farmed fish to compete. These imports drive down domestic fish prices and hence disincentivize fish farmers and reduce their willingness to invest.

2.3.4. *Low preference for fish*

Traditionally there have been non-fish eating communities, due to consumer perceptions and exposure to the product. Although consumption is increasing, the rate of increase is not enough to boost the sector so that it can develop faster and realize its full potential.

2.3.5. *Water pollution and droughts*

Most fish farmers depend on natural water supplies, which are prone to pollution and scarcity.

3. Tax proposal

There has been a history of VAT incentives for the fishing sector to reduce cost and encourage growth and investment. The Finance Act, 2017 introduced paragraph 14 of Part A of the Second Schedule of the VAT Act under which "*taxable goods supplied to marine fisheries and fish processors upon recommendation by the relevant state department*" were zero rated. The provision only applied to 'marine fisheries' which meant the provision would only apply to activities conducted to extract fish from the ocean. This provision would exclude inland fisheries which according to FAO are defined as activities conducted to extract fish and other aquatic organisms from 'inland waters'. This in effect meant that the provision did not apply to most aquaculture operations as they are conducted in 'inland waters' which includes rivers, lakes, dams, ponds and streams.

In 2018, the Tax Laws (Amendment) Act, 2018 deleted the zero-rating provision and made "*taxable goods supplied to marine fisheries and fish processors upon recommendation by the relevant state department*" exempt from VAT under paragraph 97 of Part I of the First Schedule of the VAT Act. The exemption was repealed through the Tax Laws (Amendment) Act, 2020 with effect from 25 April 2020.

To ensure affordability and to foster the growth of the aquaculture sector, we propose an amendment that reintroduces the VAT exemption under the First Schedule Part I of the VAT Act, that applies to all fisheries – whether inland or not:

> "*Taxable supplies including for fish feeding and handling, water operations, cold storage, fish cages, pond construction and maintenance, and fish processing and handling, imported or purchased for* ***direct and exclusive use*** *in the operations of fisheries and fish processors upon recommendation by the relevant state department.*"

As stated above, one of the challenges facing aquaculture in Kenya is the high cost of inputs which account for 75% of the total production costs. These inputs are subject to VAT at 16%. Currently, the supply of fish is exempt from Value Added Tax ("VAT") under paragraph 19 of the Value Added Tax Act, 2013 ("VAT Act"). Therefore, aquaculture companies such as Victory Farms cannot claim input

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VAT incurred on inputs utilized to produce, process, or store fish. Inevitably, a portion of the irrecoverable input VAT incurred on the inputs is passed on to the consumer; this cost can be up to 55% of the total VAT cost incurred. The high cost of the inputs plus the irrecoverable VAT cost makes domestic fish more expensive and less competitive compared to imported frozen fish

3.1. Justifications for the proposed amendment

3.1.1. Reduced cost of fish

VAT exemption of the supplies above will significantly reduce the cost of the fish supplied within Kenya thus providing an affordable and nutritious source of protein to Kenyans, especially low-income and food-insecure communities.

3.1.2. Increased investment and production

Inputs account for the largest percentage of costs for aquaculture companies. An exemption from VAT on the supplies above would ensure more capital is available for investment and promotion of growth within the sector. Increased investment in aquaculture will increase fish production, which is a policy priority in Kenya's economic blueprint.

3.1.3. Reduced reliance on imported fish

With the VAT exemption, fish produced domestically will be more competitive against imported fish. This will reduce dependence on fish imports to support the growing demand for fish.

3.1.4. VAT exemptions in other jurisdictions

Kenya will not be unique in providing exemptions for inputs used in aquaculture. Other African countries such as Rwanda, The Gambia and Cameroon have implemented VAT exemptions for inputs used in aquaculture as shown below:

Country	Exemption
Rwanda	Aquaculture and fisheries inputs which includes: Fishing nets and contour, Turning seine, Pond Seine, Landing-net Incubator for fish eggs, Water sampler, Plankton net, Echo-probe and accessories, Oxygen pump during transport of fingerlings, Aquarium fish equipment, Chemical products for limnology, Limnological kit, Greenhouse structures for increasing pond temperature to 28 degrees, wading boots for staying dry while working in water, Bird netting to protect ponds from bird predation, Floating fish cages, mesh for grading fish by size, Oxygen meter for testing dissolved oxygen levels, High density Poly Ethylene pond liners, Live fish transportation tanks, air pumps, blowers, air diffusers, Aerators, piping and hoses, shading cloth for reducing stress on photosensitive fish, Ultra Violet,

	Methyltestosterone, Pelletizer of different sizes, Cage protection nets, braids, ropes and sewing threads, automatic feeders, Plastic sheets ("pond sheets"), Aquaculture laboratory equipments and materials and Special vehicle for fish production transport. Equipment and materials of the processing and packaging line of aquaculture products: Huller of different sizes, Millers of different sizes, mixers of different size, Extruders of different size, Layers of different sizes, Boilers, Screw conveyors of different sizes, Air conveyors of different sizes, Cooling conveyors of different sizes, Cooling conveyor of different sizes, Paddle wheel aerator, Electric driven aerators, Rotational arm paddle wheel aerator, Floating fish feeds, Automatic feeders, Cage protection nets, braids, ropes and sewing threads, Land volute pumps, Frozen fish chopping machine, Speed fish mincing machine, Large axial flow pump, Assembling type plastic impeller, dewatering pumps, Waste water pumps, Methyltestosterone and Fish processing equipment.
Gambia	Agriculture and aquaculture inputs and equipment.
Cameroon	Pesticides, fertilisers and inputs, as well as other agricultural, livestock and fishery inputs used by the producer.

4. Conclusion

The continued imposition of VAT on inputs required for aquaculture results in irrecoverable input VAT, and therefore, producers and farmers inevitably pass on some of the cost of the inputs to this final consumer making the product less accessible and less competitive compared to imported frozen fish. An exemption from VAT of inputs utilised will ensure cost savings that can be passed on to the final consumer.

PETROLEUM INSTITUTE OF EAST AFRICA
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PIEA/ADMIN 27B

May 26, 2021

The Clerk
Kenya National Assembly
Parliament Buildings
P.O Box 41842 - 00100
NAIROBI

ATT: MR. MICHAEL SIALAI, CBS

Dear Sir.

SUBMISSION OF MEMORANDUM FOR THE FINANCE BILL, 2021

In accordance with article 118(1)(b) and the National Assembly Standing Order 127(3), the Petroleum Institute of East Africa (PIEA) takes this opportunity to submit our comments for the Finance Bill, (National Assembly Bill No. 18 of 2021).

We are a professional body for the oil and gas industry in the East Africa region. Part of our mandate is to advocate that Kenyan laws and policies support socio-economic development.

The petroleum industry has and continues to play a significant role in the Country's petroleum, energy and manufacturing sectors in line with achieving the objectives for the Country to attain vision 2030.

We propose the attached amendments to the Finance Bill 2021, in support of the National Government's big four development agenda, which we envisage will facilitate an enabling and progressive legislative framework that protects especially the health of Kenyans, environmental conservation and further guarantee progress towards the country's achievement of the Sustainable Development Goals (SDGs).

We will be available to explain our proposals further if required and look forward to attending the parliamentary hearing to defend our proposals in person.

Yours Sincerely,

Wanjiku Manyara,
General Manager

Cc:

HON. GIKARIA DAVID
The Chairman
Parliament Departmental Committee on Energy
Kenya National Assembly
NAIROBI

DIRECTORS: OLA Energy, KenolKobil, Total (K) Ltd, Vivo Energy, Galana Oil (k) Ltd, Gulf Energy, Hashi Energy, National Oil Corporation, Kenya Pipeline Co., Kenya Petroleum Refineries,

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Parliament Departmental Committee on Finance and National Planning
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The Chairman
Parliament Departmental Committee on Environment and Natural Resources
Kenya National Assembly
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HON. ALI, ADAN HAJI
The Chairman
Parliament Departmental Committee on Trade, Industry and Cooperatives
Kenya National Assembly
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PETROLEUM INSTITUTE OF EAST AFRICA
PIEA

MEMORANDUM: THE FINANCE BILL 2021

PROPOSED AMENDMENT, RATIONALE AND JUSTIFICATION

REVISED SUBMISSIONS 26th MAY 2021

The Clause Number	Current Clause	Proposed Amendment	Rationale and Justification
Part III Value Added Tax	Include a clause to amend the Second Schedule of the VAT Act 2013 to include in the Schedule of Zero Rated Supplies: The supply of liquefied petroleum gas including propane	**Revocation of the Proviso on the Reinstatement of 16% VAT on LPG** The supply of liquefied petroleum gas including propane **should remain zero rated**	Imposing VAT on liquefied petroleum gas (LPG) will adversely impact Kenya's aspired socio-economic transformation considering the positive impact of LPG on human health, environment conservation, local manufacturing and food security. LPG usage has steadily increased six times over the last two decades between 1999-2019 from approximately 0.6 million to 3.7 million households. This has been mostly driven by an enabling fiscal environment which has facilitated access, affordability and adoption of LPG. The Government policy in promoting the use of LPG as the primary household cooking fuel and target of achieving the complete access to clean household cooking by 2028 can only be guaranteed by preserving the fiscal incentives and retaining a conducive investment environment. **Local Manufacturing**: To support the government's policy which is tied to the Sustainable Development Goal(SDG) target of converting 76 per cent of Kenyans relying on firewood and charcoal for cooking to using LPG, which is clean burning and smoke free, by 2028(brought forward from 2030 by GOK in November 2019), requires economic incentives to support LPG demand. The ongoing deliberate GOK action plan on increasing LPG demand translates to increased local manufacturing of LPG cylinders which subsequently increases the opportunity for employment in local cylinder manufacturing plants as well as in the construction of LPG storage depots and cylinder refilling and revalidation plants. The growth momentum of this sector which is largely supplemented by the current fiscal inducements must be retained as it will especially come in handy as a catalyst for recovery from the COVID-19 economic shocks. **Environment:** In less than three weeks from the end of April 2020, more than 200 Kenyans have died and hundreds of thousands displaced from their homes due to floods from heavy rains-this has been the pattern for many years. Current data indicates that out of Kenya's forty-seven (47) Counties, sixteen (16) of them have the United Nations recommended forest cover of above ten percent (10%) while twenty-one (21) of them have forest cover of below 10% and therefore Kenya's total forest cover is 7.4%. We cannot achieve our afforestation target of 10% forest cover by 2030 unless we deliberately shift from the unsustainable use of charcoal and firewood- which are derived from our

diminishing forests -to LPG and while at it we will preserve our water catchment areas and mitigate against climate change and in so doing promote our agricultural productivity and specifically our food security.

Any increase on the cost of LPG will result in reversing the current penetration rate with consumers resorting back to charcoal and firewood for their household cooking requirements further ravaging what is left of our below 10% forest cover.

Food Security: Kenya has experienced the impacts of climate change on our weather patterns on account of our poor environment conservation. The weather disruption has interfered directly on farm output and specifically adversely affected our food productivity making the Country food insecure. Further, the flooding occurring from deforestation has additionally destroyed food in the farms hence significantly compromising food security in the Country.

Continued access to LPG will deter the use of firewood and charcoal which is derived from our forests hence promoting deforestation that contributes to climate change, thus hampering food security.

Health: The goal in securing LPG as Kenya's primary cooking fuel is to end the health problems caused by cooking energy that emits harmful toxins. Currently, 84 per cent of Kenyans are still cooking using firewood, charcoal, dung and kerosene as cooking fuel, which create a deadly cocktail of smokes leading to pneumonia and other respiratory diseases like ischaemic heart disease, chronic obstructive pulmonary disease (COPD) and lung cancer.

As a matter of fact, the Government report, Kenya Household Cooking Sector Study, which was launched at the Clean Cooking Forum on 5th November 2019, indicates that the aforementioned respiratory diseases are currently killing 21,650 Kenyans annually.

Further,40 per cent of deaths for children under five are caused by respiratory diseases and 14 million Kenyans now suffer from respiratory diseases- which have been declared as being one of the country's top five killers in the said report and also in the 2019 Economic Survey that was launched this May.

In this COVID-19 pandemic situation medical professionals have encouraged cigarettes smokers to reduce or stop the habit altogether as this may compound the ability of the body to fight the disease if infection occurs.

Akin to the above, a recent study by University of California, Berkeley indicated that the continuous exposure to the toxic pollutants that are released by cooking with charcoal or firewood is equivalent to smoking 400 cigarettes an hour, with young children particularly being more susceptible to the consequent damage to their lungs because they spend so much time with their mothers in the kitchen.

This level of health damage is calamitous and yet preventable by implementing interventions that promote the shift from Kenyan households using polluting cooking fuels to using clean-burning, smoke-free fuel will enable Kenyans to enjoy their constitutional right to good health and a healthy environment.

			Affordable LPG is the single bullet that will help Kenya save on the National health budget as well as spur and guarantee progress towards Kenya achieving the Sustainable Development Goals (SDGs) on good health and wellbeing, gender equality, access to affordable, modern and clean energy, climate action and education.
Part IV Excise Duty Act	Current Excise Duty imposed on LPG Cylinders – 35%	**Reduction of current excise duty on Imported Liquefied Petroleum Gas (LPG) Appliances-Cylinders from 35% to 5%** with gradual annual increases as the local technical and production capacity improves/grows so that local manufacturing is promoted and protected even as the cost of conversion to LPG is managed as appropriate.	**Excise Duty Reduction on Imported Liquefied Petroleum Gas (LPG) Appliances-Cylinders.** At the Global Clean Cooking Forum(CCF) that was hosted by Kenya on 5th November 2019, the Government committed to achieving universal access to clean cooking by 2028, two years ahead of schedule of the 2016 public-private sector (PPS)LPG penetration action plan hence requiring the fast tracking of the deployment of the target 18 million safe LPG cylinders in the market so as to facilitate the transition towards making LPG the primary cooking fuel for Kenya Households. The aforementioned focused action plans are aimed at implementing the Government policy and specifically with regard to strategies related to expanding LPG usage by making it available, accessible and affordable. To further expand usage of LPG especially in the peri-urban and rural areas the **its imperative that the conversion costs are kept as low as possible-these being the costs for the first time LPG user which are related to the LPG cylinder, cooking stove and accessories such as the hose and regulator**. Resultant from the PPS LPG penetration action, LPG demand has been increasing progressively and in keeping with this development local manufacturing of LPG cylinders has also taken shape with at least three Plants supplying LPG brand owners with locally manufactured LPG cylinders. PIEA highly supports this local manufacturing as it not only creates wealth and employment opportunities but also decreases the lead time for cylinder procurement and costs as well. However, as demonstrated so far the local manufacturing technical and production capacity is work in progress and indeed in 2020 the KEBS raised a red flag on the below standard quality of certain batches of cylinders that were manufactured in these three plant-a situation that has now been remedied but is still being monitored to ensure sustained compliance to standards. To ensure that brand owners have a fall back and flexibility plan in meeting consumer demand of LPG in safe cylinders we proposed that the Excise Duty that was imposed at 35% from Nil in 2019 be reduced to 5% and gradually increased as the local technical and production capacity improves/grows so that local manufacturing is promoted and protected even as the cost of conversion to LPG is managed as appropriate.
Schedule II Part V of the Income Tax Act	Schedule II Part V of the Income Tax Act	**Attracting Investment In Petroleum And Liquefied Petroleum Gas Infrastructure To Create Wealth and Employment Opportunities**	Kenya needs to sustainably facilitate the establishment of required infrastructure for import, refining, storage transportation and distribution facilities to match the current and forecasted petroleum demand deficiencies in infrastructure that have not only been hampering security of supply but also significantly contributed to the upward cost of fuels due to inefficiencies of the related infrastructure. Once the Kenya National Petroleum Master Plan is completed, that the storage of fuel will have to extend beyond Special Economic Zones (SEZs) in order to overcome energy poverty in the short to medium term.

		Provide that Investment Deductions for Petroleum and Gas Storage facilities be amended to include: a) petroleum distribution facilities b) 100% capital allowance in the first year of use	Treating petroleum storage and distribution infrastructure like other industrial properties by providing tax holidays and capital deductions that allow investors in the sector to recover the investment or part of will create incentives and hence encourage more investment which would then create the much needed wealth and job creation opportunities at various stages of petroleum and LPG projects progression right through to the post project commissioning stage. **We propose that we retain 100% capital allowance of Petroleum and Gas Storage and Distribution facilities within the first year of use in order to support new LPG investments which are critical for meeting GOK policy particularly that of making LPG the primary cooking fuel by 2028 and making it accessible and cheaper than it currently is**.
New	None	**Lubricant and Coolant Reforms** **CET** Tariff split to zero rate inputs (**similar to ink in 2005** & effective response to Egyptian imports which enjoy COMESA preferential market access) Base oils **T.I. 2710.19.59** at 0% and a residual **T.I. 2710.19.60 at 10%** Additives **T.I. 3811.21.00** at 0% (natural) and **T.I. 3811.29.00** at 0% (synthetic) and retain the residual heading for any other composition at 10% **Accompanying Mitigating measures** **Legal** – Either a defined period for a CET Stay awaiting tariff split implementation (win-win), OR direct implementation of the proposed tariff split.	The Petroleum industry would wish to see these proposed reforms in Kenya's Lubricant business segment implemented specifically **to promote the competitiveness of Kenya's lubricants locally and regionally**. The lubricants business segment was a **major direct employer** of the blending, steel drums, packaging, and other related industries up to the end of the 1970's. Traditional markets for Kenya were Tanzania, Uganda, Congo, Ethiopia, Rwanda (Egypt through COMESA). These sales have been declining over the past 25 years. Currently, Kenya's major exports of finished Lubricants are to Uganda, Zambia and the DRC. **Kenya is unable to exploit the price sensitive Ethiopia, Tanzania and Mozambique Markets**. This is mainly because Kenya charges 10% duty on Lubricant base oils and additives. Kenya's export market is curtailed as it outpriced in the local and regional markets. Further, there have been no incentives for investors to set up lubricant manufacturing companies. This makes it difficult for people to acquire quality product leading to an **influx of substandard product, damage to equipment and the environment**. **Overreliance on imports despite current under-utilized surplus capacity:** Data from the Economic Survey 2020 and the Kenya Revenue Authority (KRA) shows that lubricant products from the Egypt amount to Sh4 billion annually; combined lubricant imports in 2019 from the UAE, Asia and Europe cost our economy **Sh7.5 billion** in 2019. Kenya's high appetite for imported goods has seen it sink into a trade deficit with Africa for the first time in more than two decades, official data shows. The country's import bill from other African countries rose to Sh234 billion last year, an 11 percent increase from the Sh210 billion spent in 2018. Export receipts rose by a paltry three percent to Sh224 billion in the year. According to Kenya National Bureau of Statistics 2019 census reports, Kenya's population has doubled over the last 25 years, to about 47 million people, and rapid population growth is set to continue. The same growth has been witnessed in the energy sector with the consumption of Petrol growing by an average of 13% percent between 2008 and 2018 from a growth in the number of motor vehicles from 250,000 to 2.5million. The However, in the lubricant sector, growth has averaged 3% between 2008 and 2018 a performance not in tandem with the population growth and growth in other sectors, indicating declining volumes per capita. Despite Africa (Kenya) being the fastest lubricants market, Kenya is not benefiting from it rather UAE, ASIA and Europe are benefitting. UAE countries have over 100 blend plants producing 1 million tons for export into Africa. They are now major exporters of lubricants employing thousands of people with backward integration that has seen massive growth in their base oil and petrol chemical manufacturing industry (such as Sabic the biggest plastic raw materials in our region). Kenya could learn from this
		Proposals to review import duty on base oils for Lubricants as below: i. **Split H.S. Code 2710.19.59 which is currently classified as 'Other' into two as below:**	

		• 2710.19.59 Base oils for blending lubricants with boiling point range between 550F and 1050F and a • New H.S. Code 2710.19.60 (New Proposed TI) i. Reduce import duties as below: • 2710.19.59 Base oils for blending lubricants with boiling point range between 550F and 1050F – **Remove import duty from 10% to 0%** 2710.19.60 (New Proposed TI) – Import Duty 10%	example and position itself to not only export the EAC but also the Central and West African markets which is dominated by the UAE, Europe & Asia. With a highly competitive market, the Lubricants market is characterized by small margins. Incentivizing Government Policies and economies of scale are needed in order to promote growth. We shall stimulate domestic taxes reduce tax evasion and expand our markets. Kenya's manufacturing plants are no longer efficient and most complementary manufacturing plants have closed and/or downsized (*For example, Steel Africa, Premium Drums, Vitaplast, Elgon Plastics and some of the existing have financial problems; over 5,000 direct and indirect loss of jobs. 20 years ago Greif E.A. Limited has a staff of 300. Today they have less than 30 employees and under pressure to downsize. Ashut Engineering employs less than 50 employees. Total employment in Steel drum manufacture has dropped from 500 employees 20 years ago to less than 60 now and most want to close*). To curtail the decline in local blending and closure of local manufacturing plants (Sepyana) we must **reduce imported lubricants, at the same time increase both domestic and export lubricants sales** to fully utilize existing capacity and to avoid dependency on imports which creates room for tax evasion and sub-standard products. **An estimate of 7% of lubricants are imported in the market through tax evasion**. We also estimate **up-to 5% of lubricants imported in the country are made from recycled base oils or inadequate additive treatment.** The current policy and regulatory framework has resulted to Kenya becoming uncompetitive, a dumping ground for substandard and counterfeit base oils and lubricants as well as smuggled import contrary to the **Government's top agenda of supporting local manufacturing.** Base oil and additives are strictly raw materials in the manufacture of lubricants. East Africa and even Africa as a whole is a net importer of base oil and additives. The 10% import duty does not protect the local industry but rather puts the industry at a disadvantage. No country in Africa produces base oils and additives to meet their domestic demand so it is wrong to protect base oils and additives with import duty. **For this reason, there is a need to reclassify base oils and additives from intermediary to raw materials. Additionally, the importation regime needs to have a standard rate to get rid of avenues of mis-declaration of tariffs**. **SIMILAR BEST PRACTICES AND CASE STUDIES IN OTHER COUNTRIES WHERE ZERO RATING INPUTS HAS WORKED**: Kenya was a regional hub for lubricants, a position we are slowly losing as the import duty is fragmenting the market. Import duty on base oils has undermined market access in the EAC and COMESA region. We are unable to compete in export markets against imports from countries that don't charge duty on raw materials such as Egypt and South Africa. While others outside COMESA give export incentives e.g. India. We are unable to get a fair share of Ethiopian, Uganda, Zambia, Malawi, Rwanda, Burundi and DRC markets. On account of strategic competition from other regions (COMESA, UAE, India, Malaysia) primarily on account of cheaper products. Additionally, much closer to home, our market share of the EAC market is shrinking because of the duty stay on raw materials in Tanzania and Rwanda. **Kenya was shut off of the lucrative Middle East market** in the late 70s when the Gulf Arab Countries Community (GACC) imposed 25% duty on all imported lubricants and at the same time removed import duty on base oil and additives to their local blending plants. This led to the termination of Imports from outside GACC including Kenya and today, the UAE has over 100 blend plants exporting mainly to Africa, Kenya included with 70% of their production being
		Proposal to review import duty for Lubricants additives as below: i. 3811.21.00 Additives for lubricating oils: Containing petroleum oils or oils obtained from bituminous minerals – **Proposal to remove the current import duty of 10% to 0%** i. 3811.29.00 Other (**Proposal to change current description from "Other" to Additives for lubricating oils: Containing synthetic oils. The import duty should remain 0%**	

			exported. Some package manufacturers like Prinjas Polycan relocated to Dubai and now have a huge plant. Abudhabi, Bahrain, Qatar and Saudi Arabia have built modern base oil production plants, they have developed an advanced petrochemical industry employing thousands of people. The UAE is now becoming a major additive manufacturer. Since the year 2000, **Tanzania stayed duty on base oils to protect the Government owned blend plants** with expanded package manufacture. They now dominate the East African market and have become a major supplier to Kenyan market. They have a competitive market in East Africa over Kenyan market against Kenyan imports and can compete favorably against South African blenders in Zambia and the DRC. **Imports from Egypt into Kenya saw a 75% increase in 2019** from previous year and this is mainly from Caltex products which formally used to be manufactured in Mombasa. They are now currently being distributed by Africa Fuels & Lubricants Ltd (AFAL) who are the authorized Distributors of Caltex products. After Caltex left the Kenya market, they set up an agency (AFAL) who imported from Dubai but had a hard time competing due to the 25% import duty on finished products. **They shifted supply to Egypt where there is no duty on base oil and no duty on additives**. They import under the COMESA Trade Agreement and therefore do not pay duty and therefore have lower prices. They are now selling cheaper than locally produced lubricant products and this explains their big growth in 2019. They also supply Uganda and Rwanda under same regime. These markets used to be supplied from the Kenya (Caltex Mombasa plant). A stay on the import duty on base oil and additives will have a favorable impact on lubricant prices for consuming sectors. Further the reforms will supplement the Government's effort in promoting **local manufacturing** and **job creation**. It will immediately reduce imports and significantly increase local production which the industry is capable of achieving instantly given the current under-utilized surplus capacity. This will in turn lead to **an increase in collection of PAYE, Corporate and VAT taxes**. Additionally, it will create future relief and sustained economic recovery for Mombasa citizens who have been disadvantaged by the COVID-19 economic shocks and the SGR impact.
New	None	CET Tariff split **to provide for coolants at 25%.** 2710.19.56 Non-lubricating oils (cutting oils, coolants, anti-rust, brake fluids and similar oils nes.)	Coolant is manufactured locally by many local manufacturers therefore there's a need to support and build local manufacturing and export all over Africa in favour of imports which is creating a loss of foreign exchange. Local demand is more than 6m litres per annum. There is currently enough local capacity to manufacture the same. (There are currently 8 Manufacturers and also 2 new investment coming.)
New	None	Tax Policy Development / Reforms	Establishment of a national tax policy that will act as comprehensive advisory to the Ministry of National Treasury and Planning to holistically look at matters taxation in the long-term and short term.

D/DC's
Please deal.
14/06/21

Leah Mwaura
pls facilitate
14/6/21

The Clerk of the National Assembly
Office of the Clerk, Main Parliament Buildings
P.O. Box 41842 – 00100
Nairobi, Kenya

31 May 2021

Attention: Michael R. Sialai, EBS (clerk@parliament.go.ke) and Leah W. Mwaura (leahwanjiru4@gmail.com)

Dear Sirs,

RE: SUBMISSION OF MEMORANDUM ON THE FINANCE BILL, 2021

We refer to the above matter and your public notice inviting the public to submit their comments on the Finance Bill, 2021 (the **Bill**) which was published on 5 May 2021.

Please see annexed to this letter a schedule setting out our comments and proposals relating to the Bill.

Should you require any clarifications, please do not hesitate to contact Kenneth Njuguna of Anjarwalla & Khanna LLP (kkn@africalegalnetwork.com) or myself (Maxwell@amcham.co.ke).

Yours faithfully,

Maxwell Okello

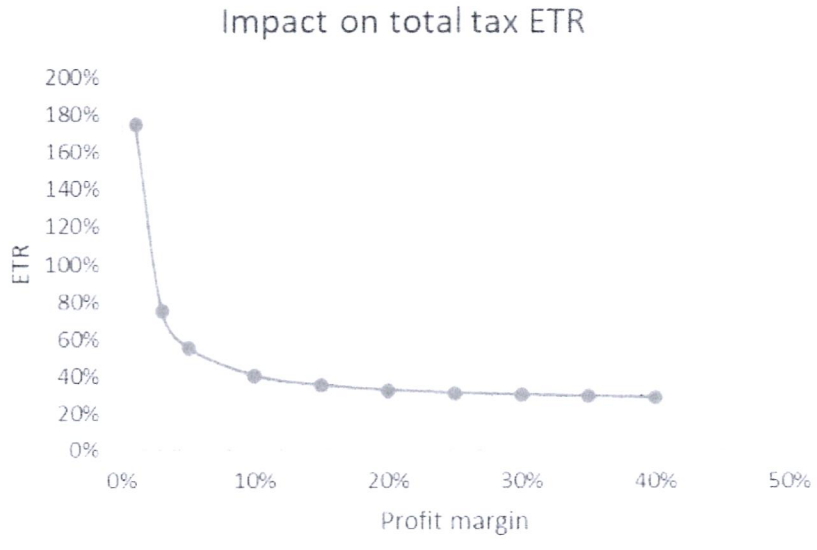
Chief Executive Officer
American Chamber of Commerce, Kenya

NATIONAL ASSEMBLY
RECEIVED
14 JUN 2021
DEPUTY CLERK
P. O. Box 41842 - 00100, NAIROBI

Deputy Director/In-charge
RECEIVED
15 JUN 2021
Directorate of Departmental Committees

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	AMENDMENTS TO THE INCOME TAX ACT (CHAPTER 470, LAWS OF KENYA)		
1.	Clause 2 (a) **Definition of Control**	The Bill proposes to re-introduce the definition of the term control. Under the proposed definition, a person will be in control of another person if the person holds at least 20% of the voting rights in a company; advances a loan constituting 70% of the assets of that other person; guarantees 70% of the indebtedness of that other person; appoints more than 50% of the board of directors of that other person; owns the intellectual property which that other person wholly depends on for business; supplies at least 99% of the purchases of that other person or purchases at least 99% of the sales of that other person; or, if in the opinion of the KRA, the person influences the prices or other conditions relating to the purchases or sales of that other person.	The proposed definition of the term control is very wide and will have far reaching and generally unintended transfer pricing and deemed interest implications since many business dealings apply franchise models and exclusive supplier / dealer licences, such as the motor business sectors which may be deemed to be controlled by resident principals/franchisors for tax purposes. Many resident businesses that get supplies from one supplier will meet the 90% threshold introduced. We propose that the definition of the term "control" be pegged to a person's equity interest or voting power in a company similar to the one prevailing before the repeal of the Second Schedule to the Income Tax Act (ITA) by the Finance Act 2020 but with the necessary modification with respect to the shareholding or voting power threshold. The definition should read as follows: *"control", in relation to a body corporate, means the power of a person to secure, by means of the holding of shares or the possession of voting power in or in relation to that or another body corporate, or by virtue of powers conferred by the articles of association or other document regulating that or another body corporate, that the affairs of the first mentioned body corporate are conducted in accordance with the wishes of that person; and in relation to a partnership, means the right to a share of more than one-half of the assets or of more than one-half of the income of the partnership:*

			Provided that in the case of a body corporate, unless otherwise expressly provided for by the articles of association or other documents regulating it "control" shall mean the holding of shares or voting power of twenty per cent or more
	Clause 3 **Income accruing from a Digital Marketplace**	The Bill proposes to amend section 3(2), by deleting paragraph (ca) and substituting therefor the following new paragraph— (ca) income accruing from a business carried out over the internet or an electronic network including through a digital marketplace;	This will potentially bring into scope remote services offered by non-resident business entities. However, the Bill proposes to exempt income already subject to WHT from DST. Consequently, if passed there will be minimal impact (if any) on non-resident business entities as the technical services are already subjected to WHT. Our proposal would be for this expanded definition to be removed. Instead, the Bill should maintain the previous definition that only covers income accrued from a digital marketplace. Additionally, extending scope of DST would be an incredibly burdensome tax policy and effectively a form of triple/multilayer taxation of non-resident companies providing digital services. These companies are already subject to corporate income tax in the territory of residence and non-residents that have presence in Kenya are already subject to corporate income tax in Kenya. The flow down effect would mean that non-residents bear much of the burden and the cost of doing business increases in Kenya. DST will have a particularly distortive impact for low margin businesses (see below table and chart) and is likely to lead to costs being passed down the supply chain and ultimately borne by customers resident in Kenya. All non-resident entities that provide digital service to Kenyan based customers through internet regardless of their sizes need to register and pay DST. The countries that enacted DST legislation generally put worldwide and national thresholds (at group level) to mitigate the distortive impact of

			turnover based taxation on small businesses or on the new businesses/investments at local level. For example, France DST legislation sets group level thresholds of €750 million worldwide and €25 million local; UK DST legislation sets group level thresholds of £500 million worldwide and £20 million local. On the other hand, there is a threshold of KES5m (c. USD50k) for VAT registration in Kenya. Similar thresholds should be introduced for DST to mitigate the distortive impact as well as the compliance burden for non-resident businesses that have small revenue. Please see the effective tax impact below: 

	Clause 5 **Digital Services Tax**	The Bill proposes to amend section 12E (a) in subsection (1)— (i) by deleting the word "person" and substituting therefor the expression "non- resident person"	If the person is replaced by "non-resident person", the legislation will apply to non-resident entities that have presence (i.e. branch) in Kenya which would be discriminatory against established non-resident entities that are taxed equally to resident entities in Kenya. We propose that the wording should be replaced by "*non-resident person that does not have presence in Kenya*". If the aim of the legislation is for the DST to apply also to non-resident entities that have presence in Kenya, the right to credit DST against the income tax shall be granted to non-resident entities that have presence in Kenya in order to avoid double taxation. In general, the only way to deal with the perceived imbalances is via a coordinated global solution. Only the OECD can deliver that. We would strongly recommend Kenya to wait for OECD solutions and proactively input into the proposals. a) Any tax law changes to address perceived concerns arising from digitalization must be (1) profits based, (2) proportionate, (3) applicable to all businesses, (4) not additive (i.e. for each $1 of profit that is taxable in the market country, there is an equal and opposite relinquishment of taxation rights in the production country). b) An OECD solution would be pro-growth, and if profit-based, should ensure it considers the impact of COVID-19 on businesses who are recovering by not imposing undue tax burdens on them (such as gross revenue taxes), which might stall their recovery. c) As this is a global discussion, compromise will be needed to reach a solution and we encourage Kenya to engage proactively at the OECD on these issues.

	Clause 5 **Accounting and Payment of Digital Service Tax (DST)**	The Bill proposes to amend Section 12E (2) of the ITA by replacing it with the following sub-section: (2) A person subject to digital service tax shall submit a return and pay the tax due to the Commissioner on or before the twentieth day of the month following the end of the month in which the digital service was offered.	Currently, non-resident persons subject to the DST are required to compute the DST and make an online payment of the DST due through the iTax platform. There is no requirement to file a return and the format of the return has not been uploaded on iTax. The proposed amendment is welcome because the previous requirement to make real-time payment is unlikely to be achieved due to the volume of online transactions that occur at any given time. We propose that for purposes of clarity, a format for the proposed return be provided by KRA. The format of the proposed return should provide clarity on the nature of information which should be provided to the KRA to avoid ad hoc information requests. The information that should be requested in the return should be limited to the following: i) supplier's PIN; ii) tax period; iii) currency and exchange rate used; iv) taxable amount; and tax payable. Further, current DST legislation requires each individual entity to file separately. We recommend group level filing and payment could be helpful to mitigate compliance burden on non-resident

			groups that run several businesses under separate corporate structures. The effective date of the legislation is 1st July 2021. Considering that the legislation has not been enacted yet as of date, the period between the enactment of the legislation and the effective date would be very limited. Companies affected by these changes will need time to prepare for the implementation i.e. data collection to calculate the tax and to file tax returns. We recommend the delay of the effective date to January 2022 to provide time to non-resident entities to prepare for the implementation.
	Clause 6(b) **Perpetual carrying forward of tax losses**	The Bill proposes to allow perpetual carrying forward of tax losses beyond the currently allowed ten years.	Although the Bill proposes to allow carrying forward of tax losses in perpetuity, it does not repeal Section 15(5) of the ITA which requires a person seeking to carry forward tax losses beyond ten years to apply for extension of the time to carry forward such losses to the Minister. We propose a repeal of Section 15(5) of the ITA to facilitate an automatic carrying forward of tax losses in perpetuity without the need to apply to the Minister.
	Clause 7 **Thin capitalisation**	The Bill proposes to amend section 16 of the Income Tax Act in respect of the provision relating to thin capitalisation restrictions by deleting the current debt to equity ratio of 3 to 1, to a percentage	We propose that the proposed amendment is deleted since it is unfavourable for capital intensive infrastructure businesses that rely on debt capital by restricting the interest deductible to 30%. This is contrary to the country's policy on creating a conducive business environment and facilitating foreign direct investment.

		of earnings before interest taxes depreciation and amortization (**EBITDA**). The proposed thin capitalisation restriction requires that the gross interest paid or payable to related persons and third parties in excess of 30% of the EBITDA of a resident borrower in any financial year will not be deductible for tax purposes.	
	Clause 8 **Return on activities in other jurisdictions**	The Bill proposes to introduce a requirement for "multinational enterprises group whose ultimate parent entity are resident in Kenya to file annual group returns of its operations in Kenya and other jurisdictions. Multinational enterprise group means a group that includes two or more enterprises which are resident in different jurisdictions including an enterprise that carries on business through a permanent establishment or through any other entity in a jurisdiction.	We propose this clause is amended to only require the local enterprise in Kenya to file/submit the relevant information on behalf of the group entity. This will ensure ease of business and operations particularly for multinationals with extensive global footprint.
	Second Schedule of the Income Tax Act	With the repeal of the Second Schedule of the ITA by the Tax Laws Amendment Act, 2020, certain definitions e.g "farm-works" were deleted.	We propose that the Second Schedule is amended to include definition of farm-works since currently it remains ambiguous on what investments relating to farm-works should qualify for this capital deduction.

AMENDMENTS TO THE VALUE ADDED TAX ACT, 2013			
	Clause 15 **Income accruing from a Digital Marketplace**	The Bill proposes to amend section 3(2), by deleting paragraph (ca) and substituting therefor the following new paragraph— (ca) income accruing from a business carried out over the internet or an electronic network including through a digital marketplace;	The effective date of the legislation is 1st July 2021. Considering that the legislation has not been enacted yet as of the date, the period between the enactment of the legislation and the effective date would be very limited. Companies affected by these changes will need time to prepare for the implementation i.e. data collection to calculate the tax and to file tax returns. We recommend the delay the effective date to January 2022 to provide time to non-resident entities to prepare for the implementation.
	Clause 16 **Treatment of Imported Services**	The Bill proposes to amend Section 10 (1) of the VAT Act by deleting the word "registered" to clarify that <u>any person</u> (not only registered persons) who imports taxable services will be deemed to have made the taxable supply to themselves.	The Value Added Tax (Digital Marketplace Supply) Regulations, 2020 (the **DMS Regulations**) provide that business-to-customer (**B2C**) transactions will fall under its provisions while business-to-business (**B2B**) transactions will fall within the provisions of Section 10 of the VAT Act. This posed a challenge for digital businesses who have both B2B and B2C customers. Specifically, it was not clear in the VAT Act or the DMS Regulations what information could be relied on by non-resident suppliers to determine

		Further, the Bill proposes to amend Section 10 (2) to clarify that if the person importing the taxable supply is a registered person, then will they be entitled to claiming input VAT credit on the tax payable on a taxable supply made.	whether a transaction is B2B (therefore not to charge VAT) or B2C (therefore to charge VAT). However, with the proposed amendment to the VAT Act, <u>all</u> persons (whether in B2B or B2C transactions) will be subject to Section 10 of the VAT Act. This provision under the VAT Act currently contradicts the DMS Regulations which provides for B2C transactions and requires that B2B transactions to apply Section 10. The challenge that will be faced by digital businesses such as Uber is the difficulty in determining whether a transaction falls within the scope of the DMS Regulations or under the provisions of Section 10. As a result, it is not clear for such businesses to determine whether to charge VAT on their supplies or not. We propose that clarity should be provided further on this point in the VAT Act and/or the DMS Regulations. Our proposal is that the provision in the DMS Regulations that provides for only B2C transactions should be deleted to the effect of subjecting all transactions to Section 10, which would have an implication of subjecting all DMS transactions to VAT in Kenya. Entities which are registered for VAT will be in a position to claim input vat. In particular, we propose the following amendments to the DMS Regulations so as to subject to VAT all supplies made by non-resident persons in relation to digital services in Kenya. Specifically, we propose that: Regulation 4 of the DMS Regulations is amended –

			a) by deleting subsection (2) (3) (4) and subsection (5) and substituting therefor the following new paragraph under subsection (1)- (2) Where the supply under Regulation 3 is made in a business-to-business transaction, the provisions of Section 10(3) shall apply. Regulation 5 of the DMS Regulations is amended: a) in subsection 1(a) by deleting the words " a recipient in Kenya in a business-to-customer transaction" and substituting therefor the word "any recipient in Kenya" b) in subsection 2 by deleting the words "business-to-customer" appearing immediately before the words "a person from an export country who makes a" Regulation 6 of the DMS Regulations is amended: c) by deleting the words "business-to-customer" appearing immediately before the "a person from an export country who makes a" The effect of the proposed amendments to the DMS Regulations is to subject to VAT "all persons" receiving a supply from a non-resident supplier making supplies on a digital marketplace. In our view, this will not cause any prejudice because in any event, Section 10 provides that persons in B2B transactions will be entitled to claim input VAT while B2C transactions will bear the burden of VAT as it was intended by the DMS Regulations. We note that a similar model has been adopted by countries like South Africa that requires electronic sales made by non-resident suppliers to

			businesses in South Africa to charge VAT on such supplies and not to use the reverse charge method.
	Clause 19 **Removal of Group VAT registration**	The Bill proposes to amend the Value Added Tax Act, 2013 to delete the provision for group VAT registration.	While this provision is often not used, it allows for group entities to have one VAT registration. Removal of the provision allowing for group registration for companies with each entity being required to account for its own VAT is a hindrance to ease of doing business in Kenya due to administrative compliance burden imposed on the group. We propose that the provision is retained.
	Clause 20 **Powers of Cabinet Secretary to make Regulations**	The Bill has proposed to amend the Value Added Tax Act, 2013 to delete the requirement for Regulations made under the Value Added Tax Act to be tabled before the National Assembly for approval before they take effect.	The proposed amendment implies that the Cabinet Secretary for National Treasury will have powers to make regulations under the Value Added Tax Act, 2013 without approval of the National Assembly. Effectively, the National Treasury will be able to come up with new tax measures and implement them without any oversight by the National Assembly. The proposed amendment would be inconsistent with the provisions of the Statutory Instruments Act, 2013, which requires all statutory instruments, such as legal notices and regulations, which are made pursuant to powers granted to a Cabinet Secretary under a written law, to be tabled in Parliament within 7 days after the publication of the relevant statutory instrument. We recommend that the proposed amendment is shelved to keep it clear that the regulations made under section 67 of the Value Added Tax Act, 2013 should be tabled in the National Assembly for approval.
	Clause 21 (b) **Exportation of services exempt from VAT**	The Bill has proposed to exempt exportation of services from VAT (a supply which is currently zero rated).	Exportation of services is currently a zero-rated supply which means that input VAT incurred in making the supply is set off against output VAT received in making other taxable supplies and a VAT refund can be applied

			for from the KRA in respect of the excess portion of input VAT credit incurred in making zero-rated supplies. It is a globally accepted principle and international best practice that exportation of both goods and services are zero rated supplies for VAT purposes. Zero rating of exportation of goods and supplies promotes and encourages exports to enhance the balance of payments for Kenya. The impact of the proposed amendment is that suppliers of services may have to dig deeper into their capital to fund the tax cost relating to the restricted input VAT on exportation of services. Our recommendation is that export services should be maintained as zero rated as changing to exempt will mean that companies offering export services will not be able to claim/re-coup input VAT incurred in offering such services hence increasing business costs for these companies. This will in turn discourage investment in the service industry by increasing the cost of exported services.
	Paragraph 67 of the First Schedule of the Value Added Tax 2013 **Exempt supplies to Standard rated supplies**	Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating) barbeques, braziers, gas-rings, plate warmers and similar non-electric domestic appliances, and parts thereof, or iron or steel of tariff numbers 7321.11.00, 7321.12.00, 7321.19.00, 7321.81.00, 7321.82.00, 7321.83.00 and 7321.90.00 that were exempt form VAT are now subject to VAT.	Until last year's emergency COVID-19 Budget, clean cooking appliances were exempt from VAT, in order to support Kenya's clean energy objectives. However, following the Finance Act 2020 that introduced a raft of changes to the Value Added Tax Act, 2013, these appliances which include clean cookstoves are now subject to VAT resulting in higher prices for consumers. Moving clean cookstoves back to VAT exempt status will lower prices for Kenyan consumers of these life-saving products. These issues have never been more pressing than during a pandemic that disproportionately threatens those with underlying respiratory conditions. We propose that such appliance are exempt from VAT.

AMENDMENTS TO THE EXCISE DUTY ACT, 2015			
	Clause 25 (b) **Excise duty on "other fees"**	The Bill proposes to amend the definition of the term *"other fees"* under Part III of the First Schedule to the Excise Duty Act by deleting the words *"fees or commission earned in respect of a loan"*.	The implication of the deletion is that fees or commissions earned in respect of a loan will be subject to excise duty at the rate of 20% of the excisable value. Currently, there are many disputes between the KRA and financial institutions on whether fees and commissions earned in respect of loans amount to "other fees" for excise duty purposes. These disputes relate to the periods pre-dating the Finance Act 2019 which clarified that fees and commissions earned in respect of loans do not amount to "other fees" hence not subject to excise duty. The proposed amendment will result in re-emergence of such disputes for periods post enactment of the Finance Act 2021 on whether fees or commission earned in respect of a loan constitute a return on loan for excise duty purposes. We propose that the Bill be updated by deletion of the proposed clause 25(b)(c) or in the alternative, that the Bill includes a definition of the phrase *"return on loan"*.
	Clause under the provisions of the Excise Duty Act, imported sugar confectionary and imported white chocolate, chocolate in blocs, slabs or bars are subject to excise duty.	The Bill has proposed to amend the paragraph by deleting the word 'imported' which means that both locally manufactured and imported sugar confectionary and chocolate will be subject to excise duty at the rate of KES 20 per kilogram and KES 200 per kilogram, respectively.	The proposed amendment will eliminate the competitiveness of the local confectionary industry against imported confectionary as the retail prices will increase due to the excise duty cost that will be passed to final consumers. It will also erode the competitiveness of locally produced confectionery products in regional export markets where similar duties were removed after lawmakers assessed the negative impact on industry. Reduced competitiveness in domestic and export markets will result in reduced sales and will lead to loss of direct and indirect jobs; With price increases, confectionery players will face massive challenges re-pricing given our current price points (sh 5, Sh 10) and prevailing issues with coin circulation.

			The value that will be destroyed in the confectionery subsector if this amendment is retained in the Bill will be more than the revenue the government hopes to collect. This will reverse the gains that the Government had made in promoting the local food processing and manufacturing sector The National Treasury had proposed a similar amendment through the Tax Laws (Amendment) Bill, 2020 as well as the the prior year's Bill, but the proposals were not approved in both cases by the National Assembly. We urge lawmakers to maintain their well informed position on this matter and protect the local industry. The word "imported" needs to be reinserted into the phrasing of the paragraph relating to excise duty on confectionery to ensure that local producers stay competitive and grow jobs.
AMENDMENTS TO THE TAX PROCEDURES ACT, 2015			
	Clause 26 **Administration of provisions of the Miscellaneous Fees and Levies Act**	The Bill proposes to bring the administration of miscellaneous fees and levies including export levy, import declaration fees and railway development levy under the provisions of the TPA.	This is expected to pose interpretation challenges on the applicability of the provisions of the East African Community Customs Management Act (EACCMA) vis-à-vis the TPA since Section 9 of the Miscellaneous Fees and Levies Act (MFLA) expressly provides that the provisions of the EACCMA applies for purposes of assessment, collection and enforcement of payment of the export levy, import declaration fees and railway development levy. The Bill does not seek to repeal/amend Section 9 of the MFLA.
	Clause 28 (a)	The Bill has proposed to increase the period within which the Commissioner may amend a tax assessment from five years to 7 years. Under the proposed amendment, the Commissioner will be	Our proposal is that the period for record keeping and issue of assessment should be maintained to 5 years. Increasing the period to seven years will mean that taxpayers will have to hold on to documentation for longer periods which at times is costly and tedious. Increasing the assessment

	Increase of look-back period for tax purposes	permitted by law to investigate / look into the affairs of a taxpayer within 7 years from the date the Commissioner serves notice of intention to audit the tax affairs of a taxpayer.	period to 7 years may disadvantage many taxpayers as in most cases it is difficult to have/maintain institutional memory for such a long period. Alternatively, and without prejudice to the above proposal, we propose that the the provision take effect two years from now i.e., the relevant month in 2023 to allow all taxpayers to comply with the requirement.
	Clause 40 **Concurrent civil and criminal proceedings**	The Bill proposes to include a provision allowing criminal and civil proceedings with respect to the same tax offence to be instituted at the same time with neither of the proceedings being a ground of stay or prohibition for the other.	This amendment is likely to have challenges in its application in light of Section 80 of the TPA which prohibits imposition of a penalty and prosecution of an offence in respect of the same act or omission and which provision the Bill does not seek to repeal. In any event, the Civil Procedure Act and the Criminal Procedure Code are the main legislations that govern issues of stay or prohibition orders and the proposed amendment is silent on the interplay between the TPA with the said pieces of legislation. We propose that Clause 40 of the Bill be deleted.

END

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Private and Confidential

Hon. Gladys Wanga, MP
Chairperson
Departmental Committee on Finance & National Planning
The National Assembly
Parliament Buildings
Parliament Road, Nairobi

25 May 2021

Dear Hon. Wanga,

Memorandum to National Assembly on Finance Bill, 2021 Request to Abandon Proposed 20% Excise Duty on Betting Stakes

We refer to the above matter and the Finance Bill, 2021, and write to advocate for **abandonment of the proposed 20% excise duty on betting on amounts staked.**

I. Background to the Issue

Section 25(b) of The Finance Bill, 2021 seeks to amend Part II of the First Schedule to the Excise Duty Act No. 23 of 2015 (Excise Duty Act), to introduce excise duty on betting, computed as 20% of the amount wagered or staked.

The Government has proposed a re-introduction of this excise duty in the hope of expanding its revenue base. The Government's objective of expanding its revenue is aimed at funding the Big 4 agenda whose focus is on the food and nutrition security, affordable housing, enhancing manufacturing and 100% universal health coverage. The increased revenue base is anticipated to augment the 2021/22 budget theme, "**BUILDING BACK BETTER: STRATEGY FOR RESILIENT AND SUSTAINABLE ECONOMIC RECOVERY**".

Kenya and indeed, as have most other nations globally, has suffered a severe economic downturn courtesy of the Covid-19 pandemic. As a result of the economic battering, citizens purchasing power has been eroded and livelihoods lost, particularly in the sensitive services industry. The betting industry, being a service industry, is premised on games and the chances that punters take on such games came to a screeching halt as countries and regulators suspended sporting activities across the board.

So severe were the sporting activities suspensions that even iconic events such as the Olympics were postponed, and it is still not clear if these will be held as planned in the summer of 2021. It is no wonder then, that a key plank of the 2021/22 budget is resilience and recovery.

While we believe the betting industry has survived against many odds and is coming to maturity, we also strongly believe that effective regulation cannot be achieved through fiscal policy as proposed by Government. Experience globally calls for a multi-pronged approach combining fiscal tools and effective self and peer- led regulation to nurture the betting industry and achieve a win-win for all stakeholders.

Like any other sector struggling to recover from the current economic crises, the betting industry is ill-prepared to absorb additional taxes, particularly noting that currently, the betting industry is the most-taxed industry in Kenya. Imposition of an additional 20% excise duty on amounts staked will undoubtedly see a decline in revenues as customers move to more "tax favorable" markets such as offshore and online betting sites or underground gaming shops.

The gaming industry in the fiscal year 2018/2019 contributed about KShs 12.5 billion and KShs 31.7 billion in the last 3 years to the Exchequer in form of direct and indirect taxes that include, betting tax, withholding tax, PAYE and Corporate Tax as tabulated below. If the gaming industry grinds to a halt, the Government stands to lose this direct revenue.

Table 1: Tax Contributions for the Period 2018 - 2021

Fiscal Year	Total Taxes (KShs)
2020/2021	8,500,000,000
2019/2020	10,700,000,000
2018/2019	12,500,000,000
TOTAL	**31,700,000,000**

The Finance Act, 2019, had introduced 20% Withholding Tax on Winnings. This immediately resulted in a steep decline in taxes paid by the betting industry as clearly shown in the below table. Specifically, for the fiscal year 2018/2019 betting tax paid by the industry amounted to KShs 6.9 billion which declined to KShs 2.2 billion in 2019/2020, **reflecting a 34.7% decline from 55.2% to 20.5% of total industry taxes**.

Table 2: Betting Tax Contribution for the Period 2018 - 2021

Fiscal Year	Betting Tax (KShs)	Total (KShs)	% Contribution of Betting tax
2020/2021	2,000,000,000	8,500,000,000	23.5%
2019/2020	2,200,000,000	10,700,000,000	20.5%
2018/2019	6,900,000,000	12,500,000,000	55.2%
TOTAL	**11,100,000,000**	**31,700,000,000**	**35.0%**

The expected revenue loss for the Government does not take into consideration the losses that accrued to the supporting ecosystem of partners. This impact is already a reality as some key betting players have since wound up, citing commercial non-viability owing to the extremely high tax regime in Kenya. Thus, for example, the media industry which benefitted from massive advertising spend resorted to employee layoffs following ceasing of advertising by the industry.

Similarly, local sports teams that benefitted from sponsorship now languish in financial difficulties as most struggle to meet even basic player expenses, allowances and to acquire even basic kit and equipment previously sponsored by the betting industry.

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Therefore, while the proposed 20% excise duty on stakes may be intended to generate more tax revenue for the Government, based on the clear evidence of reduced tax revenues in 2019/20, the proposed 20% excise duty on stakes is unlikely to have the intended impact of revenue generation and in this case will make it difficult for the government to achieve its agenda.

We have, in the following paragraphs, summarised our concerns with the proposed 20% excise duty and articulated the justifications for these concerns.

II. Why the Proposed Excise Duty Would Kill an Already Struggling Gaming Industry

Excise duty is a consumption tax that is collected from a consumer. In this case, the consumer is the punter who places bets with bookmakers such as Milestone Games Limited. Should the 20% excise duty be implemented as proposed, the tax should be deducted from the punters' wagers or stakes (because the Finance Bill 2020 proposes that the excise duty be applicable on "*amount wagered or staked*"). This means that a punter would lose 20% of his/ her funds merely by placing a bet.

In the tables below, we review two scenarios: Scenario I is for two punters (A and B); and scenario II is for the bookmaker. In both situations, Punter A places a bet of KShs 1,000 and wins (odds of 1.3) whereas Punter B places a bet of KShs 1,000 but loses the bet.

Scenario I: Punters		**Punter A (Wins)**	**Punter B (Loses)**
Amount staked **(A)**		1,000.00	1,000.00
Less: 20% excise duty **(B)**		(166.67)	(166.67)
Bet amount (C)	**C= A – B**	**833.33**	**833.33**
Betting Odds: **(D)**		1.3	1.3
Punter Pay-Out based on odds **(E)**	**E = C * D**	1,083	0
Punter Winnings **(F)**	**F = E - C**	250.00	0
Less: 20% WHT on winnings* **(G)**	**G = 20% *F**	50.00	0
Available to punter (H)	**H = E - G**	**1,033**	
Total tax paid		**216.67**	**166.67**

Note:

- *WHT on winnings is calculated at 20% of the net winnings of the punter (net positive difference between pay-outs made and stakes).
- Excise Duty will be levied on the amount wagered, effectively reducing the amount available to place a bet by 20%.

- On a wager of KShs 1,000, KShs 167 will be deducted as Excise duty and the balance of KShs 833 available to place a bet.
- Punter A who won KShs 250, will only remain with KShs 33 while the rest of KShs 216.67 is paid out to Government as taxes.

Generally, betting odds are lower than the above example, hence the winning margin on a bet for a punter is low. From the above example, given the excessive tax policy, a punter will opt not to play as his/her winnings are significantly low due to the taxes involved, and would more likely opt for offshore betting sites that are not subjected to the same level of taxes.

III. Justification for Abandonment of Excise Duty on Betting

We kindly request your office to table this request, consider and recommend for abandonment of the proposed 20% excise duty on betting amounts wagered or staked based on the following grounds:

a) Multiple taxation;
b) Exhaustion of funds through taxation;
c) Erroneous base of excise duty;
d) Infiltration by offshore operators; and
e) Creation of a black-market environment.

a) Multiple taxation – In addition to the 20% WHT on winnings (from punters) and 15% betting tax (from bookmakers), the proposed excise duty would be adding onto the excise duty burden already borne by punters when transferring funds from mobile money wallets to the bookmakers' pay-bill wallets - and also when withdrawing their winnings and wagers from their mobile money wallets.

In the Kenyan gaming industry, 100% of the bets are placed through mobile money transfer services into the bookmakers' pay-bill wallets. The punters' money transfer from their mobile money accounts to the company's pay-bill is subject to excise duty, albeit on the transactional fees/ charges.

b) Exhaustion of Funds through Taxation – Based on our experience, most stakes are recycled bets from winnings and not new or additional funds introduced into the betting ecosystem. While punters do deposit new or additional funds with the bookmakers in order to put up new wagers/ stakes, a majority of the staked funds are proceeds from previous winnings, which is not new money into the betting ecosystem. Therefore, continued taxation based on amounts staked could easily lead to exhaustion of punters' funds through multiple taxation of the same funds, and this would bring an end to the local gaming industry because punters would end up losing interest in gaming.

c) Erroneous Base of Excise Duty - The proposed excise duty is to be applied on "*the amount wagered or staked*". However, Section 9 of the Excise Duty Act provides that the excisable value of excisable services shall be "*...the fee, commission, or charge payable for the services, or ...the*

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open market value of the services". For instance, a person using mobile money transfer services to transfer KShs 1,000 is subjected to excise duty on the transaction charges collected by the telecommunication company, and not on the KShs 1,000 transferred. Similarly, in banking, excise duty applies on the transactional banking charges/ fees.

In the gaming industry, the amount staked is not the fee charged for the service, unless and until the punter loses a bet. In this regard and in line with the provisions of Section 9 of the Excise Duty Act, the correct value of the excisable betting service would be either:

i. from the punter's perspective, the transactional charges when transferring funds (or when withdrawing) from his/ her mobile money wallet; or

ii. from the bookmakers' perspective, any net gains from betting activity - the GGR which is already subject to 15% in the hands of the bookmaker.

The lack of clarity on the excisable amount based on the above provisions of Section 9 of the Excise Duty Act not only runs counter to the now well settled cannons of certainty and simplicity in taxation, but it is also clearly inequitable and unfair when compared to the tax base foe other excisable services such as money transfer services.

d) ***Infiltration by Offshore Operators*** – Should the proposed 20% excise duty be passed into law; we foresee the local market being infiltrated by online operators from offshore jurisdictions. The Covid 19 pandemic has accelerated online transactions, a factor which provides a conducive environment for offshore operators to operate irregularly in Kenya. Currently, a number of such companies are already operational. Offshore gaming operators are not shackled by local laws and will continue to take bets through online payment getaways and cryptocurrency, mainly because they do not subject punter winnings to tax and neither are they subject to local betting tax (or the proposed excise duty). These unchecked transactions would not be regulated and may cause social harm not to mention lose the government much needed revenue. The above effects do not even consider another critical factor - the foreign exchange impact on Kenya as the offshore betting operators would naturally use hard currency as the operational currency to transact.

e) ***Black market environment*** – Generally, when punitive tax measures are imposed on an industry, a black-market environment, commonly exploited by criminal elements who are willing to take the risk of avoiding the taxes, ordinarily arises and thrives. The alcoholic drinks industry is a good example of black-market enterprises with disastrous consequences for all stakeholders including the Government through tax leakages and lost revenues. It is common knowledge that China has the largest black-market gambling industry in the world, which industry arose following the Government's punitive approach to gambling.

We trust that Government will consider the painful lessons from China and obviate the creation of black-market gambling.

IV. Best Practice in Other Countries

From our research on taxation practice in other jurisdictions, betting and gaming companies are only taxed on their GGR. Uganda taxes GGR at 20%, Rwanda at 13% and Tanzania at 6%. In these jurisdictions, once the bookmaker pays the gaming tax, they are not subject to any further taxation.

It is noteworthy that Kenya stands out as the only country seeking to introduce an excise duty on amounts staked or wagered by punters. Therefore, when the current 20% WHT on winnings, applicable in Kenya, is taken into account, an additional 20%, especially on amounts wagered or staked, the industry will be carrying an extremely heavy burden - and in the long run, the Government will end up losing even revenue that the industry contributes to the Exchequer.

V. Conclusion and Request

Milestone Games Limited, as a stakeholder of this sector, humbly request your office to table a recommendation for **abandonment** of the Finance Bill 2021 **proposal to subject betting stakes to 20% excise duty.**

We request that your committee recommend a deletion of clause 25(b) of The Finance Bill, 2021

Allowing the industry to continue operating under a sustainable tax environment, would translate into additional direct and indirect taxes over the years ideally serving to boost the developmental targets for the Big 4 and future government Agendas. However, if this new excise tax is implemented as proposed, it will lead to grinding the industry to its knees, leaving the Government with a gaping hole in its budgeted revenue expectations for 2021/ 2022 and in future years.

As already mentioned herein, if the intention is to curtail perceived negative effects of betting, we would be pleased to discuss with Government other means of regulating the industry, without implementing the proposed excise duty which would completely kill the industry rather than curtail any negative effects that it creates. As it is already, we are informed of punters who are currently placing their bets with offshore bookmakers in order to avoid the multiple taxes in Kenya.

We are available to make a presentation on this matter and look forward to your invite in case you feel the need for such a presentation. In the meantime, we trust that our submission is clear and thank you in advance for supporting the contents of this submission.

Yours sincerely,



Capt. Ronald Karauri
Milestone Games Limited

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Private and Confidential

Hon. Gladys Wanga, MP
Chairperson
Departmental Committee on Finance & National Planning
The National Assembly
Parliament Buildings
Parliament Road, Nairobi

25 May 2021

Dear Hon. Wanga,

Memorandum to National Assembly on Finance Bill, 2021 Request to Abandon Proposed 20% Excise Duty on Betting Stakes

We refer to the above matter and the Finance Bill, 2021, and write to advocate for **abandonment of the proposed 20% excise duty on betting on amounts staked.**

I. Background to the Issue

Section 25(b) of The Finance Bill, 2021 seeks to amend Part II of the First Schedule to the Excise Duty Act No. 23 of 2015 (Excise Duty Act), to introduce excise duty on betting, computed as 20% of the amount wagered or staked.

The Government has proposed a re-introduction of this excise duty in the hope of expanding its revenue base. The Government's objective of expanding its revenue is aimed at funding the Big 4 agenda whose focus is on the food and nutrition security, affordable housing, enhancing manufacturing and 100% universal health coverage. The increased revenue base is anticipated to augment the 2021/22 budget theme, "**BUILDING BACK BETTER: STRATEGY FOR RESILIENT AND SUSTAINABLE ECONOMIC RECOVERY**".

Kenya and indeed, as have most other nations globally, has suffered a severe economic downturn courtesy of the Covid-19 pandemic. As a result of the economic battering, citizens purchasing power has been eroded and livelihoods lost, particularly in the sensitive services industry. The betting industry, being a service industry, is premised on games and the chances that punters take on such games came to a screeching halt as countries and regulators suspended sporting activities across the board.

So severe were the sporting activities suspensions that even iconic events such as the Olympics were postponed, and it is still not clear if these will be held as planned in the summer of 2021. It is no wonder then, that a key plank of the 2021/22 budget is resilience and recovery.

While we believe the betting industry has survived against many odds and is coming to maturity, we also strongly believe that effective regulation cannot be achieved through fiscal policy as proposed by Government. Experience globally calls for a multi-pronged approach combining fiscal tools and effective self and peer- led regulation to nurture the betting industry and achieve a win-win for all stakeholders.

Like any other sector struggling to recover from the current economic crises, the betting industry is ill-prepared to absorb additional taxes, particularly noting that currently, the betting industry is the most-taxed industry in Kenya. Imposition of an additional 20% excise duty on amounts staked will undoubtedly see a decline in revenues as customers move to more "tax favorable" markets such as offshore and online betting sites or underground gaming shops.

The gaming industry in the fiscal year 2018/2019 contributed about KShs 12.5 billion and KShs 31.7 billion in the last 3 years to the Exchequer in form of direct and indirect taxes that include, betting tax, withholding tax, PAYE and Corporate Tax as tabulated below. If the gaming industry grinds to a halt, the Government stands to lose this direct revenue.

Table 1: Tax Contributions for the Period 2018 - 2021

Fiscal Year	Total Taxes (KShs)
2020/2021	8,500,000,000
2019/2020	10,700,000,000
2018/2019	12,500,000,000
TOTAL	**31,700,000,000**

The Finance Act, 2019, had introduced 20% Withholding Tax on Winnings. This immediately resulted in a steep decline in taxes paid by the betting industry as clearly shown in the below table. Specifically, for the fiscal year 2018/2019 betting tax paid by the industry amounted to KShs 6.9 billion which declined to KShs 2.2 billion in 2019/2020, **reflecting a 34.7% decline from 55.2% to 20.5% of total industry taxes**.

Table 2: Betting Tax Contribution for the Period 2018 - 2021

Fiscal Year	Betting Tax (KShs)	Total (KShs)	% Contribution of Betting tax
2020/2021	2,000,000,000	8,500,000,000	23.5%
2019/2020	2,200,000,000	10,700,000,000	20.5%
2018/2019	6,900,000,000	12,500,000,000	55.2%
TOTAL	**11,100,000,000**	**31,700,000,000**	**35.0%**

The expected revenue loss for the Government does not take into consideration the losses that accrued to the supporting ecosystem of partners. This impact is already a reality as some key betting players have since wound up, citing commercial non-viability owing to the extremely high tax regime in Kenya. Thus, for example, the media industry which benefitted from massive advertising spend resorted to employee layoffs following ceasing of advertising by the industry.

Similarly, local sports teams that benefitted from sponsorship now languish in financial difficulties as most struggle to meet even basic player expenses, allowances and to acquire even basic kit and equipment previously sponsored by the betting industry.

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Therefore, while the proposed 20% excise duty on stakes may be intended to generate more tax revenue for the Government, based on the clear evidence of reduced tax revenues in 2019/20, the proposed 20% excise duty on stakes is unlikely to have the intended impact of revenue generation and in this case will make it difficult for the government to achieve its agenda.

We have, in the following paragraphs, summarised our concerns with the proposed 20% excise duty and articulated the justifications for these concerns.

II. Why the Proposed Excise Duty Would Kill an Already Struggling Gaming Industry

Excise duty is a consumption tax that is collected from a consumer. In this case, the consumer is the punter who places bets with bookmakers such as Milestone Games Limited. Should the 20% excise duty be implemented as proposed, the tax should be deducted from the punters' wagers or stakes (because the Finance Bill 2020 proposes that the excise duty be applicable on "*amount wagered or staked*"). This means that a punter would lose 20% of his/ her funds merely by placing a bet.

In the tables below, we review two scenarios: Scenario I is for two punters (A and B); and scenario II is for the bookmaker. In both situations, Punter A places a bet of KShs 1,000 and wins (odds of 1.3) whereas Punter B places a bet of KShs 1,000 but loses the bet.

Scenario I: Punters		**Punter A (Wins)**	**Punter B (Loses)**
Amount staked **(A)**		1,000.00	1,000.00
Less: 20% excise duty **(B)**		(166.67)	(166.67)
Bet amount (C)	**C= A – B**	**833.33**	**833.33**
Betting Odds: **(D)**		1.3	1.3
Punter Pay-Out based on odds **(E)**	**E = C * D**	1,083	0
Punter Winnings **(F)**	**F = E - C**	250.00	0
Less: 20% WHT on winnings* **(G)**	**G = 20% *F**	50.00	0
Available to punter (H)	**H = E - G**	**1,033**	
Total tax paid		**216.67**	**166.67**

Note:

- *WHT on winnings is calculated at 20% of the net winnings of the punter (net positive difference between pay-outs made and stakes).
- Excise Duty will be levied on the amount wagered, effectively reducing the amount available to place a bet by 20%.

- On a wager of KShs 1,000, KShs 167 will be deducted as Excise duty and the balance of KShs 833 available to place a bet.
- Punter A who won KShs 250, will only remain with KShs 33 while the rest of KShs 216.67 is paid out to Government as taxes.

Generally, betting odds are lower than the above example, hence the winning margin on a bet for a punter is low. From the above example, given the excessive tax policy, a punter will opt not to play as his/her winnings are significantly low due to the taxes involved, and would more likely opt for offshore betting sites that are not subjected to the same level of taxes.

III. Justification for Abandonment of Excise Duty on Betting

We kindly request your office to table this request, consider and recommend for abandonment of the proposed 20% excise duty on betting amounts wagered or staked based on the following grounds:

a) Multiple taxation;
b) Exhaustion of funds through taxation;
c) Erroneous base of excise duty;
d) Infiltration by offshore operators; and
e) Creation of a black-market environment.

a) Multiple taxation – In addition to the 20% WHT on winnings (from punters) and 15% betting tax (from bookmakers), the proposed excise duty would be adding onto the excise duty burden already borne by punters when transferring funds from mobile money wallets to the bookmakers' pay-bill wallets - and also when withdrawing their winnings and wagers from their mobile money wallets.

In the Kenyan gaming industry, 100% of the bets are placed through mobile money transfer services into the bookmakers' pay-bill wallets. The punters' money transfer from their mobile money accounts to the company's pay-bill is subject to excise duty, albeit on the transactional fees/ charges.

b) Exhaustion of Funds through Taxation – Based on our experience, most stakes are recycled bets from winnings and not new or additional funds introduced into the betting ecosystem. While punters do deposit new or additional funds with the bookmakers in order to put up new wagers/ stakes, a majority of the staked funds are proceeds from previous winnings, which is not new money into the betting ecosystem. Therefore, continued taxation based on amounts staked could easily lead to exhaustion of punters' funds through multiple taxation of the same funds, and this would bring an end to the local gaming industry because punters would end up losing interest in gaming.

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V. Conclusion and Request

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We request that your committee recommend a deletion of clause 25(b) of The Finance Bill, 2021

Allowing the industry to continue operating under a sustainable tax environment, would translate into additional direct and indirect taxes over the years ideally serving to boost the developmental targets for the Big 4 and future government Agendas. However, if this new excise tax is implemented as proposed, it will lead to grinding the industry to its knees, leaving the Government with a gaping hole in its budgeted revenue expectations for 2021/ 2022 and in future years.

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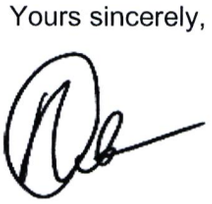
We are available to make a presentation on this matter and look forward to your invite in case you feel the need for such a presentation. In the meantime, we trust that our submission is clear and thank you in advance for supporting the contents of this submission.

Yours sincerely,



Capt. Ronald Karauri
Milestone Games Limited

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km Partners

Kimakia Magara & Partners LLP
Advocates, Commissioners for Oaths & Notaries Public

*Kimakia K.D. *Magara O.G.

Our Ref: KMP/LEG/BD-1/2021 Your Ref: TBA Date: 27th May, 2021

The Clerk of the National Assembly,
Office of The Clerk,
Main Parliament Buildings,
P.O Box 41842-00100, Nairobi.

Dear Sir,

RE: SUBMISSION OF MEMORANDA TO THE FINANCE BILL (NATIONAL ASSEMBLY No. 88 OF 2021), TO PROPOSE AMENDMENT OF THE STAMP DUTY ACT (CAP 480)

The above matter refers.

In light of the publication of the Perpetuities and Accumulations Bill 2021 *(Kenya Gazette Supplement No. 94 (National Assembly Bills No. 24))* and the Trustees (Perpetual Succession) (Amendment) Bill, 2021 *(Kenya Gazette Supplement No 93 (National Assembly Bills No. 23),* it is our considered view that these amendments would make more financial sense to ordinary Kenyans if the Stamp Duty Act was also amended under the Finance Bill, 2021 as published in the Kenya Gazette Supplement No. 88 (*National Assembly Bills No. 18*) to align with the developments in the proposed laws.

The primary motivation for the proposal is to prevent double taxation of stamp duty by exempting payment of stamp duty in the transfer of title in immovable property into a family trust since stamp duty for the same property would have already been for by the same owners when they acquiring the said properties. This will increase the financial accessibility of family trusts as a modern estate-planning tool to the ordinary Kenyan.

It is on this basis that we request the House to broaden its scope of amendments to the Finance Act as proposed in our attached Memorandum.

Yours faithfully,

FOR: KIMAKIA MAGARA & PARTNERS LLP

Kimakia K. Dennis
Email: dennis@kmpartners.co.ke

SPECIAL ISSUE KENYA GAZETTE SUPPLEMENT NO. 88 (NATIONAL ASSEMBLY BILLS NO. 18)

DATED 5TH MAY 2021

KM PARTNERS ADVOCATES' MEMORANDUM TO THE FINANCE BILL 2021, TO PROPOSE AMENDMENT OF THE STAMP DUTY ACT (CAP 480) SUBMITTED TO PARLIAMENT ON 28TH MAY 2021

	ISSUE	PROPOSED CHANGES	JUSTIFICATION
1.	In light of the publication of the Perpetuities and Accumulations Bill 2021 *(Kenya Gazette Supplement No. 94 (National Assembly Bills No. 24))* and the Trustees (Perpetual Succession) (Amendment) Bill, 2021 *(Kenya Gazette Supplement No 93 (National Assembly Bills No. 23)*. These amendments would make more financial sense to ordinary Kenyans if the Stamp Duty Act was also amended to align with the developments in the proposed laws.	- We propose amendment of Amendment of Section 52(2)(b) of Cap 480 - by inserting the words 'or a registered family trust' after the word "established". - We also propose the Amendment of Section 117(1)(h) of Cap 480- by inserting the words 'registered family trust' in between the words "codicil" and "or".	The Justification for the proposed review is to prevent double taxation of stamp duty by exempting payment of stamp duty in the transfer of title in immovable property into a family trust since the property would have already been paid stamp duty when acquiring the same properties. This will increase the financial accessibility of family trusts as a modern estate planning tool to the ordinary Kenyan.

SPECIAL ISSUE KENYA GAZETTE SUPPLEMENT NO. 88 (NATIONAL ASSEMBLY BILL NO. 18 OF 2021)

KM PARTNERS ADVOCATES' MEMORANDUM TO THE FINANCE BILL 2021, TO PROPOSE AMENDMENT OF THE STAMP DUTY ACT (CAP 480)

(SUBMITTED TO PARLIAMENT ON 31ST MAY 2021 PURSUANT TO A REQUEST FROM THE FINANCE & NATIONAL PLANNING COMMITTEE)

	ISSUE	PROPOSED CHANGES	JUSTIFICATION
1.	In light of the publication of the Perpetuities and Accumulations Bill 2021 *(Kenya Gazette Supplement No. 94 (National Assembly Bills No. 24))* and the Trustees (Perpetual Succession) (Amendment) Bill, 2021 *(Kenya Gazette Supplement No 93 (National Assembly Bills No. 23)*. These amendments would make more financial sense to ordinary Kenyans if the Stamp Duty Act was also amended to align with the developments in the proposed laws.	- We propose amendment of Section 52(2)(b) of Cap 480 - by inserting the words 'or a registered family trust' after the word "established". - We also propose the Amendment of Section 117(1)(h) of Cap 480- by inserting the words 'registered family trust' in between the words "codicil" and "or".	The Justification for the proposed review is to prevent double taxation of stamp duty by exempting payment of stamp duty in the transfer of title in immovable property into a family trust since the property would have already been paid stamp duty when acquiring the same properties. This will increase the financial accessibility of family trusts as a modern estate-planning tool to the ordinary Kenyan.

KISOO MUTUA
& ASSOCIATES ADVOCATES

COMMISSIONER FOR OATHS & NOTARIES PUBLIC

Our Ref: KM/05/2021 **Your Ref:** TBA **Date:** 28th May 2021

The Clerk of the National Assembly,
Office of The Clerk,
Main Parliament Buildings,
P.O Box 41842-00100,
Nairobi.

Dear Sir,

RE: SUBMISSION OF MEMORANDA TO THE FINANCE BILL (NATIONAL ASSEMBLY No. 88 OF 2021).

In light of the publication of the Perpetuities and Accumulations Bill 2021 *(Kenya Gazette Supplement No. 94 (National Assembly Bills No. 24))* and the Trustees (Perpetual Succession) (Amendment) Bill, 2021 *(Kenya Gazette Supplement No 93 (National Assembly Bills No. 23)*.

The primary objective of the proposed amendments is to create a sustainable estate planning and wealth management tool for ordinary Kenyans to make use of. Family trusts will be the end of many potential contentious succession issues and also act as investment vehicles which would eventually increase the country's tax base and government revenue.

It is on this basis that we request the House to accommodate us to present, in person, our submission on critical tax efficiency proposals that we believe the two Bills need in order to actualize their intended effect as proposed in the attached Memoranda.

Yours Faithfully,

Mary Kisoo,
Managing Partner,
Kisoo & Associates Advocates.

KISOO MUTUA & ASSOCIATES ADVOCATES
2nd Floor, Park Place Business Centre, Second Parklands Avenue, Off Limuru Rd | P.O. Box 10-00623 - Nairobi

SPECIAL ISSUE KENYA GAZETTE SUPPLEMENT NO. 88 (NATIONAL ASSEMBLY BILLS NO. 18)

DATED 5TH MAY 2021

MARY KISOO & ASSOCIATES ADVOCATES' MEMORANDUM TO THE FINANCE BILL 2021, TO PROPOSE AMENDMENT OF THE STAMP DUTY ACT (CAP 480) & INCOME TAX ACT (CAP 470) SUBMITTED TO PARLIAMENT ON 28TH MAY 2021

	ISSUE	PROPOSED CHANGES	JUSTIFICATION
1.	In light of the publication of the Perpetuities and Accumulations Bill 2021 *(Kenya Gazette Supplement No. 94 (National Assembly Bills No. 24))* and the Trustees (Perpetual Succession) (Amendment) Bill, 2021 *(Kenya Gazette Supplement No 93 (National Assembly Bills No. 23)*. These amendments would make more financial sense to ordinary Kenyans if the Income Tax Act (Cap 470) was also amended to	We propose: **1.** Amendment of Section 11 (3)(c) by inserting subsection (c) with the following paragraph: In the case of a registered family trust, sub-section (3) shall only apply to, any amount that is paid out of the trust income on behalf of	- To create tax incentives that encourage Kenyans to save and accumulate income for the benefit of their families for the purposes of education, accessing medical treatment and securing early adult housing. - To broaden the financial accessibility of family trusts to ordinary Kenyans by exempting distributions to beneficiaries which is below Ksh 10 million.

	align with the developments in the proposed laws.	any beneficiary and is used exclusively for the purpose of education or medical treatment, early adulthood housing or any deemed income, to any beneficiary, for any other purpose, which is collectively above Ten million Kenya shillings in the year of income or any other such amount as the commissioner may prescribe from time to time and at such rate as prescribed in paragraph 5 of the third schedule or as further amended by the commissioner from time to time;	
2.		We propose: - Amendment of Section 25(7)(b)- (Income settled on Children) in the definition of "Settlement", insert the words "through a registered family	- This section will allow a family trust, as a separate legal entity to make its own accounts on taxes. - It is in line with the proposed paragraph 57 of the First Schedule which proposes to make any distribution of accumulated income in a family trust, tax exempt.

		trust or" in between the words "assets" and "resulting"	
3.		We propose: - Amendment of Section 26(5)-(Income from certain settlements deemed to be income of Settlor) in the definition of "Settlement", insert the words "other than a registered family trust" in between the words "trust" and "covenant"	- This section will allow a family trust, as a separate legal entity to make its own accounts on taxes. - It is in line with the proposed paragraph 57 of the First Schedule which proposes to make any distribution of accumulated income in a family trust, tax exempt.
4.		We propose: - Insertion of new paragraph 36(g) in the First Schedule, PART I as follows:	- To avoid double taxation of investments, being transferred into a family trust, from capital gains tax, since the settlor had already paid the same and the trust is a non-trading entity intended to just hold the property.

		Property (including investment shares) which is transferred or sold for the purpose for transferring the title or proceeds into a registered family trust.	
5.		We propose: - Insertion of new paragraph 57 in the First Schedule, PART I with the following paragraphs: (1) The income and or principal sum of a registered family trust targeting multiple generations (2) Any capital gains tax relating to the transfer of title of immovable property to family trust	- To avoid double taxation by exempting the transfer of immovable property from capital gains tax. - To exempt the principal and accumulated income held in a family trust from taxation since despite the trust is intended to be non-charitable it is a non-trading entity and taxes have already been collected at source.

6.		We propose: - Insertion of new paragraph 5(jb) of the Third Schedule with the following paragraph: In respect to disbursement of deemed income to beneficiaries under Section 11(3)(c), standard corporate tax rate of the gross amount paid.	- To generate government revenue through taxation of deemed income distributed to beneficiaries, by taxing at the standard corporate tax rate (currently at 30%).

Ivia Kitonga
Eric J. Mutemi
Mukoya C. Weche

NZAMBA KITONGA
ADVOCATES LLP
Commisioners for Oaths | Notaries Public | Patent Agents

31st May, 2021

Clerk's Chambers
National Assembly
Parliament Buildings
P.O. Box 41842-00200
NAIROBI

Dear Sir,

RE: COMMENTS ON THE FINANCE BILL, 2021, (NATIONAL ASSEMBLY NO. 18 OF 2021

We refer to the above matter and your communications requesting for comments on the Finance Bill **(the Bill)** which was introduced for first reading in the National Assembly on 5th May 2022.

The Bill seeks to make amendments to various tax laws, including the Income Tax Act (CAP 470), the Value Added Tax Act, 2013, the Tax Procedures Act, 2015, the Miscellaneous Fees and Levies Act, 2016 and the Excise Duty Act, 2015, among others.

We are of the view that the Bill has the following impact on the various elements on the county's tax regime;

1. **Amendment of the Income Tax Act**

1.1 Clarity on the Application of the Digital Service Tax

Digital Service Tax ("DST") was introduced in Kenya through the Finance Act, 2019 and enacted through the Finance Act, 2020 with an effective date of 1st January 2021. It was introduced to both the Income Tax Act ("ITA") and the Value Added Tax Act ("VAT Act").

The Bill proposes to further amend the provisions relating to DST as follows:

- **Application of DST:** The Bill has proposed to limit the application of DST to non-resident persons only. Based on the wording of the proposed amendment, DST will only apply to non-resident persons. The current legal regime relating to DST applies to both non-resident and resident persons. The import of this is that
- **Income Subjected to DST:** The Bill proposes to amend the scope of income that will be subject to DST to include income accruing from a business carried out

over the internet or an electronic network including through a digital marketplace.

- **Definition of Digital Market Place:** The Bill has proposed to amend the definition of a digital marketplace in the Income Tax Act to mean "an online platform which enables users to sell or provide services, goods or other property to other users." A digital marketplace is currently defined as "a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means".

1.2 Amendment of the term of the Term 'Control' Tax Purposes

The Bill has proposed to insert the definition of the term 'control' in the Income Tax Act to include instances where a person:

a. Holds more than 20 percent of the voting rights of a company;
b. Advances a debt or gives a debt guarantee of at least 70 percent of indebtedness of a company;
c. Has power to appoint more than 50 percent of the board of directors of a company or at least one director or executive member of the governing board of that company;
d. Owns or has exclusive right to the intellectual property rights that a company is dependent on for the manufacture or processing of goods for its business;
e. Supplies or purchases at least 90 percent of the purchases or supplies of a company or has influence on supply of goods, prices or markets of a company; or
f. Has any other relationship, dealing or practice with another person which the Commissioner may deem to constitute control.

Previously, the term 'control' in relation to a body corporate, was defined in the Second Schedule to the Income Tax Act to mean, the holding of shares or voting power of 25 percent or more. The Second Schedule was deleted by Tax Laws (Amendment) Act, 2020, effective 25th April 2020 and replaced by a new Second Schedule, but the definition of the term 'control' was not set out in the Income Tax Act. The Intellectual Property regime is designed to spur economic growth. Taxing innovators/owner's IP will have a chilling effect on innovation.

2. Amendments to the Value Added Tax Act, 2013

2.1. VAT Exemptions in the Energy sector

The Bill has proposed to re-introduce the VAT exemptions relating to the energy sector that had been withdrawn by the Tax Laws (Amendment) Act, 2020.

The supply of the following goods will be exempt from VAT:

- Taxable goods supplied to persons that had an agreement or contract with the Government prior to 25th April 2020 and the Agreement or contract provided for exemption from VAT. Our interpretation of this exemption is that these projects can apply for exemption from VAT in respect of the goods procured locally or imported for the implementation of the projects.
- Specialized equipment for the development and generation of solar and wind energy, including photovoltaic modules, direct current charge controllers, direct current inverters and deep cycle batteries that use of store solar power.
- Taxable goods, excluding motor vehicles, imported, or purchased for direct and exclusive use in geothermal, oil or mining prospecting or exploration by a company granted a prospecting or exploration license.

2.2. Reclassification of VAT Treatment

The Bill proposes to reclassify the treatment of the certain products such as on ordinary bread and other basic products and this in turn is expected to be subject of public debate, given the potential impact such taxes could have on the cost of living on the overburdened tax payer.

The proposal to subject ordinary bread and other basic products to VAT is likely to face a lot of pushback due to reduced incomes arising from the containment measures introduced locally to fight the COVID-19 pandemic.

2.3. Exemption on Transfer of Assets into Real Estates Investments Trusts (REIT)

The Bill has proposed to re-introduce the exemption from VAT in respect of transfer of assets and other transactions related to the transfer of assets into real estate investment trusts and asset backed securities. This will have a domino effect of increasing investments within the real estate sector.

2.4. Cabinet Secretary to Make Regulations without Approval of National Assembly

The Bill has proposed to amend the Value Added Tax Act, 2013 to delete the requirement for Regulations made under the Value Added Tax Act to be tabled before the National Assembly for approval before they take effect. If the proposed amendment is approved, the Cabinet Secretary for National Treasury will have powers to make regulations under the Value Added Tax Act without approval of the National Assembly

If this amendment in the Finance Bill is passed into law, it shall occasion a Constitutional concern as the National Treasury will be at liberty to implement new VAT legislation without going through the National Assembly for approval.

3. Amendments to the Tax Procedures Act, 2015

3.1. Limitation Period for Tax Assessments

The Bill has proposed to increase the period within which the Commissioner may amend a tax assessment from five years to seven years. Under the proposed amendment, the Commissioner will be permitted by law to investigate / look into the affairs of a taxpayer within seven years from the date the Commissioner serves notice of intention to audit the tax affairs of a taxpayer.

In line with the proposed increase in the limitation period for tax assessments, the Bill has proposed to increase the period within which a person should retain documents under a tax law from five years to seven years from the end of the reporting period to which the document relates. The proposed amendment will increase the compliance burden on taxpayers as they will now be required to keep records for a longer period.

3.2. Introduction of Common Reporting Standards under Domestic Law

The Bill seeks to introduce provisions relating to Common Reporting Standards (CRS) obligations by financial institutions located in Kenya on exchange of financial account information in tax matters, under the Tax Procedures Act, 2015 in line with the Convention on Mutual Administrative Assistance in Tax Matters (the Convention) which was signed by Kenya on the 8th of February, 2016.

The impact of this is that globally, CRS filings have been a useful tool for revenue authorities to enhance compliance and disclosure, effectively curbing revenue leakage.

4. Amendments to the Excise Duty Act, 2015

4.1. Excise Duty on Betting

The Bill has proposed to reintroduce excise duty on betting at the rate of 20 percent of the amount waged. The proposed amendment is aimed at expanding the tax base and collection of revenue by the KRA. The 20 percent excise duty will be in addition to the 20 percent withholding tax applicable on winnings by punters. Despite, leading to increase in revenue, the proposed amendment will erode the betting firms' profitability and is likely to discourage punters in placing bets which may ultimately lead to investors exiting the Kenyan industry.

4.2. Introduction of Excise Duty on fees and commissions earned on loans

The Bill seeks to amend the definition of "other fees" by deleting the words 'fees or commissions earned in respect of a loan. The effect of this amendment is that fees or commissions earned in respect of a loan will not be excluded from the definition of 'other fees' and will therefore be subject to excise duty at the rate of 20 percent.

4.3. Exemption of imported glass bottles

The Bill proposes to exclude imported glass from excise duty. Currently, Excise duty on imported glass is imposed duty at the rate of 25%. If this provision were to be implemented, it will be a welcome move for manufacturers who use imported glass to package their products and rely heavily on imported glass.

5. Conclusion

We trust the above comments and proposals are helpful. Please contact us should you require any clarification.

Yours faithfully,

NZAMBA KITONGA ADVOCATES LLP,

IVIA KITONGA

REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY- FIFTH SESSION
FINANCE BILL, 2021 (NATIONAL ASSEMBLY BILL NO. 18 OF 2021)

NATIONAL TAXPAYERS ASSOCIATION

FINANCE BILL, 2021 (NATIONAL ASSEMBLY BILL NO. 18 OF 2021)

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	Part V- Excise Duty	(1) The National Taxpayers Association (NTA) would like to commend the National Treasury for proposing tax rate of Kes.5,000 per Kg for products containing nicotine or nicotine substitutes intended for inhalation without combustion or oral application but excluding medicinal products. Related to this NTA proposes15% increase in excise tax specifically for cigarettes and adoption of uniform specific excise tax structure.	**Effects of tobacco tax on consumption of tobacco** Studies have shown that tiered tax structure creates incentives for manufacturers to reposition their brands for maximum gain – which is a common practice to reduce the retail selling price (RSP) of lead brands in order to be eligible for a lower tax rate. Tiered specific excise taxes on cigarettes are not effective for tobacco control as they would lead to higher levels of cigarette consumption as well as lowered revenue levels. Uniform specific excise is identified as best practice in tobacco control and excise revenue maximization. **Scenario** Imposing 15% increase uniform specific excise tax on cigarettes will contribute to the following positive impact; Cigarette consumption will decrease by 1.2% million packs that is from 10million packs to 9.9 million packs after 15% increment on uniform specific tax on the middle brands. The tax revenue is expected to increase by 13.6% after an increment of 0.7million from 5.0 million to 5.7 million because of increment in uniform specific tax. This therefore means that the government will be able to raise revenue from tobacco products to fund its development programmes and at the same time reducing use of tobacco products thus improving public health.

			The WHO tobacco simulation model was used to come up with the figures. Data for simulation model came from national sources.

REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY- FIFTH SESSION
FINANCE BILL, 2021 (NATIONAL ASSEMBLY BILL NO. 18 OF 2021)

Sugar Campaign for Change (SUCAM) Memorandum on FINANCE BILL , 2021 (NATIONAL ASSEMBLY BILL NO. 18 OF 2021)

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	21. The First Schedule to the Value Added Tax Act, 2013 is amended— (b) in Part II, by adding the following new paragraphs immediately after paragraph 31— 32. The exportation of taxable services. 33. The transfer of assets and other transactions related to the	Defore adding paragragh 32 and 33 after paragrapgh 31 : **Delete** paragraph 18A from Part II – Services from the First Schedule of the VAT Act 2013 Exempt Service reading..."**Transportation of sugarcane from farms to milling factories".**	The President, on 4 August 2016, assented to the Value Added Tax (Amendment) Act, 2016 ("VAT Amendment Act"), a law whose objective was to amend the Value Added Tax Act, 2013 ("VAT Act") to exempt the levying of Value Added Tax ("VAT") on transportation of sugarcane from farms to sugar milling factories. In this regard, the exemption has been introduced in Part II of the First Schedule to the VAT Act with effect from 24 August 2016. However, **input tax in relation to exempt supplies is non-deductible and is disallowed** under Section 17(6) of the VAT Act 2013. Put the other way; VAT Act prohibits the claiming of input tax credits in relation to VAT incurred in the course of making exempt supplies. This has impacted negatievely on poor cane

	transfer of assets into real estate investment trusts and asset-backed securities **Page 556**		farmers: 1. Accordingly, under the amended VAT law, transporters of sugarcane are not be able to recover any VAT incurred by them in relation to their transportation services to the sugarcane farmers. For instance, any VAT incurred on the acquisition and/or repair of their transportation vehicles, is becoming a sunk cost for the transporters. 2. Accordingly, whilst VAT may not be applicable on the sugarcane transportation costs, the desired cost reduction objective is unlikely to be met. ***It is our view that the transporters seek to recoup their non-recoverable VAT costs by way of increased transport charges to farmers***.
	22. The Second Schedule to the Value Added Tax Act, 2013 is amended— (a) in paragraph 1 of Part A, by deleting the words "or taxable services"; (b) by deleting paragraph 13A.	Insert new paragraph 5A under Part A Zero Rated Supplies – Second Schedule of the VAT Act 2013 reading... "Transportation of sugarcane from farms to milling factories".	➨ Unlike the case of VAT exemption, if the transportation of sugarcane from farms to mills were to be zero rated, the suppliers of these services would (to the extent they are registered for VAT) be entitled to claim input tax credits in relation to VAT incurred in the course of their business. ➨ Consequently, transporters would have no reason to hike their transportation charges and the desired cost reduction to farmers would be achieved. ➨ The second schedule provides that "...Zero-rating shall be in accordance

	Page 556		with the provisions of Section 7(1) of the VAT Act which states; Where a registered person supplies goods or services and the supply is zero rated, no tax shall be charged on the supply, but it shall, in all other respects, be treated as a taxable supply..." **Expected Benefits:** **Transporters will be able to claim input tax on transport services thereby the related cost can be reduced on final product – benefits to** **1. Farmers – Higher Net income** **2. Consumers – Cheaper retail sugar price**

RSM

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1st June 2021

The Departmental Committee on Finance and National Planning
The National Assembly
Parliament Buildings
Nairobi, Kenya

Dear Sirs,

RE: CALL FOR STAKEHOLDER ENGAGEMENT ON THE FINANCE BILL, 2021 BY THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

We, RSM (Eastern Africa) Consulting Limited, in accordance with the request for public participation pursuant to Article 118 (1) (b) of the Constitution of Kenya, are pleased to submit our proposals below for your consideration.

We thank you for the opportunity to participate in this undertaking.

Yours faithfully,

Ashif Kassam
Executive Chairman
RSM (Eastern Africa) Consulting Ltd

THE POWER OF BEING UNDERSTOOD
AUDIT | TAX | CONSULTING

Directors: Ashif Kassam, Lina Ratansi, Nihla Mazrui, Elvis Ogeto
RSM (Eastern Africa) Consulting Ltd is a member of the RSM network and trades as RSM. RSM is the trading name used by the members of the RSM network. Each member of the RSM network is an independent accounting and consulting firm each of which practises in its own right. The RSM network is not itself a separate legal entity of any description in any jurisdiction

REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY- FIFTH SESSION
FINANCE BILL, 2021 (NATIONAL ASSEMBLY BILL NO. 18 OF 2021)

FINANCE BILL, 2021 (NATIONAL ASSEMBLY BILL NO. 18 OF 2021)

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	INCOME TAX ACT		
2(a) - Section 2 of the ITA – Definition of control	The Bill has re-introduced the definition of **control** which is much more comprehensive, and also in line with the proposal in the Income Tax Bill. **Control** in relation to a person now includes: i) A person holding at least 20% voting rights in a company, directly or indirectly; ii) A loan advanced constituting at least 70% of the book value of the total assets of the entity, excluding a loan from a financial institution not associated with the person	The amended definition should read as follows: "**Control"** in relation to a person now includes: i) A person holding at least 20% voting rights in a company, directly or indirectly; ii) A loan advanced constituting at least 70% of the book value of the total assets of the entity, from i) a director of the entity; ii) a shareholder of the entity who holds any shareholding directly or indirectly; or iii) any associate of the director or shareholder of the entity;	There are a number of provisions in this that make Kenya uncompetitive for business: i) "Control" in its literal sense means the ability to influence or direct the operating and financial policies of an entity; and the definition should not be extended to bringing market based third-party transactions into the ambit of control. ii) In a number of third-party agency agreement, the supply terms are agreed between independent third-parties. The supply of

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	advancing the loan; iii) A guarantee by a person for any form of indebtedness constituting at least 70% of the total indebtedness of the entity, excluding a guarantee from a financial institution not associated with that guarantor; iv) The power to appoint more than half of the board of directors of the entity, or at least one director or executive member of the governing board of that entity; v) A person who has exclusive rights over the know-how (includes patent, copyright, trademark, license, franchise, and any other business or commercial right) on which the entity is wholly dependent for the manufacture or processing of goods or articles or business carried on by the other person; vi) The person or another person designated by him supplies at least 90% of the purchases of the entity; or in the opinion of the Commissioner, influences the price or other conditions relating to the supply of the purchases of the entity; vii) The person or another person	iii) A guarantee by a person for any form of indebtedness constituting at least 70% of the total indebtedness of the entity from i) a director of the entity; ii) a shareholder of the entity who holds any shareholding directly or indirectly; or iii) any associate of the director or shareholder of the entity; iv) The power to appoint more than half of the board of directors of the entity, or v) The powers, under an agreement, to influence or direct the financial and operating policies of the entity or the ability to control the board;	goods or services, without the ability to exercise control over the financial and operating policies, does not constitute control. iii) An overarching power to determine control by the Commissioner is unconstitutional. A provision of law has to be specific with no provision for board interpretation, as the imposition of any unilateral power could be subject to abuse.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	designated by him purchases 90% of the sales of the entity; or in the opinion of the Commissioner, influences the price or any other conditions of sales of the entity; or viii) Any other relationship, dealing or practice that the Commissioner may deem to constitute control.		
2(b) - Section 2 of the ITA – Definition of a permanent establishment	The definition of a permanent establishment has been deleted and substituted to include: i) A fixed place of business through which business is wholly or partly carried on and includes: • A place of management, a branch, an office, a factory, a workshop and a sales outlet; • **A mine, an oil or gas well, a quarry, or any other place of extraction or exploitation of natural resources;** • A warehouse in relation to a person whose business is providing storage facilities to others; or • A farm, plantation or other place where agricultural, forestry plantation or related activities are carried out; ii) A building site, construction,	The amended definition of a permanent establishment should now read: "Permanent establishment" now includes: i) A fixed place of business through which business is wholly or partly carried on and includes: • A place of management, a branch, an office, a factory, a workshop and a sales outlet; • A mine, an oil or gas well, a quarry, or any other place of extraction or exploitation of natural resources, if it is in existence for more than 12-months; • A warehouse in relation to a person whose business is providing storage facilities to others; or • A farm, plantation or other place where agricultural, forestry	i) An extraction site (a mine, an oil or gas well, a quarry, or any other place of extraction or exploitation of natural resources) constitutes a PE if it lasts more than 12 months under the OECD Model Tax Convention and 6 months under the UN Model Tax Convention. ii) It is not logical to expect an individual who has not met the residency status in Kenya to create a PE for their non-resident employers. iii) The number of days for a consultant providing a service on behalf of a non-resident should be aligned with the 183 days (6 months) in line with the

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	assembly or installation project, or any supervisory activity connected to a site or project if it continues for a period of more than 183 days, provided that: • Where a person carries on activities at a place that constitutes a building site or construction or installation project and these activities are carried on during one or more periods of time that, in the aggregate, exceed 30 days but do not exceed 183 days; and • Connected activities are carried on at the same building site or construction or installation project during different periods of time, each exceeding thirty days, by one or more enterprises closely related to the first-mentioned enterprise; the different periods of time shall be added to the aggregate period of time during which the first-mentioned enterprise has carried on activities at that building site or construction or installation project; **iii) The provision of services including consultancy services provided by a person through**	plantation or related activities are carried out; ii) A building site, construction, assembly or installation project, or any supervisory activity connected to a site or project if it continues for a period of more than 183-days, provided that: • Where a person carries on activities at a place that constitutes a building site or construction or installation project and these activities are carried on during one or more periods of time that, in the aggregate, exceed 30-days but do not exceed 183-days; and • Connected activities are carried on at the same building site or construction or installation project during different periods of time, each exceeding thirty days, by one or more enterprises closely related to the first-mentioned enterprise; the different periods of time shall be added to the aggregate period of time during which the first-mentioned enterprise has carried on activities at that building site or construction or installation project;	Income Tax Act residency rules. iv) Definition (iii) providing that consultancy services provided by a non-resident person for a period exceeding 91 days will adversely affect businesses which require the foreign special expertise not available locally, will be affected as the non-resident supplier may refuse to conduct business with the local entities. This will adversely affect manufacturing and construction industries, where upon importation of machinery, they require the expertise of the non-resident consultants for installation and training purposes. Moreover, these services are subject to 20% withholding tax, which effectively results into profit margin of 53.3% at the 37.5% non-resident rate of corporation tax.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	employees or other personnel engaged for that purposes if the period exceeds the aggregate 91 days in any 12month period commencing or ending the year of income concerned; iv) An installation or structure used in the exploration of natural resources provided the exploration continues for a period equal to 91 days or more; or v) A dependent agent of a person who habitually concludes, contracts or plays the principal role leading to the conclusion of contracts without material modification by the person, excluding the activities that are of a preparatory or auxiliary character such as: • The use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise; • The maintenance of stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display, for the purpose of processing by another enterprise; or	iii) The provision of services including consultancy services provided by a person through employees or other personnel engaged for that purposes if the period exceeds the aggregate 183-days in any 12-month period commencing or ending the year of income concerned; i) An installation or structure used in the exploration of natural resources provided the exploration continues for a period equal to 91-days or more; or ii) A dependent agent of a person who habitually concludes, contracts or plays the principal role leading to the conclusion of contracts without material modification by the person, excluding the activities that are of a preparatory or auxiliary character such as: • The use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise; • The maintenance of stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display, for the purpose of processing by	

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	• The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or collecting information for the enterprise, for the purpose of carrying on any other activity or combination of activities.	another enterprise; or • The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or collecting information for the enterprise, for the purpose of carrying on any other activity or combination of activities.	
7(a) - Section 16(2)(j) of the ITA	Deleting paragraph (j) and substituting therefore the following new paragraph— (j) gross interest paid or payable to related persons and third parties in excess of thirty per cent of earnings before interest, taxes, depreciation and amortization of the borrower in any financial year: Provided that— i) any income which is exempt from tax shall be excluded from the calculation of earnings before interest, taxes, depreciation and amortization; and ii) this paragraph shall apply to— (A) interest on all loans; (B) payments that are economically equivalent to interest; and (C) expenses incurred in connection with raising the	The current paragraph (j) to be deleted and substituted with: (j) an amount of interest paid in proportion to the extent that the highest amount of all loans from non-resident lenders held by the company at any time during the year of income exceeds two times the sum of the revenue reserves and the issued and paid up capital of all classes of shares of the company; or an amount of deemed interest where a non-resident person is in control of the company – For the purpose of this subsection, the expression "revenue reserves" includes accumulated losses; Provided that this paragraph	i) Businesses in a free-market economy are at the liberty to decide how to finance the business and the restriction on how to structure the capital of an entity should not be governed by tax laws. The restriction of interest expense to 30% of EBITDA is too limiting to businesses and will adversely affect the financing of businesses, especially start-ups, venture and private capital backed entities and capital intensive companies. Also for low-margin businesses, 30% of EBITA is a very low threshold. ii) Additionally, the interest expense paid on loans provided by local lenders are taxed as income on the

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	finance.	shall - (i) also apply to loans advanced to the company by a non-resident associate of the non-resident company controlling the resident company; and (ii) not apply where the company is a bank or a financial institution licensed under the Banking Act or Microfinance Act; **The other alternative is**: (j) interest payments in proportion to the extent that the highest amount of all loans held by the company at any time during the year of income exceeds the greater of three times the sum of the revenue reserves and the issued and paid up capital of all classes of shares of the company or an amount of deemed interest where the company is in the control of a non-resident person and where the company is not a bank or a financial institution licensed under the Banking Act; Provided that this paragraph –	resident lenders, and therefore there is no loss in revenue. Forcing companies not to borrow, will have its impact on the financial sector, which are one of the highest tax paying sectors. iii) The provisions as worded to include payments that are economically equivalent to interest, without defining what these mean could create a lacuna, as there are could be a conflict with interest un-winding in the accounting sense, which is not interest. iv) If Kenya is to act as an investment hub, we need to be cognizant of the financing structures used globally and not create our own restrictions, without having a full analysis of the impact of tax changes on these in-bound investments.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
		i) shall apply to loans advanced to the company by a non-resident associate of the non-resident company controlling the resident company; and ii) shall exclude loans received from residents (including a bank or a financial institution licensed under the Banking Act or Microfinance Act).	
8. Section 18B(2) of the ITA	(2) An ultimate parent entity of a multinational enterprise group shall submit to the Commissioner a return describing the group's financial activities in Kenya, where its gross turnover exceeds the prescribed threshold, and in all other jurisdictions where the group has taxable presence, not later than twelve months after the last day of the reporting financial year of the group.	The prescribed turnover threshold has not been provided. The Finance Act, 2021 should state what is the prescribed threshold.	Multinational Groups whose Ultimate Parent Entities are located in Kenya need this information for certainty on compliance with the provision.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	VALUE ADDED TAX, 2013		
20. Section 67(2) of the VAT Act	67.(1) The Cabinet Secretary may make regulations for the better carrying of the provisions of this Act, and without prejudice to the generality of the foregoing, the regulations may – (a) prescribe conditions and procedures for the registration of registered persons; (b) provide for the submission of returns and the place at which returns are to be submitted and tax is to be paid; (c) prescribe the form of notices, returns or other forms required for the purposes of this Act; (d) prescribe offence and penalties thereto; (e) prescribe rules for particular types of supplies and in relation to input tax credits; or (f) prescribe any other thing required to be prescribed for the purposes of any provision of this Act. **(2) Regulations made under this section shall be tabled before the National Assembly for approval before they take effect.**		The deletion of the section contravenes Section 11(1) of the Statutory Instruments Act which requires all statutory instruments to be tabled in the National Assembly for approval. Moreover, regulations made in the absence of a review and feedback mechanism, could have its own consequences.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	The Bill proposes the deletion of Section 67(2) above which requires the CS Treasury to table VAT regulations in the National Assembly for approval before they take effect.		
21(b) - Paragraph 32 Part II of the First Schedule of the VAT Act, 2013 – Exportation of taxable services	The supply or importation of the following goods shall be exempt supplies. 32. The exportation of taxable services.	The supply of exportation of taxable services remain as a zero-rated supply. The supply should remain in the Second Schedule of the ITA and read as: Where the following supplies, excluding hotel accommodation, restaurant or entertainment services where applicable, take place in the course of a registered person's business, they shall be zero rated in accordance with the provisions of Section 7 – 1. The exportation of goods or taxable services.	Exempting exported services will increase the cost of doing business and also make Kenya a less competitive destination for outsourcing. Kenya is becoming regional powerhouse for provisions of exported services in areas of information technology, as a transport hub, professional services and advertising. KRA has continued to frustrate this growth by initially declining VAT refunds in areas of export of services in total contradiction of the OECD guidelines. When the principal accorded by KRA was not accepted by the Tax Appeals Tribunal and the courts, the solution now proposed is to exempt the export of services. What is being forgotten that export of services results in employment, is a source of foreign exchange and also results in local companies paying income and other taxes, which would all be lost if we make this sector uncompetitive.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
TAX PROCEDURES ACT, 2015			
29 - Section 31 of the TPA	31.(1) Subject to this section, the Commissioner may amend an assessment (referred to in this section as the "original assessment") by making alterations or additions, from the available information and to the best of the Commissioner's judgement, to the original assessment of a taxpayer for a reporting period to ensure that— (4) The Commissioner may amend an assessment— (a) in the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time; or (b) in any other case, within seven years of— (i) for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates; or	This amendment be adopted and Section 31 should remain as is. 31.(1) Subject to this section, the Commissioner may amend an assessment (referred to in this section as the "original assessment") by making alterations or additions, from the available information and to the best of the Commissioner's judgement, to the original assessment of a taxpayer for a reporting period to ensure that— (4) The Commissioner may amend an assessment— (a) in the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time; or (b) in any other case, within **five** years of— (i) for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates;	i) With the resources provided to KRA including technological advances adopted, 5-years is a long time to for the revenue authority to confirm the validity of self-assessment returns. ii) Prior to the TPA, the timeframe for audit in the VAT Act was 5-years, and this was adopted as a common timeframe across all tax heads. iii) There is also concern in relation to the Voluntary Tax Disclosure Program, which runs for a 5year period from 1st January 2021. The impact of this change is that persons who make a volunteer declaration under the program, could be subject to an additional assessment in respect to the areas of voluntary disclosure, which is not the aim of the program. This may affect taxpayers' willingness to take advantage

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	(ii) for any other assessment, the date the Commissioner notified the taxpayer of the assessment. (6) Where an assessment has been amended, the Commissioner may further amend the original assessment— (a) seven years after— (i) for a self-assessment, the date the taxpayer submitted the self-assessment return to which the self-assessment relates; or (ii) for any other assessment, the date the Commissioner served notice of the original assessment on the taxpayer; or	or (ii) for any other assessment, the date the Commissioner notified the taxpayer of the assessment. (6) Where an assessment has been amended, the Commissioner may further amend the original assessment— (a) **five** years after— (i) for a self-assessment, the date the taxpayer submitted the self- assessment return to which the self-assessment relates; or (ii) for any other assessment, the date the Commissioner served notice of the original assessment on the taxpayer; or	of the Voluntary Tax Disclosure Program since an audit may be triggered for the remaining two years not captured under VTDP.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
32 - Section 42A(4A) of the TPA	The Bill proposes the deletion of the following section of the TPA. 42(4A). The Commissioner may at any time exempt any supplier from the provisions of this section if such supplier has sufficiently demonstrated that due to the nature of his business, and due to the application of this section, he is going to be in a continuous credit position for a period of not less than twenty-four months. The provision allowing the application for withholding VAT exemption for suppliers has been deleted. This move follows the reduction of the withholding VAT rate from 6% to 2%.	i) The provision for withholding VAT exemption should not be deleted and retained. ii) The provision should remain as: 42(4A). The Commissioner may at any time exempt any supplier from the provisions of this section if such supplier has sufficiently demonstrated that due to the nature of his business, and due to the application of this section, he is going to be in a continuous credit position for a period of not less than twenty-four months.	i) Despite the reduction in the VAT withholding tax rate, some suppliers may still find themselves in a significant VAT refund position. ii) Given the significant time that VAT refund processes takes from application to payment, the deletion of this provision may still affect suppliers who transact in large volumes. iii) Given the impact the global pandemic has had on business cash flows, the exemption from withholding VAT may provide necessary relief.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
33. Section 47 of the TPA (Refund of overpaid tax)	The Bill proposes to introduce two subsections 4A and 4B 47.(1) When a taxpayer has overpaid a tax under a tax law the taxpayer may apply to the Commissioner, in the approved form, for a refund of the overpaid tax within one year five years of the date on which the tax was paid. Provided that for value added tax the period of refund shall be as provided for under the Value Added Tax Act, 2013. (2) The Commissioner may, for purposes of ascertaining the validity of the refund claimed, subject the claim to an audit. (3) The Commissioner shall notify in writing an applicant under subsection (1) of the decision in relation to the application within ninety days of receiving the application for a refund. (4) Where, in relation to an application for a refund made under this section or made under any other tax law, the Commissioner is satisfied that a taxpayer has overpaid a tax, the	A new subsection under section 47 needs to be inserted which should read: "Where on the filing of an income tax return, a taxpayer has overpaid tax for the year of income, the amount overpaid can be transferred to another year of income based on a written application by the taxpayer, and the amount overpaid will be transferred within 60 days of the receipt of the application. Where the revenue authority needs to verify the transfer, it will complete the process within the 60 days provided".	i) Instalment taxes are based on estimates and upon submission of returns, the self-assessed tax liability for the period may be lower than the prior year liability which was used to estimate instalment taxes. ii) Upon the rollout of the iTax system, the system enabled persons to utilize overpaid income tax credits against tax liabilities in subsequent periods through the issue of an advance payment voucher. The iTax system, however, no longer issues advance payment vouchers. iii) The removal of the ability of overpaid tax to appear as an advance payment voucher greatly affects taxpayers' cash flows as income tax refunds tax a significant amount of time to be conducted, verified and processed.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	Commissioner shall apply the overpayment in the following order— (a) in payment of any other tax owing by the taxpayer under the tax law; (b) in payment of a tax owing by the taxpayer under any other tax law; and (c) any remainder shall be refunded to the taxpayer. **(4A) Where the Commissioner notifies a taxpayer that an application for a refund has been ascertained in accordance with subsection (3), and applies the refund to the payment of an outstanding tax in accordance with subsection (4)(a) or (b), interest or penalties shall not accrue on the amount applied to the payment of the outstanding tax from the date of the notification.** **(4B) For the avoidance of doubt, where the Commissioner has applied a refund to the payment of an outstanding tax under subsection (4A), if there is any outstanding tax after such application, the outstanding**		iv) KRA is allowed to verify the overpaid tax, but this should be done within a reasonable time limit in order to allow taxpayers to plan their cash flows accordingly.

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
	tax shall accrue interest and penalties in accordance with this Act. (5) The Commissioner shall repay the overpaid tax within a period of two years from the date of application, failure to which the amount due shall attract an interest of 1% per month or part thereof of such unpaid amount after the period of two years. **The Bill should also introduce a new subsection under section 47 allowing the offset of overpaid income tax.**		

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
		EXCISE DUTY ACT, 2015	
25(c) - Part III of the First Schedule of the EDA (Definition of other fees)	"other fees" includes any fees, charges or commissions charged by financial institutions relating to their licensed activities, but does not include interest on loan or return on loan or an insurance premium or premium based or related commissions or any share of profit or an insurance premium or premium based or related commissions specified in the Insurance Act or regulations made thereunder or specified in the Insurance Act or Regulations;	i) No amendment to the definition of other fees so that the definition of other fees remains as: "other fees" includes any fees, charges or commissions charged by financial institutions relating to their licensed financial institutions licensed activities, but does not include interest on loan or return on loan or an insurance premium or premium based or related commissions or fees or commissions earned in respect of a loan or any share of profit or an insurance premium or premium based or related commissions specified in the Insurance Act or regulations made thereunder or specified in the Insurance Act or Regulations; ii) If the Bill proposal should remain, the Finance Act, 2021 should import the definition of interest from the ITA to read as follows; "interest" (other than interest	i) Increased cost of borrowing- This is not in line with the strategic intent to spur economic growth and recovery ii) The proposed change is retrogressive and is likely to lead to ambiguity of the scope of interest that is exempt from excise duty, a deficiency that had already been cured by the Finance Act 2019. iii) Numerous tax disputes between the KRA and banks as it has been in the past, particularly with respect to charging of excise duty on loan related fees

		charged to tax) means interest payable in any manner in respect of a loan, deposit, debt, claim or other right or obligation, and includes a premium or discount by way of interest and a commitment or service fee paid in respect of any loan or credit or an Islamic finance return".	

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FINANCE BILL 2021 MEMORANDUM FOR THE FLOWER SECTOR IN KENYA

Clause No.	Issue	Proposal	Justification
2 (a)	Expanded definition of "Control"	***We propose*** re-*definition of control and clear guidelines set within the bill on interpretation of control to guide the commissioner*	Agricultural franchises will suffer most under this regime. 1. This has a negative impact for transfer pricing because it imposes an unnecessary burden on taxpayers. 2. The provision grants the Commissioner sweeping & arbitrary power to deem relationships as constituting control (sub-paragraph (h)); 3. Creates an intricate web of new relationships that could catch a taxpayer as related. For instance, loans and guarantees may constitute control, at a primary level, then lead to further controlled transactions, at a secondary level. For example, if A grants B (an independent party) a loan that is more than 75% of B's net assets, then A and B become related. If C, an associate of A, subsequently trades with B, then the transactions between B and C would be controlled and subject to transfer pricing (since A & B are deemed to be related);

			4. Since this proposal applies to all taxpayers, including residents, then the residents may be subject to higher compliance burdens from a VAT perspective (ensuring the values of supplies are arm's length for VAT purposes).
2 (b)	Expanded definition of "permanent establishment"	***We propose*** deletion of the clause a farm, plantation or other place where agricultural, forestry plantation or related activities are carried on	We appreciate that this amendment aligns with the latest OECD Guidance on permanent establishments and targets the avoidance of taxation through fragmentation of contracts and taking advantage of specific activity exemptions. However, the inclusion of "a farm, plantation or other place where agricultural, forestry plantation or related activities are carried on" to the PE definition means that Non-resident persons running/operating farms locally, without due registration of those farms create a taxable presence in Kenya. This may negatively affect testing and evaluation facilities that may be placed by breeders within a farm. If the PE arose in such a case, KRA would tax a breeder/licensor as a result of testing completed at such a site. This will hinder innovation and development of

			more varieties within Kenya, limiting growth of the flower sector.
6	Tax losses carried forward	***We propose*** *deletion of this item as it is an avenue that supports minimum tax*	The Bill seeks to allow the carrying forward of tax losses in subsequent periods Indefinitely (until the loss is extinguished). In as much as this is meant to be a source of relief for loss-making businesses, the companies will still be subject to minimum tax of 1% of revenue (since the law provides that the tax due shall be the higher of minimum tax and installment tax). We however note that minimum tax collection by the Kenya Revenue Authority is currently suspended per the recent ruling in the Kitengela Bar Owners Association vs Commissioner General of the Kenya Revenue Authority & 2 Others case, until a decision is made by the High Court.
7	Changes in the restriction of interest	***We propose*** *deletion of this item as it would alter companies' operations permanently by increasing the cost of doing business. For instance, a bank/lender may refuse to lend to a business that may not turn*	The proposed amendment seeks to replace the current basis of interest deductibility restriction - that taxpayers cannot, for purposes of tax, fund their businesses exclusively with debt, and instead, now seeks to **limit the deductibility of interest** to the taxpayer's profitability, i.e. 30% of the EBITDA and seeks to restrict interest on loans from both related and independent parties.

		out a profit immediately, lend a lower amount or impose more conditions for such borrowers. In short, the proposal could alter the risk profile of businesses from the lenders' perspective. ***We propose*** *clarification on expenses incurred in connection with raising finance*	This proposal is retrogressive because: 1. Interest is a *bona fide* business expense that ranks *pari passu* with other business expenses. As with other expenses, the deductibility of interest cannot therefore be subject to a business' profitability, but rather, should only be restricted if the interest was not wholly and exclusively incurred in the production of income; 2. The proposal targets interest from both related and independent party loans; 3. The proposal punishes all businesses, especially many in our sector that are struggling to recover from Covid-19 disruptions, by imposing an unfair pecuniary burden. It is common practice for our members to borrow for business. Their ability to repay loans has, in many cases, been affected by the Covid-19 disruptions to our sector. Even when these businesses fully recover, such a tax would be unequitable to impose on them since the borrowing decisions (the ability to repay the debt) were made on the basis of existing legislation;

			4. The law already provides mechanisms to deal with "excessive" interest: a. Transfer pricing rules to ensure that the interest is reasonable and arm's length; b. Current interest restriction (3:1 debt/equity ratio) to ensure that taxpayers do not take advantage of tax planning. In addition to the interest on loans, the Bill introduces two new categories of expenses that would be categorized as interest: 1. Payments that are economically equivalent to interest; and 2. Expenses incurred in connection with raising finance. The former is ambiguous. The latter is not only unfairly targeted, but appears open-ended. It is not clear where one would draw the line with #2, that is, does it target fees only such as arrangement fees or does it extend to the entirety of costs that would be linked to raising debt? For example, if the CEO and CFO are engaged in raising debt - for say, one month in the year, would their salaries (& other costs, such as travel, accommodation) be disallowed?

			We also note that there is no provision for taxpayers to carry forward disallowed interest, in line with Action 4 of the OECD's BEPS project.
8	Introduction of Country-by-Country (CbC) reporting	***We propose clear definition of the*** prescribed threshold" on CbC and link to global threshold.	This section follows the OECD's Base Erosion and Profit Shifting (BEPS) Action Plan 13 and has been implemented in other jurisdictions. Section 18(B)(3) details the types of information that should be provided by the Kenyan-resident ultimate parent company to the Commissioner on an annual basis. This provision aims to bring the activities of Kenyan-held multinational entity (MNE) Groups into sharper focus, in a bid to curb the shifting of profits through transfer (mis)pricing. The OECD has already prescribed a CbC requirement threshold of **EUR750 million** per year. The proposed Bill however provides that the requirement will apply to ultimate parent companies whose gross turnover exceeds "the prescribed threshold", which will presumably be done by the Commissioner.

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Ref: 99999/45/am/1336

02 June 2021

Mr. Michael Sialai, CBS
Clerk of the National Assembly
Parliament Building
NAIROBI.

PROPOSALS TO AMEND THE FINANCE BILL, 2021

Preamble

We refer to the above captioned matter.

Further to the request for submission of Memoranda with respect to the Finance Bill 2021, Ernst & Young LLP ('we') hereby forwards the proposals we believe, will enhance our country's tax policy as well as facilitate trade and thereby high tax revenue generation.

The Bill seeks to propose additional amendments to the following tax laws; The Income Tax Act (ITA), The VAT Act, Excise Duty Act, Tax Procedures Act and Miscellaneous Fees and Levies Act. The Bill also proposes other miscellaneous amendments to the Insurance Act, Retirement Benefits Act, Capital Markets Authority Act, Kenya Revenue Authority Act and the Central Depositories Act.

It is expected that the tax proposals will enhance the canons of taxation and thereby contribute to efficient tax structure during these unprecedented times of Covid-19 Pandemic and other unexpected and inexplicable events affecting the economy at large.

We have reviewed the Bill and found out that some of the provisions therein negate the core intention leading to uncertainty, ambiguity and in some instances, inconsistencies with the existing tax laws.

We hereby summarize our proposals to amend the Bill as per the attached Appendix 1 to ensure that it achieves the intended purpose.
Should you require further clarification on the issues detailed below do not hesitate to contact Ann Magondu, Stephen Ndegwa or the undersigned.

Partners: C O Atinda, H C Wasike, M M Kimoni, A K Gichuhi, A M Muthusi, J M Ngong'a, F N Kamau, N M Muhoya, T O Nyakoe, C A Munda, C N Kirathe, H Nannyomo.
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Yours Sincerely,



Francis Kamau

Tax Partner & East Africa Tax Leader

cc.

Hon. Amb, Ukur Yattani

The Cabinet Secretary
National Treasury and Planning
Treasury Building, Harambee Avenue,
NAIROBI

Encl.

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Appendix I

Intervention for Business entities			
Area of intervention	**Specific problem**	**Recommendation**	**Expected impact**
Section 2 of the Income Tax Act (ITA) **Definition of "Control "**	The proposed Bill introduces an elaborate definition of control covering both shareholding and financing relationships including loan advanced and guarantee. The proposed definition also gives a lot of discretion in deeming exercise of control. Giving the Commissioner a lot of discretion to deem control is likely to be abused and lead to controversy with the taxpayers. It also causes uncertainty in the application of the law by taxpayers.	Delete paragraph (h) - discretion of the commissioner to deem control from the definition By doing so, the taxpayers will have clarity on what indeed constitutes control so as to enhance the understanding that this will be based on the level of shareholding, financing and guarantees.	To enhance certainty and limit subjective interpretation of the law
Section 2 of the Income Tax Act (ITA) **Definition of "Control "**	Proposal to include suppliers, customers, guarantors, and financiers should also be removed as it is broad, ambiguous and onerous for taxpayers. For instance, the quantity of payables and receivables is bound to change during the normal course of business and thus the persons deemed to have 'control' will continuously change depending on whether or not they meet the set threshold. There is a risk that entities which are independent may be deemed to have control over the other unrelated entities.	Delete paragraphs (b), (c), (f) & (g) proposed to be introduced under the definition of the term control	For certainty
Section 2 of the Income Tax Act (ITA) **Definition of "Permanent Establishment "**	Reduction of services PE from 183 days to 91 days within any 12-month period The proposal to lower the threshold for a service PE to 91 days is inconsistent with the UN and OECD model tax conventions which have a higher threshold for creating a services PE (183 days). The proposal as currently worded is not clear on whether the current treaties with different thresholds	Amend paragraphs (c) & (d) on definition of the term Permanent Establishment by replacing the phrase "… ninety-one days….. with one hundred and eighty-three days"	For harmonisation

	will be renegotiated. This will lead to increased disputes with the KRA. The proposal may also not achieve the intended purpose of increasing tax collections. Most payments for services offered by non-residents are already subject to a final 20% WHT on gross payment. The introduction of this clause may result in a reduction of WHT as there is a higher likelihood by entities to create services PE. They will in turn be required to account for corporate income tax on net income which may result in an effective tax rate lower than the WHT rate.		
Donations towards alleviation of effects of Covid-19 Pandemic	Section 15 2(aa) only allows for deductibility of donations to the Kenya Red Cross, County Governments or any other institution responsible for the management of National disasters to alleviate the effects of a national disaster declared by the president. We note that the section restricts deductibility of donations towards alleviation the effects of any disaster which the President has not declared to be a National Disasters In an unprecedent way, the Kenyan Government have been attempting to alleviate the ramifications of Covid-19 since the first case was recorded in the country in March 2020. We take note that in a bid to ensure swift action, the president established a national emergency response committee on coronavirus. Upon the establishment of the committee, a dozen of well-wishers including corporate entities made significant donations through this committee to assist the Government in dealing with the Covid19 pandemic.	We recommend an expansion of Section 15 (aa) to include donations made to alleviate the effects of any pandemic that is a threat to the Nation.	To support economic recovery and social welfare of the citizens.

	Apparently, the Pandemic has not been declared a National Disaster by the President thereby rendering the donations to this noble course NOT deductible for tax purposes		
Section 15(4) of ITA Utilisation of tax losses	The Bill proposes to amend section 15(4) to remove the ten-year time limitation on utilization of tax losses arising in a given year of income effective 01 July 2021. In our understanding, the proposal seeks to include tax losses incurred after 1 July 2021 The Bill has not provided a transition clause which creates ambiguity on the treatment of existing losses incurred prior to 1 July 2021.	We propose that a new paragraph be inserted under section 15(4)(iv) to read: "Any deficit incurred prior to 1 July 2021 shall be deemed to have been incurred in that year of income.	To enhance clarity and support business in economic recovery.
Section 16(2)(j) of ITA, restriction of deductibility of interest expense	The Bill proposes to substitute the provisions of section 16(2)(j) of the ITA with new provisions of deductibility of interest on loan for thin capitalization. The proposal seeks to restrict deduction of interest paid or payable to related parties and **third parties**. Considering that interest paid to third parties is at arm's length, prohibition of deduction of the same would be punitive to taxpayers.	We recommend that paragraph16(2)(j) is amended to delete the terms, '*and third parties'* appearing after the term persons.	To encourage economic growth and ease of access to credit.
Paragraph 1 of the second schedule to ITA	**Meaning of the term ' farmworks'** The schedule has not provided an operative meaning of the term' farmworks	We propose that a new subparagraph be inserted immediately after the proposed subparagraph (g) to read; (h) Farmworks means, "farmhouses, labor quarters, any other immovable buildings necessary for the proper	To enhance clarity and ease of implementation

	This may lead to varied interpretations of what constitutes farmworks for purposes of investment allowance and thereby unwarranted controversies	operation of the farm, fences, dips, drains, water and electricity supply works other than machinery, windbreaks and other works necessary for the proper operation of the farm."	

Section 12E of the ITA- Digital Service Tax (DST)			
Section 3 (2)(ca) & Section 12E of the ITA	The Bill proposes to delete paragraph (ca) of subsection 2 to expand the scope of income subject to DST to align with the DST regulation released by the CS in in 2020. The proposed paragraph reads as follows; *income accruing from a business carried out over the internet or an electronic network including a digital marketplace.* We note that there is no minimum set threshold for income subject to DST. This means that all income accruing from rendering of digital services will be subjected to DST however minimal. This is not economical as the cost of collection of tax should be reasonable to both the taxpayer and the Revenue Authority. Looking at ATAF- Suggested Approach to drafting Digital services tax legislation-, the forum has recommended for a De Minimis provision to the extent that tax should be levied if the targeted tax payer accrues income above the set minimum threshold, France, which is among the first jurisdiction in the world to introduce DST, they have set a minimum threshold revenue of USD 28 million	We propose that a threshold is introduced under section 12E subsection 3 to read; "*Notwithstanding the provisions of subsection (1), where income accruing from Kenya to a non-resident is less than KES. 1,000,000, this section shall not apply.*"	To enhance compliance by reducing administration costs in line with the canons of taxation.

	Within our tax legislation, section 12C (Turnover tax), the Government has set the minimum threshold to KES 1,000,000 for payment of turnover tax		
Section 3 (2)(ca) of the ITA	Expansion of scope for DST to cover '**income accruing from business carried over the internet or electronic network**, including over a digital marketplace' The expanded scope will capture most online businesses even as many firms seek to cut their overheads by embracing technology. This proposal will increase the cost of doing business and entities may decide to conduct business in other jurisdictions with more favourable business environments. This proposal may also discourage adoption of technology by businesses which will in turn affect efficiency. The increased cost will most likely end up being passed to the final customer resulting to a general increase in the price of goods and services offered via the internet.	*The proposal to expand the scope of DST to cover income accruing from business carried over the internet or electronic network should be expunged from the Bill.*	For certainty
Section 8 of TPA Registration of taxpayers	Section 8 of the TPA requires a person who has accrued a tax liability or expects to accrue a tax liability under the Income Tax Act or the Value Added Tax Act ..... to apply to the Commissioner to be registered. For DST, we note that most non-resident Companies operate within a Group. In this respect, a single	We propose that a new paragraph 1(d) is added after 1© to read as follows: "despite the provisions of subparagraphs a, b, c, a non-resident person required to account for tax under section 3(2ca) of the Income Tax Act and section 5(7) of the Value Added Tax Act, can apply to the Commissioner for a single registration as a	To enhance simplicity and minimize compliance costs

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	registration for each entity would not be economical in terms of administration costs.	group where it has a group of entities that qualify to register for tax.	

Intervention for Individual Tax Payers			
Taxation of Work from home expenses reimbursed by the Employer	The Income Tax Act does not provide for taxation of certain expenses incurred by employees as a result of working from home for which they are reimbursed by the employer These include cost of internet, printing, purchase of office furniture.	Amend Section 5 (2) (a) (ii) of the ITA to include, *''where the Commissioner is satisfied that subsistence, traveling, entertainment,* ***work from home expenses*** *or other allowance represents solely the reimbursement to the recipient of an amount expended by him wholly and exclusively……* *Amend Section 2 to include a definition of work from home expenses immediately after winnings.* *Work from home expenses includes* cost of internet, printing, purchase of home working furniture.	Encourage and enable employee to work from home in line with Government's Covid-19 response measures
Tax PIN deregistration for individuals	PIN cancellation for expatriates who have left Kenya after completing their assignments has been quite problematic. There are no clear-cut guidelines and requirements needed to have the process complete.	The Commissioner should come up with guideline and a prescribed form for de-registration in line with Section 10 (2) (a) of the Tax Procedures Act.- *We propose the following for expatriate employees who do require deregistration* *A registered expatriate shall apply for deregistration under Section 10 (1) of the Tax Procedures Act and shall provide the following: -* • Copy of the exit stamp on the taxpayer's passport upon exit. • Letter from the company confirming that the expatriate's employment in Kenya has ceased if applicable	- Elimination of ambiguity on the PIN cancellation process. - Reduced time spent in cancelling PINs for expatriates who have left Kenya permanently. - Improve on tax projection and proper reporting of active taxpayers by the KRA.

		• Copy of the expatriate's cancelled or expired work permit • Tax compliance certificate Where the expatriate taxpayer in employment fails to apply for deregistration as required under Section of the TPA, the employer may write to the Commissioner and request to have the PIN deregistered attaching the following: - • Letter from the company confirming that the expatriate's employment in Kenya has ceased • Copy of the expatriate's cancelled or expired work permit • Confirmation in writing from employee that the PIN can be de-registered Commissioner shall upon confirmation that the employee has no further tax obligations, de-register the employee.	
PIN registration	Remote working across various jurisdictions has become the norm. Going forward, many companies may be served by employees spread across the globe without having to be physically present in the country where the employer is located. It has been a challenge getting the KRA to register these individuals as the process of registration of expatriate employees requires a copy of the work permit, and the same should have been endorsed on the passport which is not possible where the employee has not been to Kenya.	Amend the first schedule to the TPA immediately after paragraph 13 to include (14) Individuals working remotely outside the country for an employer in Kenya The documents required for this registration may include: -	• Increase revenue collection from employees working remotely for Kenyan entities.

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<td>a) Copy of employment contract or assignment contract
b) Application in the prescribed form
c) Copy of the individual's passport details
d) Copy of the PIN certificate for the entity in Kenya or any other document from the employer supporting the application</td>
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<tr>
<td>Reduction of PAYE rates back to 25%
Third Schedule of the Income Tax Act, Paragraph 1</td>
<td>The pandemic has reduced disposable incomes among many households. The rates should be reverted to 25% as was the case between April – December 2020.</td>
<td>Amend Third Schedule paragraph 1 as follows:

The individual rates of tax shall be

<table>
<tr><td>On the first Shs. 288,000</td><td>10%</td></tr>
<tr><td>On the next Shs. 200,000</td><td>15%</td></tr>
<tr><td>On the next Shs. 200,000</td><td>20%</td></tr>
<tr><td>On all income above Shs. 688,000</td><td>25%</td></tr>
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<td>- Increased spending power hence higher amounts realized through indirect taxes

• Increased savings for investment which have a ripple effect to the economy</td>
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Value Added Tax (VAT) Act,2013			
Area of Intervention	**Specific Issue affecting industry/nature of problem**	**Recommendation**	**Expected Impact**
Enactment of VAT regulations	The Finance Bill 2021 proposes to delete Section 67 of the VAT Act 2013 which requires the Cabinet Secretary (CS) to table proposed VAT Regulations before the National Assembly for approval before they take effect. This is contrary to the principle of separation of powers with the CS seemingly having legislative powers	***We recommend that the provision be retained.*** This will ensure check and balances and to ensure principle of separation of powers is adhered to.	Avoid possible contest on the constitutionality of the enacted VAT Regulations.
Exportation of taxable services	The Finance Bill 2021 proposes to amend the VAT status of exported taxable services from zero rated to exempt. This is will result to increased cost of doing business for the affected suppliers and making Kenyan exports more expensive and thus unattractive destination for doing business. Some multinationals may move their regional offices from Kenya to other countries making the registration counterproductive. Further, we note that this against the practices of international trade. The ease of doing business reform initiative as launched by the President will be greatly affected by this proposal thus eroding gains made in recent years.	***We recommend that the provision be retained as is in the current VAT Act.*** This will ensure that Kenya continues to be competitive on matters favourable investment destination are concerned.	Avoid losing existing investments in Kenya and foreign exchange earner.
Syringes	The Finance Bill 2021 proposes to amend the VAT status of syringes from exempt to taxable at standard rate. This is will result to increased cost of medication especially with the COVID 19 vaccination campaign. It is counterproductive to the COVID 19 impact mitigation measures taken and the vaccination campaign being undertaken by the Government.	***We recommend that the provision be retained as is in the current VAT Act.*** The health of Kenyans and resumption of normalcy is key to the growth of the economy and revenue generation. It is therefore paramount to support COVID mitigation measure that would fast track restoration to normalcy.	Avoid higher medication cost and support COVID 19 mitigation measures.

Exemption from withholding VAT	The Finance Bill 2021 seeks to take away the power of the Commissioner to exempt any taxpayer from withholding VAT obligations. Currently, if a taxpayer can demonstrate to the Commissioner that due to the nature of his business and as a result of withholding VAT he will be in a continuous VAT credit position for a period of not less than 24 months, the Commissioner can exempt such taxpayer from the withholding VAT regime, such that where the commissioner grants such exemption, withholding VAT shall not apply to taxable supplies made by such a taxpayer/supplier.	***We recommend that the powers of the Commissioner to exempt taxpayers from withholding VAT be retained.*** The repeal of this provision will be punitive for taxpayers who are in a perpetual VAT recoverable position especially if VAT is not refundable. This will protect businesses from cashflow constraints arising from withholding VAT.	Protect businesses from cashflow constraints arising from withholding VAT
Ordinary bread	The Finance Bill 2021 proposes to amend the VAT status of ordinary bread from zero rated to taxable at standard rate. Ordinary bread is a staple food and the change in VAT status will lead to increased prices.	***We recommend that the VAT status of ordinary bread be retained as zero-rated.*** This is to cushion Kenyans from high cost of food especially with the negative economic impact occasioned by COVID 19 that has led to loss of incomes to many households.	Cushion Kenyans against high food prices.
VAT status of medical oxygen.	The Finance Bill 2021 proposes to amend the VAT status of oxygen therapy from taxable at 16% to zero rated. Currently, it is not clear whether oxygen therapy includes medical oxygen which is an important medicine in treating COVID 19 and other ailments. Currently medical oxygen is taxable at 16% as per the recent ruling at the Tribunal, in the case of ***Hewa Tele Ltd Vs Commissioner of Domestic Taxes (KRA).***	***We recommend that the Medical oxygen be included under exempt supplies.*** This will contribute to COVID 19 mitigation measures by making treatment of COVID 19 among other diseases more affordable.	Make treatment of COVID 19 among other diseases more affordable

Input tax deduction	The Finance Act, 2020, introduced a requirement under the VAT Act section 17(2b) that a deduction for input tax would otherwise be allowable under subsection 1 "*the registered supplier has not declared the sales invoice in a return.*" This provision requires that for a taxpayer to claim input VAT on taxable supplies purchased, the seller must have declared the same in the VAT return. While this is meant to enhance compliance, we note that the purchaser has no powers to enforce compliance on the part of the seller and the iTax has also not been enabled to establish what has been declared. This has made the requirement untenable for the purchaser with many suppliers.	***We recommend that the provision introduced of making declaration of output VAT by a seller precedent to the deduction of input VAT be scrapped off in its entirety.*** The VAT Act is clear regarding who has the mandate to declare output tax and the related penalties and interest should a supplier not account for output tax charged to its customer. The role of tax collection and enforcement lies with the KRA not customers claiming input tax. We also note that the with the inception of the Electronic Tax Register legislation, the enhanced iTax system will facilitate seamless flow of transactions/information both from supplier and purchase which would automatically address what was envisaged in this provision.	Reduced cost of tax compliance and fair and equitable tax administration.
Taxation of distance teaching/e-learning	The Value Added Tax (Digital Marketplace Supply) Regulations, 2020 provide for taxation of distance teaching/e-learning. The first schedule part II of the VAT Act, 2013 exempts education services from VAT. While digital taxation is meant to widen the scope of taxation, taxation of distance teaching/e-learning puts into conflict the said regulations and the VAT Act.	***We recommend that the provision in the Regulation be deleted in its entirety.*** This would clear the inconsistency and avoid possible conflict on the taxation of education services. Further, it will preserve the intended intention for affordable education to all.	Reduced possible conflict and litigation and support affordable education program
Registration threshold under VAT (Digital Marketplace	Section 34 of the VAT Act,2013 provides the turnover threshold for VAT registration purposes. This is currently five million shillings or more in any period of twelve months.	***We recommend that the VAT Regulation be harmonized with the VAT Act to specifically clarify the VAT registration threshold .***	Reduced possible conflict and litigation and enhance compliance.

Supply) Regulations, 2020	The Value Added Tax (Digital Marketplace Supply) Regulations, 2020 do not provide for registration threshold. While the provisions of the VAT Act should prevail over subsidiary legislations, there lacks clarity on whether registration threshold should apply to supplies made via a digital marketplace.	This will provide clarity and thus enhance compliance and the same time avoid possible conflict on the registration threshold.	
Transfer of business as going concern	The Tax Law (Amendment) Act, 2020 changed the VAT status of 'transfer of business as a going concern' from exempt to taxable at 16%. This is against international best trade practices. Additionally, the change has come with implementation challenges as non-resident parties seeking to acquire businesses in Kenya are not registered for VAT and therefore cannot offset this input VAT. This is business un-friendly and potentially makes Kenya unattractive for business.	***We recommend that transfer of business as going concern be exempted from VAT.*** This will align Kenya to international best business practices and make Kenya attractive for investment.	Make Kenya attractive for investment.

Building a better working world

Excise Duty Act, 2015			
Area of Intervention	**Specific Issue affecting industry/nature of problem**	**Recommendation**	**Expected Impact**
Definition of services chargeable to excise duty	The first schedule, Part 11, paragraph 1 of the Excise Duty Act provides for excise duty for telephone and internet data services. However, the Excise Duty Act does not define telephone and/or data services. This means that we can only derive the meaning from the general meanings of the words. According to Oxford Dictionary, a telephone is *"a system for transmitting voices over a distance using wire or radio, by converting acoustic vibrations to electrical signals."* Therefore, our interpretation is that a telephone service is a conduit for providing other services. There is no single definition for the words 'internet data services' but 'data services' are defined as third-party services that help manage data for clients. The lack of a definition of telephone services poses a risk that there is a thin line between the meaning of telephone and internet data services and other services, such as electronic services, provided through a telephone as a medium. The clarity in this definition aims to mitigate the risk of affected taxpayers seeking tariff rulings and litigating opposing positions due to the ambiguity under available dispute resolution mechanisms.	**Introduce a definition of electronic communication service as follows:** …. any service of any description provided by a person or a company by means of any transmission, emission or reception of signs, signals, writing, images and sounds or intelligible information of any nature, by wire, optical, visual or other electromagnetic means or systems, including- • voice, voice mail, data services, audio text services, video text services, radio paging and other emerging electronic communication services; • fixed telephone services including provision of access to and use of the public switched or non-switched telephone network for the transmission and switching of voice, data and video, inbound and outbound telephone service to and from national and international destinations; • cellular mobile telephone services including provision of access to and use of switched or non-switched networks for the transmission of voice, data, video and Value-Added Services,	The amendment would provide clarification on the chargeability of telephone and internet data services to excise duty.

		inbound and outbound roaming service to and from national and international destinations; • carrier services including provision of wired, optical fibre or wireless facilities and any other technology to originate, terminate or transit calls, charging for interconnection, settlement or termination of domestic or international calls, charging for jointly used facilities including pole attachments, charging for the exclusive use of circuits, a leased circuit or a dedicated link including a speech circuit, data circuit or a telegraph circuit; • provision of call management services for a fee including call waiting, call forwarding, caller identification, multicalling, call display, call return, call screen, call blocking, automatic call-back, call answer, voice mail, voice menus and video conferencing; • private network services including provision of wired, optical fibre, wireless or any other technologies of electronic communication link between specified points for the exclusive use of the client; • data transmission services including provision of access to wired or wireless facilities and services specifically designed for efficient transmission of data; and • communication through facsimile, pager, telegraph, telex and other electronic communication services."	

		The duty on electronic communication services shall become due and payable by electronic communication service providers.	

Miscellaneous Fees and Levies Act, 2016			
Area of Intervention	**Specific Issue affecting industry/nature of problem**	**Recommendation**	**Expected Impact**
Exemption threshold	The Finance Bill 2021 proposes to amend the list of goods exempt from IDF and RDL in Part A and B of the Second Schedule to the Miscellaneous Fees and Levies Act, 2016 before clearance through customs to include: "Such other goods the exemption of which the Cabinet Secretary may determine is in the public interest, or to promote investment and the value of which shall not be less than ***five billion shillings***." This proposal has increased the threshold of investment from a previous KES 200 million (before it was shelved on 30 June 2020) to 5 billion in order to qualify for the exemption from IDF. It is a reversal of the government's stance to abolish exemption of IDF on public interest projects in 2020.	Substitute the threshold of "5 billion shillings" with "200 million shillings"	Equitable taxation framework

Deloitte.

Our Ref: FK/NA/010621

01 June 2021

Clerk of the National Assembly
Parliament Buildings
Parliament Road
P.O. Box 41842 – 00100
Nairobi

By email: clerk@parliament.go.ke

Dear Sir,

Memorandum: In the matter of consideration by the National Assembly on The Finance Bill (National Assembly Bill No. 18 of 2021)

We refer to the above subject matter where you invited interested members of the public and organizations to submit any representations that they may have on the Finance Bill 2021 ("the Bill"). These representations have been made pursuant to Article 118 (1) (b) of the Constitution and the National Assembly Standing order 127 (3).

We hereby enclose our detailed submissions as an Appendix to this letter.

Please feel free to reach out to the undersigned on fomondi@deloitte.co.ke or Patrick Chege on pchege@deloitte.co.ke, should you require additional information or clarification in regard to our submissions.

Yours faithfully,

For: Deloitte & Touche

Fred Omondi
Partner, Tax & Legal Leader

Appendix: Submissions by Deloitte & Touche in the matter of consideration by the National Assembly on The Finance Bill (National Assembly Bill No. 10 of 2020)

(i) Income tax

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
1.	Section 2 **New definition of Permanent Establishment ("PE")**	The Bill proposes to delete the current definition of permanent establishment ("PE") captured in the ITA and introduce a new definition. Based on the proposed definition, a PE in Kenya includes: • A fixed place of business through which business is wholly or partly carried on and includes a place of management, a branch, an office, a factory, a workshop, a mine, an oil or gas well, a quarry or any other place of extraction or exploitation of natural resources, a warehouse in relation to a person whose business is providing storage facilities to others, a farm, plantation or other place where agricultural, forestry plantation or related activities are carried on and a sales outlet; • A building site, construction, assembly or installation	The expansion of the definition of PE aligns, to a large extent, the domestic legislation with international best practice, as captured in Article 5 of the UN and OECD Model Tax Conventions, which are widely used as the basis for negotiating tax treaties. However, in regard to service PEs, the threshold of 91 days appears to divert from the generally accepted threshold of 12 months or 6 months under the UN and OECD Model Tax Conventions respectively. Further, Article 6 of OECD gives the right to tax income from immovable property to the state of Source, that is the State in which the property producing such income is situated. Specifically, income from agriculture and or forestry is taxed under article 6 of OECD.	The recommended proposals are intended to align with the international best practice and maintain consistency with the model tax conventions.

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
		project or any supervisory activity connected to the site or project, but only if it continues for a period of more than one hundred and eighty-three days; • The provision of services, including consultancy services, by a person through employees or other personnel engaged for that purpose, but only where the services or connected business in Kenya, continue for a period of, or periods exceeding in the aggregate, ninety-one days in any twelve-month period commencing or ending in the year of income concerned; • An installation or structure used in the exploration for natural resources where the exploration activities continue for periods not less than ninety-one days; • A dependent agent of a person who acts on their behalf in respect of any activities which that person undertakes in Kenya including	Based on the above we recommend that the threshold relating to the number of days is amended to one hundred and eighty three days. Also, we recommend the removal of Fixed Place of business PE of a farm, plantation or other place where agricultural, forestry plantation or related activities for three reasons; First, taxation of agricultural and forestry plantation is already provided for under Article 6. Secondly, all the Double tax treaties Kenya have concluded with other partner states deals with taxation of agricultural and forest plantation under article 6 Finally, by placing this income under article 5, the government will be denied revenue which would have been easily earned under article 6 because article 6 has no threshold. For income to be taxable under article 5 a minimum threshold of 3, 6, or 12 months threshold as the case may be must be met. No such requirement is needed under article 6.	

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
		habitually concluding contracts or playing the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the person.		
2.	Section 2 Definition of the term "**infrastructure bond"**	The Bill proposes to define the term "infrastructure bond" by way of amending Section 2 of the ITA.	The proposed definition restricts itself to bonds issued by the Government and does not include bonds issued by government agencies or government owned entities. In addition, the listing of strategic public infrastructure facility excludes energy projects which could also be considered strategic and mostly financed through infrastructure bonds. To remedy the foregoing, we propose the proposed definition is deleted and replaced with the following: - *"infrastructure bond" means a bond issued by the Government* ***of Kenya or State-Owned Agencies*** *for the financing of a strategic public infrastructure facility including a road, hospital, port, sporting facility, water and sewerage*	Implementation of energy projects is capital intensive. This requires sourcing of financing from the public or development partners in form of loans, equity, infrastructure bonds. The proposed amendment to include energy sector projects in the listing of strategic public infrastructure will enable the sector to attract investors and as such make it easy for the players to borrow.

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
			system, a communication network ***or an energy project;"*** Above noted, it would be desirable if the taxpayers can be allowed to rely on the prospectus which should explicitly state whether the bond is issued as an infrastructure bond to pre-empt a situation where taxpayers have to investigate the purpose for which a bond is being issued. It is worth noting that the term "infrastructure bond" has not been reference elsewhere under the ITA implying that the definition may be inconsequential.	
3.	Section 12E (1) **Digital Service Tax**	The Bill proposes to expand the scope of digital service tax to include business carried out over the internet or an electronic network by amending Section 3 (2) (ca)	While it appears like the amendment of the charging section seeks to expand the scope of DST, the amendment should have been reflected under Section 12E which imposes digital service tax. To remedy this, we recommend that Section 12E (1) is deleted and replaced with the following: - *"Notwithstanding any other provision of this Act, a tax to be known as digital service tax shall*	This aligns Section 12E (1) with the provisions of Section 3(2) (ac) and eliminates any likely ambiguities.

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
			*be payable by a **non-resident person whose income from the provision of services is derived from or accrues in Kenya through a business carried out over the internet or an electronic network including** through a digital marketplace"* Unlike the other countries across the globe, DST in Kenya do not provide for a minimum threshold of income below which DST should not apply. The ITA should be amended to include a minimum threshold of qualifying income below which DST will not apply. To this end, we recommend introduction of a proviso under Section 12E (i) to read as follows: *"Provided that Digital service tax shall only apply to a person who has provided digital services or expects to make digital services, the value of which is five million shillings or more in any period of twelve months"*	Exempting income below a given threshold from DST will cushion small and emerging entrants into the market as the DST may take up a significant part of the revenues of such nascent players. In addition, the effort to administer DST on revenues below a certain threshold may not be commensurate to the tax yields thereon.

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
			To eliminate any uncertainty on the threshold, the threshold may be converted into a minimum value per month as opposed to a period of twelve months. The Bill further proposes to exclude resident persons from the ambit of DST. However, despite deletion of the proviso that entitled non-resident persons with Permanent Establishments (PE) in Kenya to an offset of the DST paid, the proposed amendment has not explicitly excluded non-resident persons with Pes from DST. We believe this could have been an omission. To remedy the error, we propose introduction of a proviso to read as follows: *"For Avoidance of doubt, non-resident persons with Permanent Establishments in Kenya are outside the scope of Digital Service Tax"*	This will also ensure that Kenya does not lose its position as an innovation and tech hub in Africa Non-residents with permanent establishments in Kenya are treated for tax purposes like residents. The proposed amendment will eliminated the perceived bias and provide a level playing ground for the non-resident persons with PEs in Kenya with resident persons. The above move may foreign businesses that provide digital services to register branches in Kenya and avert back log of tax refunds.
4.	Section 12 E (3)	The Bill proposes to introduce a subsection under Section 12E that explicitly exempts income	Tax on the income that is taxable under Section 9(2) of the Income Tax Act is imposed at 5%. This	The recommended proposal shall ensure equity in taxation and encourage non-residents whose income is taxable under Section 9(2) to invest in Kenya

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
	Exemption from Digital Service Tax	chargeable under section 9(2) or section 35 from the DST regime. Section 9(2) brings to charge the income of a non-resident person who carries on the business of transmitting messages by cable or radio communication, optical fibre, television broadcasting, Very Small Aperture Terminal (VSAT), internet or any other similar method of communication while Section 35 lists the incomes that are liable to withholding tax in Kenya.	contrasts with DST, which is imposed at 1.5%. A tax at 5% appears to be on the higher side, considering that it is levied at gross level. Since the business giving rise to income under Section 9 (2) is fundamentally the same as the business that give rise to income that fall under the DST regime, taxpayers who fall under Section 9 (2) of the ITA may feel the tax levied on their income is not equitable. As a result, we recommend that the provision that exempts them from DST be deleted. Instead, the new subsection should read as follows. *(3) Despite subsection (1), digital service tax shall not apply to income chargeable under ~~section 9(2) or~~ section 35.* We believe that once the above is passed, income that would ordinarily fall under Section 9 (2) will fall within the DST regime since the DST Section is drafted in a Notwithstanding basis.	

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
5.	Section 15 (4) **Carry forward of tax losses**	The Bill proposes to remove the time limit of carrying forward of tax losses by amending Section 15(4) of the Income Tax Act, which caps the carry forward of tax losses to 9 years, or such other longer period that may have been approved by the Minister.	The proposal to remove the capping of the tax loss utilisation period is welcome. However, it may be worthwhile to introduce a transitional provision that provides guidance on how losses that arose in prior periods should be treated. To this end, we recommend introduction of the proviso under Section 15 (4) to read as follows: *"Provided that this Section shall also apply to any unexpired accumulated tax losses as at 1 July 2021"*	The recommended amendment will ensure that there is no ambiguity in dealing with unexpired prior year losses as at the date the provision becoming effective. It will also pre-empt any potential tax disputes with the KRA.
6.	Section 16 (2) (j) **Thin capitalization**	The Bill proposes to delete Section 16(2)(j) of the Income Tax Act, which prohibits a foreign controlled entity from claiming a deduction of interest in excess of the debt-to-equity ratio of 3:1. In its place, the Bill proposes to introduce a provision that prohibits a deduction of interest paid/ payable to related and third parties in excess of 30% of earnings before interest, taxes,	The proposed introduction of an EBITDA-based interest limitation rule will discourage businesses from borrowing/ debt-financing. This measure may have a very negative impact on the economy, as many businesses depend on loans for capital. Not only are we likely to see businesses close, but financial institutions, whose business is lending are likely be majorly impacted. Investors may consider diverting their	The recommended proposals will reduce the adverse impacts of the EBITDA-based interest limitation rule, hence encouraging investment in the country.

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
		depreciation and amortization (EBITDA).	investments to other countries in order to avoid this harsh regime. Under the current regime, thin capitalization is only applicable to entities controlled by non-resident persons and excluded financial institutions and Branches. In order to address the potential negative impact of this measure, we recommend the following: • Allowing individuals to claim interest without any restrictions; • Allowing companies that are not foreign controlled, start-ups, Special Purpose Vehicles (SPVs), real estate firms and businesses operating in capital heavy sectors to only restrict interest that is paid to non-resident persons; • Allowing persons who are affected by the interest limitation rule to carry forward any excess interest for deduction against subsequent profits;	Any interest that is paid to a resident person is subject to tax under the ITA. Given that this category of businesses require high level of debt, restricting interest relating to local borrowing may have detrimental effects on their ability to pursue business.

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
			• financial institutions licensed under the Fourth Schedule to the ITA; and	Financial institutions and, particularly, banks incur material interest expense as part of their intermediation role. Indeed, interest expense may form over 60% of the Bank's expenses. Taxing such interest may lead to unintended consequences.
			• Introducing a clause that will exclude interest on existing debt/ loans from the scope of debt/ loans whose interest would be subject to the EBITDA-based interest limitation rule.	This would provide the much needed clarity on transition.
7.	Section 18B **Country by Country Reporting (CbCR)**	The Bill proposes to introduce a Country-by-Country reporting (CbCR) requirement on a Kenyan headquartered multinational enterprise group (MNEG), referred to in the proposed legislation as an "ultimate parent entity" (UPE). A UPE will be required to file a return of its financial activities in Kenya and any other jurisdiction where it has taxable presence. The return will be due within 12 months of the MNEGs financial reporting period.	This is in line with the OECD's BEPS Action 13, which is aimed at increasing the transparency of operations of MNEs and information sharing between tax authorities as well as possible coordination of audits between revenue authorities. However, in order to achieve the intended objective and eliminate unnecessary administrative burden on UPEs, we recommend introduction of a threshold of turnover that the MNEs should meet for the UPE to comply with this requirement. We recommend a threshold of KES one billion per year.	The effort to administer the annual returns on MNEs that do not meet a de-minimis threshold may not be commensurate to the benefits.

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
8.	Second schedule to the ITA **Investment Allowances**	The Bill proposes to amend the Second Schedule to the Income Tax Act in order to change the basis of calculating investment allowance from reducing balance to straight line.	The proposal to change the investment allowance basis from reducing balance to straight line is welcome, as it simplifies the computation of capital allowances and reduces the period of recovery of capital costs. Key to note is that the proposal does not have any transition clause that will guide the treatment of tax written down values as at the date of the change. This is likely to result to uncertainties and potential disputes as the taxpayers may have to rely on their own interpretation. To this, we recommend introduction of a proviso under Paragraph 1 (d) of the Second schedule to the ITA in the correct alphabetical order. The proviso should read as follows: - *"For avoidance of doubt, investment allowance on any written down values as at the date of change from reducing balance to straight line basis shall be claimed on a straight-line basis"*	The recommended guarantee the much needed certainty and pre-empt any potential tax disputes with the KRA.
Other issues excluded from the Finance Bill 2021				
9.	Section 7A	The Tax Laws (Amendment) Act 2020 deleted the exemption of	The Exemption had previously been introduced vide the Tax Laws (Amendment) Act 2018 to	The power sector is highly regulated, and the tariff charged for electricity to consumers is highly subsidized. The proposed amendment is based on the following grounds:

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
		power producing companies from compensating tax. In effect, power producing companies are expected to compute and remit compensating tax arising from distribution of profits from untaxed profits.	cushion the power producers who may be exposed to compensating tax as a result of profits derived from a power purchase agreement. We propose reinstatement of the exemption by way of amending the proviso appearing under Section 7A of the ITA to read as follows immediately after the words this Act: - *"...and dividends distributed by a power producing company in which the Government of Kenya owns at least forty-five per cent of its shares"*	• Compensating tax will majorly arise on the basis that the power producers are in tax loss position. Most players are in a tax loss position due to accelerated capital allowances. Taxing the untaxed profits will negate tax rationale for the tax incentive as it will claw back all the benefits; • Minimal loss of revenue, if any, to the Government since the dividends will be paid into the consolidated fund as the government has shareholding in the power sector; • Will ensure that the power producers have enough cashflow to finance some of the major projects in a bid to boost the power network in the country and service the loans whose default might lead to recall of the loans; and • May lead to attraction of more investors in the power sector through Public Private Partnerships (PPP).

(ii) Value Added Tax

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
1.	Paragraph 1 of Part A to the Second schedule. **Export of taxable services**	The Bill 2021 seeks to delete the words "taxable services" from this Paragraph and move into Paragraph 32 under Part II of the First Schedule (exemption schedule) the "supply of taxable services". Simply put, the Finance Bill 2021 seeks to exempt exported taxable services from VAT.	Paragraph 1 under Part A of the Second Schedule in the VAT Act 2013 zero-rates the export of goods and taxable services. We recommend that the zero-rating of exported taxable services be maintained. To this end, we propose deletion of the proposed change. We further recommend that, guided by international best practice and generally accepted principles of VAT on international trade, the Cabinet Secretary for The National Treasury (CS) develops regulations to aid the taxation of services that are traded across borders. This is pursuant to the CS's mandate under Section 67 of the VAT Act 2013.	The issue of the VAT treatment of exported taxable services remains one of the contentious tax matters with the KRA often taking a view that safeguards revenue while affected taxpayers seek to tap into the benefits of zero-rating as provided for in the VAT law. Several disputes have been litigated either at the Tax Appeals Tribunal or the High Court on the matter of VAT on exported taxable services with a lot of the judgements delivered in favour of taxpayers. In effect, the courts have developed a rich jurisprudence on this matter which, in our view, has substantially settled any divergent views on the matter. Given the courts' pronouncements on the matter of VAT on exported services which align to international best practice and generally accepted principles of VAT on international trade, it would seem that the proposal to exempt exported taxable services is a move by the government to ensure affected taxpayers do not continue to enjoy the benefits of zero-rating. In short, the proposal seeks to disentitle affected taxpayers to deduction of input tax and ultimately a refund of excess input tax occasioned by zero-rating. We respectfully submit that the National Treasury has failed to address the salient issue that has contributed to the growing number of disputes on exported services. The major issue has remained the legislative ambiguity as to what qualifies as "use or consumption" outside Kenya. Unfortunately, the proposal to simply move the export of taxable services from the zero-rating schedule to the exemption schedule will not address this pertinent issue.

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
				Expectedly therefore, were the government to exempt exported taxable services, the KRA and taxpayers will continue to be at loggerheads on what qualifies as "use or consumption" outside Kenya for exemption to apply. We submit that this proposed change should not be passed as is for the following reasons: • It negates generally accepted VAT principles which require that internationally traded services be subjected to VAT according to the destination and neutrality principles. • These principles establish the zero-rating of internationally traded services and are well canvassed in the Organisation for Economic Cooperation and Development (OECD) Guidelines on International VAT/GST. Kenya's VAT regime will depart from international best practice as a result of this proposed change. • Exemption means that affected persons are not be entitled to deduction of input tax. Such input tax automatically becomes a cost to them and affects their bottom line. • In cases of Foreign Direct Investment, while VAT should not solely influence investment decisions, a case for exemption is likely to adversely affect any investment into the country as investors will view the tax regime as unfriendly. Kenya may therefore lose to its competitors on account of this move. In addition, Companies that are currently providing exported services may also consider moving to other countries with more favourable taxation regimes. The impact of this will subsequently result in reduction of other

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
				taxes like corporate tax, PAYE that these companies are paying to KRA. • A move to exempt the export of taxable services is not only unfair but also discriminatory. The principles of VAT on international trade should apply without bias, and • We respectfully view this proposed change as bad law since it seeks to reverse the gains that have already been made through court decisions on the matter of export of taxable services.
2.	Paragraph 13A under Part A of the First Schedule.	The Bill proposes to move the VAT status of the supply of ordinary bread from zero-rated products to taxable at 16%.	Zero-rating of ordinary bread should be maintained.	Ordinary bread currently retails for approximately KES 50. Introduction of VAT would mean that the current price is likely to rise by at least 8 shillings. The price increase could even be higher where retailers are not registered for VAT and they therefore have to absorb VAT charged by manufacturers/wholesalers as a cost. The potential impact of the proposal to tax ordinary bread on manufacturers may be very significant. At the same time, this proposal affects the ability of *Wanjiku* to afford ordinary bread, a necessity whose value to the ordinary Kenyan's food needs cannot be overemphasized. Potentially therefore, the gains made through standard rating of ordinary bread could disproportionately be reversed through reduction in income tax and increased cost of living for the ordinary Kenyan. We further contend that the zero-rating and exemption regime for VAT purposely seeks to deviate from the general rate to, among others, ensure that necessities remain affordable. Taxation of ordinary bread negates this intention.

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
3.	Paragraph 114 under Part A of the First Schedule	The Bill proposes to introduce a transition provision to exempt taxable goods supplied to a person who had a contract with the Government prior to 25 April 2020 by introducing Para 114 under Part A of the First schedule	While the move is welcome to avert drastic changes in the contracting terms following removal of the exemption, the change appears to have a drafting error by referring to taxable goods supplied **to** persons and contract with the **Government.** To correct the drafting error, we recommend that the proposal is amended as follows: - *114. taxable goods supplied **by** persons that had an agreement or contract with the Government **of Kenya or any Government Agency implementing energy projects** prior to 25th April 2020 and the agreement or contract provided for exemption from value added tax;* *Provided that this exemption shall apply to the unexpired period of the contract or agreement and upon recommendation by the Cabinet Secretary responsible for matters relating to energy.*	The proposed change will eliminate the drafting error especially where the Bill refers to taxable goods supplied **to persons** as opposed to **by persons**. In addition, the proposal will capture the spirit and provide clarity that the exemption applies to energy projects that are undertaken by Government agencies and not necessarily the Government itself.
Other issues excluded from the Finance Bill 2021				
4.	Standard rating of liquified petroleum gas (LPG).	The Finance Act 2020 deleted LPG from the zero-rating schedule. As a result, with effect from 1 July 2021, LPG	We propose a reinstatement of LPG in the zero-rating schedule.	The move to tax LPG at 16% will negatively impact on the citizens especially at such a time when the Government is encouraging Kenyans to adopt use of clean energy. As it is, LPG is already unaffordable for the ordinary Kenyan. To subject it to VAT will mean

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
		will be subject to VAT at 16%.		that fewer Kenyans will afford LPG thereby reverting to less preferred energy sources such as firewood and charcoal. Ultimately, this has a bearing on environmental conservation. Use of clean energy has numerous benefits on environmental conservation efforts and in the reduction of respiratory diseases. This is especially important during this time when the country grapples with containing the adverse effects of COVID-19 pandemic.
5.	Exemption of transfer of business as a going concern	The Tax Law Amendment Act, 2020 deleted transfer of business as a going concern by a registered person to another registered person from the Exemption schedule. In effect, transfer of business as a going concern now attracts VAT the rate of 16%.	We propose a reinstatement of transfer of business as a going concern under Part 1 of the First schedule to the VAT Act, by introducing the following paragraph in proper numerical order ***"The transfer of a business as a going concern by a registered person to another registered person"***	Introduction of VAT on transfer of business as a going concern has significantly increased the cost of restructuring. The move is also retrogressive and makes Kenya uncompetitive given that most of the countries recognize that transfer of businesses needs a special treatment from a VAT perspective to encourage restructuring of businesses. Reinstatement of exemption of transfer of business as a going concern will support businesses which require to restructure post Covid-19.
6.	Taxation of supplies imported or purchased for construction of power Plants	The Tax Law Amendment Act, 2020 deleted taxable supplies imported or purchased for the construction of a power generating plant from the Exemption schedule.	We propose a reinstatement of taxable supplies imported or purchased for the construction of a power generating plant under Part 1 of the First schedule to the VAT Act, by introducing the following paragraph in proper numerical order	Our recommendation is based on the following: - • The cost of constructing a power plant is huge and relies heavily on debt financing. The removal of the exemption mid-way may lead to cash-flow constraints that were not budgeted for or envisaged at inception. • The power producers are likely to pass on the increased cost of power to the off-taker and eventually the ultimate

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
		In effect, such supplies are now subject to VAT at 16%.	*"Taxable supplies, excluding motor vehicles, imported, or purchased for direct and exclusive use in the construction of a power generating plant by a company, to supply electricity to the national grid approved by Cabinet Secretary for National Treasury upon recommendation by the Cabinet Secretary responsible for energy"*	consumer. This is in direct conflict with the Government efforts to reduce the cost of power to spur growth of the manufacturing sector.

(iii) **Employee taxes – excluded from the Finance Bill 2021**

No	Section/ Paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
1	Section 5(6)(a) Taxation of unregistered Employee Share Option Plans (ESOP) and the tax point for registered and unregistered ESOPs	Section 5(6) of the ITA should be amended to provide that taxation of unregistered ESOPs is similar to the taxation of registered ESOPs. In addition, the tax point for ESOPs should be at exercises, not vest.	We propose that Section 5(6)(a) of the ITA is deleted and replaced with the following: *"the benefits chargeable shall accrue regardless of whether such a plan is registered as a collective investment scheme within the meaning of the Capital Markets Act or not, and shall accrue to the employee at the date of exercising the option."*	• There is no express provision for taxation of unregistered employee share options thereby exacerbates the prevalence of tax disputes. • An employee receives a cash benefit only at exercise, yet the tax point is vest. Since exercise comes before vest, tax is therefore financed by either the employer or the employee from his own pocket or the benefit is reduced by the equivalent of tax amount. This may act as a disincentive to the employees.
2	Section 5 (2) (a) (iii) Change in the *per diem* tax free rates	Section 5 (2) (a) (iii) is should be amended to align the *per diem* tax free thresholds with the public sector's prescribed rates.	We recommend that Section 5 (2) (a) (iii) is deleted and replaced with the following: *"notwithstanding the provisions of sub-paragraph (ii), where such amount is received by an employee as payment of subsistence, travelling, entertainment or other allowance, in respect of a period spent outside his usual place of work while on official duties, the amount not exceeding the public service prescribed rates for the duration of that period shall be deemed to be reimbursement*	• The KES 2,000 per day cap is quite low considering the prevailing inflation rates and economic situation. • Alignment of the tax-free per diem threshold in line with the public sector rates advances the equity canon of taxation.

No	Section/ Paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
			of the amount so expended and shall be excluded in the calculation of his gains or profits. Public service rates will be as provided by the Salaries & Remuneration Commission"	
3	Section 22A(1)(c) – Pension deduction	Increase tax-free contributions to registered pension or provident funds to at least KES 360,000 p.a.	We propose that Section 22A(1)(c) of the ITA is amended to read as follows: *"three hundred and sixty thousand shillings (or, where contributions are made to registered funds of the employer in respect of a part year of service of the member, thirty thousand shillings per month of service)."*	• The tax-free threshold was last updated in 2008 and has remained constant ever since despite significant changes in the economic situation. • Increase in the pension deduction rates will encourage uptake of pension and thereby contribute to the government's agenda of a stable ageing population.
4	Section 5(2) (b) Non-cash benefit threshold	Increase the non-cash benefit tax free to at least KES 60,000.	We propose that Section 5(2) (b) of the ITA is amended to read as follows: *(b) save as otherwise expressly provided in this section, the value of a benefit, advantage, or facility of whatsoever nature the aggregate value whereof is not less than sixty thousand shillings granted in respect of employment or services rendered;*	• This provision was introduced in 2005 and has been in existence for 16 years despite changes in inflation and economic conditions
5	Paragraph 2 of the Third Schedule	Increase the insurance relief to a limit of at least KES 120,000 p.a.	We propose that Paragraph 2 of the Third Schedule to the ITA is amended to read as follows:	• This provision was introduced in 2007 and has been in existence for

No	Section/ Paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
			2. Insurance Relief *The amount of insurance relief shall be fifteen per cent of the amount of premiums paid but shall not exceed one hundred and twenty thousand shillings per annum.*	14 years despite changes in inflation and economic conditions • This will encourage uptake of insurance products relating to education, life and medical hence is aligned with the government's development agenda
6	Section 5 (i) Taxation of telephone, data or internet benefit	We propose and amendment to Section 5 (i) on taxation of telephone, data or internet benefit at a rate of 10% of telephone bills.	We propose insertion of a new Section 5 (i) which provides as follows: *"Where an employee is provided with a* telephone, data or internet *for both business and personal use, the taxable benefit will be 10% of the bills."*	• Due to the current operating environment as a result of the COVID-19 pandemic, employees are incurring higher telephone, data or internet on business activities more than the 70% envisaged by the Commissioner. • The 30% tax rate for telephone benefit has been in existence since 12 June 2003, 18 years ago.
7	Section 5(2B) taxation of car benefit	We propose an amendment to Section 5(2B) to provide clear guidance on the taxation of benefits derived from company-leased cars.	• Amend Section 5(2B) to delete the 'higher of' • We propose that Section 5(2B) of the ITA is amended to read as follows: *(2B) Where an employee is provided with a motor vehicle by his employer, he shall be deemed to have received a benefit in that year of income equal to —*	• The ITA does not provide guidelines on how to apportion the benefits derived from a company leased car. Leased cars, similar to company owned cars, are provided to an employee primarily for business use and occasionally the employee may use the vehicle for personal use. The law seeks to tax the personal use.

No	Section/ Paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
			(a) 2% of the initial capital expenditure on the vehicle by the employer, where the vehicle is five years old and below; *(b) 1% of the initial capital expenditure on the vehicle by the employer, where the vehicle is above five years old;* *(c) Is 1% of the initial capital expenditure on the vehicle by the employer, where-* *(i) the motor vehicle is bought and assembled/manufactured in Kenya; or* *(ii) the motor vehicle is a hybrid or an electric car.* *(d) 30% of the cost of hiring or leasing, where the vehicle is hired or leased from a third party.* *Provided that –* • *where an employee has restricted use of such motor vehicle, the Commissioner shall, if satisfied of that fact upon proof by the employee, determine a lower rate of benefit depending on the usage of the motor vehicle.*	• The 2% of the initial cost of the car does not take into account depreciation. • This will promote the local manufacturing sector and encourage employers to "Buy Kenya, Build Kenya". • This will encourage reduction of environment pollution through carbon emission by motor vehicles by encouraging employers to use more of hybrid and electric vehicles.

No	Section/ Paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
8	Section 5(4) non-taxable employment benefits	We propose an amendment to Section 5 (4) to increase the non-taxable benefits.	We propose that Section 5(4) of the ITA is amended to include the following subsections: i) *An amount paid by the employer either directly or through an insurance company to cover gym membership or annual wellness check-up* j) *Amounts paid by the employer for temporary language/ cultural classes, house finding services for employees hired from outside Kenya.* *For purposes of this subsection 5(4) (j) "temporary housing" means accommodation paid by the employer for not more than 30 days.*	• The exemption of wellness and health benefit costs will enable the private sector and employers to contribute to healthcare by investing in a healthier workforce. These exemptions are aimed at reducing the medical costs incurred by Kenyans because of some lifestyle diseases.

(iv) Excise Duty

No	Section/ Paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
1.	Part III, First Schedule	The Bill proposes to amend the definition of other fees in Part III of the First Schedule to the Excise Duty Act (EDA) by deleting the words "fees or commissions earned in respect of a loan" The proposed definition of "other fees" will read as follows: *"any fees, charges or commissions charged by financial institutions relating to their licensed activities, but does not include interest on loan or return on loan or any share of profit or an insurance premium or premium based or related commissions specified in the Insurance Act or regulations made thereunder"*	The proposed amendment will reverse the clarity provided by Finance Act 2019 and, based on past experience, this will lead to ambiguity on the scope of interest exempted from excise. To enhance clarity on the scope of interest exempted from excise duty we propose the following: • Define the term "interest" as defined under the ITA to read as follows: - ***"interest" (other than interest charged to tax) means interest payable in any manner in respect of a loan, deposit, debt, claim or other right or obligation, and includes a premium or discount by way of interest and a commitment or service fee paid in respect of any loan or credit or an Islamic finance return"*** or • Otherwise delete the proposed amendment to the definition of other fees.	Before the amendment of "other fees" through the Finance Act 2019, the scope of interest exempted from excise duty was unclear since the term interest is not defined under the EDA. The amendment was meant to provide clarity on the scope of interest that is exempt from excise duty. The amendment clarified that fees such as loan processing and commitment fees were not subject to excise duty. This ambiguity has in the past resulted to numerous tax disputes between the KRA and banks particularly with respect to charging of excise duty on loan related fees. The Courts have in the past relied on the definition of the term interest and determined cases in favor of the taxpayer – legally, the practice of borrowing from a statute different from the one imposing the tax may be challenged. Importing the definition from the ITA to EDA would, as such, be most welcome. The proposed change is retrogressive and is likely to lead to ambiguity of the scope of interest that is exempt from excise duty, a deficiency that had already been cured by the Finance Act 2019. If the spirit is to charge excise duty on loan related fees and commissions earned on loans, the same is likely to result to high cost of borrowing which may deter economic growth.

(v) Tax Procedures Act (TPA)

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
1.	Section 6B Common reporting standard obligations	The Bill proposes to introduce Common Reporting Standards (CRS) regime in Kenya by introducing Section 6B. The proposal is expected to effect automatic exchange of financial accounting information on tax matters.	The adoption and implementation of Common Reporting Standards in domestic legislation will provide a legal basis for the Kenya Revenue Authority's (KRA) participation in global tax transparency and accountability initiatives, particularly following ratification of the Convention on Mutual Administrative Assistance on 05 December 2019. While it is noted that the provision mandates the Cabinet Secretary ("CS") to prescribe common reporting standards for purposes of the Act, by Regulations, we note that the same is framed in optional terms and does not prescribe any timelines when such Regulations should be issued. This may result in uncertainty over the applicable standards where the provision takes effect prior to the release of Regulations by the Commissioner. To reduce uncertainties surrounding this provision, recommend that the requirement for the CS to publish Regulations is made in mandatory terms and that the effective date of the provision is linked to the release of the Regulations.: Specifically, we propose the amendment of Section 6B (6) and the introduction of Section 6B (7) as follows.	

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
			• Deletion of the word "may" in Section 6B (6) and replacement with the word "shall".	
			• Introduction of Section 6B (7) immediately after Section 6B (6) as proposed below: *"Notwithstanding subsections (1) – (6), Section 6B shall take effect upon issuance of Regulations by the Cabinet Secretary in accordance with subsection (6) or such other date that the Regulations may specify."*	• This amendment will mandate the CS to release Regulations as opposed to leaving it as an optional. This will provide certainty to taxpayers and the financial institutions since the Regulations are key in implementing the proposal.
			• Insertion of Section 6B (8) immediately after Section 6B (7) as proposed below: *"Sensitive financial information provided under this Section shall be retained by the Commissioner in accordance with Article 13 of the Constitution of Kenya, 2010 and the Data Protection Act, 2019."*	• Given the sensitive nature of financial information availed to the Commissioner by dint of this Section, a key concern for taxpayers will be the safeguards in place to ensure the safety of financial information shared with the Commissioner. Ensuring that the substantive provision is linked with existing principals and legislation purposed at ensuring data privacy will alleviate taxpayer's concerns that sensitive data may be mishandled.
2.	Section 23 and 31	The Bill proposes to extend the statute of limitation from the current 5 years to	We are of the view that the proposed amendments are retrogressive and are likely to have a negative impact on taxpayers,	The proposal to retain the period at 5 years is largely informed by the following:-

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
	Record keeping and amendment of assessments	7 years by amending various subsections of Sections 23 and 31. In effect, the following will be affected; • Documents retention period. • Amendment of returns and assessments by the Commissioner. • Amendment of the returns by taxpayers	should the same be passed. We therefore propose that these amendments be dropped and the statute of limitation is retained as five years.	• Given the complexities of the tax law, the proposal is likely to present a lot of uncertainties to taxpayers especially where the Commissioner fails to carry out an audit for a prolonged period. Further, this increases the risk that instances of non-compliance noted may result in significantly higher cashflow demands given the wider periods open for audit. • The proposal may have the detrimental effect of eroding the Commissioner's audit efficiency by reducing the incentive to conduct and conclude audits in a timeous manner. • The proposal will place unnecessary administrative burdens on taxpayers, and likely increase the cost of document retention, particularly where physical storage space is required. The proposal to retain documents for periods of up to seven years may also fail to derive the desired effect, particularly where institutional memory constraints arise.
3.	Section 37 Relief because of doubt or difficulty in recovery of tax	The Bill proposes to increase the grounds that the Commissioner can rely on in abandoning taxes by amending Section 37	The proposal is a welcome move since it empowers the Commissioner to exercise his discretion in determining whether a taxpayer may qualify for abandonment of tax while at the same time making the	• The express recognition that taxpayers may have reasonable and justifiable grounds for the abandonment of tax would empower the Commissioner to exercise his discretion in favour of taxpayers where justifiable to do so. This

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
			Commissioner accountable to the Cabinet Secretary. Despite the promise of the proposed amendment, it falls short of recognizing reasonable and justifiable reasons for the abandonment of tax as may be raised by a taxpayer. In particular, Section 37 only envisages a scenario where abandonment of tax is initiated by the Commissioner. The taxpayer is, therefore, not given an opportunity to initiate the process even where there could be very genuine reasons. We therefore propose that introduction of Section 37 (1) (d) to read as follows: *"there are reasonable and justifiable grounds for abandonment of tax as may be raised by a taxpayer vide an application to the Commissioner"*	would further capture *bona fide* commercial and business realities that may entitle taxpayer's to abandonment of tax.
4.	Section 42A (4A) Removal of withholding VAT exemption provisions	The Bill proposes to delete the provision that allowed suppliers with perpetual VAT credits for over 2 years to apply for exemption from withholding VAT by repealing Section 42A (4A)	Section 42 (4A) was introduced via the Finance Act 2017 to enable suppliers in perpetual VAT credit positions to apply for exemption from withholding VAT. Though the VAT Act allows taxpayers who have tax credit arising from withholding VAT to apply for refund of the tax, we are of the view that the proposed repeal of Section 42A (4A) is retrogressive and will adversely impact cashflow of the taxpayers in perennial VAT credit positions.	Should the repeal of Section 42A (4A) be passed, taxpayers in perennial VAT credit positions due to the application of withholding VAT will be detrimentally impacted. Affected taxpayers' only recourse will be an application for refund of VAT credits arising resultant of withholding VAT. However, it is notable that the refund application, approval and disbursement mechanisms adopted by the KRA is not efficient and therefore taxpayers may experience

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
			We therefore propose that the repeal be dropped and Section 42A (4A) be retained as is.	significant delays prior to the approval and disbursement of refunds. This is likely to apply pressure on impacted taxpayer's cashflow position to the detriment of business growth. The move will also impose significant pressure on government in availing cash for refund. This has been a major issue over the years.
5.	Section 47 **Refund of overpaid tax**	The Bill proposes to introduce timelines when accrual of penalties and interest in relation to offset of tax due against refund amount is supposed to kick in by introducing subsections 4A and 4B under Section 47 (4).	The proposal to clarify that penalties and interest should not accrue where a tax refund is applied to the payment of an outstanding tax is welcome. However, as currently phrased the amendment pegs the cessation of accrual of penalties and interest to the date that the Commissioner ascertains and approvals the refund, despite the taxpayer having no control over the approval process. We hold the view that penalties and interest should stop accruing at the point the overpayment first arose. The interpretation of Section 47 has been a source of contention between taxpayer and the Commissioner in recent past. The crux of the disputes has largely been whether Section 47 empowers taxpayers to automatically offset self-assessed tax overpayments against self-assessed taxes payable, particularly with respect to the same tax head. Further, whist Section 47 (3)	

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
			requires the Commissioner to respond to a refund application within 90 days, it does not provide a consequence where the Commissioner fails to do so. We therefore propose the below amendments in a view to address the aforementioned challenges: • Amend the proviso under Section 47 (1) by adding the following phrase after the 2013: *"...and where a taxpayer opts, by way of notifying the Commissioner, to utilize overpaid tax in offsetting tax due under the same tax obligation Section 47 (1) shall not apply. The taxpayer shall notify the Commissioner at least 90 days prior to the tax due date"*	• The introduction of this proviso will put to an end the conflicts between taxpayer and the KRA with respect to the utilisation of overpaid taxes against future tax liabilities. This will enhance equity since the KRA does not pay interest on overpaid tax. In addition, the proposal is expected to reduce further accumulation of tax refunds which National Treasury has been struggling to clear. This will also enable tax efficiency by reducing engagement with the Commissioner where tax overpayments are readily verifiable. The commissioner will still have an opportunity to assess any tax due should the taxpayer utilize overpaid tax that is subsequently disallowed. • The introduction of a consequence where the Commissioner fails to respond to a refund application will serve as an incentive for the Commissioner to efficiently respond to refund applications issued by a

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
			• Amend Section 47 (3) by adding the following phrase after the word refund *"...failure to which the refund application will be deemed ascertained and approved"* • Deletion of the phrase *"the date of the notification"* under Section 47 (4A) and replacement with the phrase *"the date the overpayment first arose"*	taxpayer. In the long run, this streamline the refund application process. Currently refund processing takes more than two years which impacts the taxpayers negatively from a cashflow perspective. • This proposal will serve to ensure that penalties and interest relating to outstanding tax to be offset against an ascertained and approved refund stop computing at the point the refund first arose. The proposal to peg the cessation of computing penalties and interest to the date of the refund approval notification is prejudicial to taxpayers as it exposes them to penalties and interest despite the existence of a verified tax overpayment. This also serves to punish taxpayers for inefficiencies from the Commissioner in verifying, validating and approving refund applications.
6.	Paragraph 14 of the First Schedule Requirement for digital service providers to register for tax	The Bill proposes to impose a requirement for sellers of goods and services over the digital marketplace to have a Personal Identification Number (PIN) by introducing Paragraph 14 to the First Schedule.	This proposal will negatively impact non-resident persons who sell goods and / or services in Kenya through a digital marketplace by introducing administrative burdens, particularly where the non-	This proposal will likely increase the cost of business and negatively impact the ease of doing business with respect to non-resident persons trading in Kenya via a digital marketplace and without a physical presence in the country.

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
			resident person does not have a presence in Kenya. We therefore propose that the amendment be deleted	Further, the proposal seems to negate the option afforded to non-resident persons of appointing a tax representative in Kenya tasked with handling the non-resident person's Kenyan tax obligations.

(vi) **Miscellaneous fee and levies**

No	Section/ paragraph	Proposed amendment per the Finance Bill	Our Recommendation	Justification
1.	Part A and Part B of the Second schedule Exemption from Railway Development Levy (RDL) and Import Declaration Fee (IDF)	The Bill proposes to exempt goods determined to be imported for public interest projects or to promote investment by the Cabinet Secretary from RDL and IDF by amending Part A and Part B of the Second Schedule. For the exemption to apply, the value of the goods imported must be KES 5 billion and above.	While the move is welcome given the impact of public interest projects, we are of the view that the threshold set of KES 5 billion may be too high. The high threshold may end up being counterproductive as it may only apply on a handful of projects. To achieve the intended objective, we propose that the threshold is reduced to KES 300 million. To this end, paragraphs xxvi and x of Part A and Part B should read as follows: *"such other goods the exemption of which the Cabinet Secretary may determine is in the public interest, or to promote investment and the value of which shall not be less than three hundred million shillings"*	The proposed amendment will ensure that the cost of public interest projects or projects that promote investment is kept at minimum while ensuring maximum value especially for public projects. The reduced threshold will broaden the scope of the projects that qualify and effectively cover several projects.

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The Chairperson
Departmental Committee of Finance and National Planning
Main Parliament Building
Parliament Road
Nairobi

Sent via email to clerk@parliament.go.ke

Attention: The Clerk of the National Assembly

Wednesday, June 2, 2021

Dear Sir,

In the matters under consideration by the National Assembly – The Finance Bill, 2021
Submissions by Leonardo Technologies and Services Limited

Pursuant to Article 118 (1) (b) of the Constitution of Kenya and pursuant further to Standing Order 127(3), The Departmental Committee of Finance and National Planning, now considering the Finance Bill, 2021 ("the Bill") called for public participation and involvement in the legislative process.

The Bill proposes to amend *inter alia,* the VAT Act, 2013 (VAT Act) by exempting from Value Added Tax ("VAT") the exportation of taxable services with effect from 1 July 2021.

We note that for a long time the subject of Value Added Tax ("VAT") treatment of export of services from Kenya has remained a contentious issue which has resulted in many unresolved disputes between various taxpayers and the Kenya Revenue Authority ("KRA").

As mentioned above, the Finance Bill proposes to exempt from VAT the supply of taxable exported services. However, we submit that exempting exported services will have far reaching implications to the Kenyan economy: the cost of doing business for companies exporting services from Kenya will increase making the country unfavourable to investors looking to operate regional hubs from Kenya.

This will consequently reduce the competitive power of Kenyan businesses in the world market where Kenya is perceived as a favourable tax jurisdiction by global companies and expose the country to the risk of investors leaving to more favourable jurisdictions. In summary, the proposed change will negatively impact cross border trade services in Kenya.

We propose the deletion of the proposed amendment seeking to exempt from VAT the exportation of taxable services. This will ensure that exportation of taxable services remains zero rated as currently provided for under Part A of the Second Schedule to the VAT Act.

Further, it is important for the Government to create a conducive environment to encourage and facilitate export of services by reviewing legislation, regulation and administrative procedures relating to export of services. To eliminate uncertainty in relation to exported services, we propose an amendment to the Value Added Tax Regulations, 2017 to provide guidelines that will give the much

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needed clarity on taxation of exported services to the KRA and the taxpayers thereby minimising the number of disputes arising as a result of uncertainty of what constitutes an exported service.

We have provided in detail under the body of this submission the proposed change, the impact on the cost of doing business for companies exporting services from Kenya and our proposed amendment.

We would be grateful for an opportunity to appear before the Committee or engage you through an online portal to further deliberate with your members on our proposals and recommendations.

We are happy to provide any additional information on the above should you require us to.

Yours faithfully
For: PricewaterhouseCoopers Limited



Maurice Mwaniki
Associate Director

CC: Leonardo Technologies & Services Limited
Watermark Business Park, Karen,
Nairobi, Kenya

pwc

1. Background

Leonardo Technologies & Services Limited ("Leonardo Kenya", "the Company") is a limited liability company incorporated in Kenya. Leonardo Kenya is registered as a subsidiary of Leonardo Technologies & Services Limited, Italy ("Leonardo Italy"), an Italian global high-tech company and one of the key players in Aerospace, Defense and Security. The principal activity of the Leonardo Kenya is therefore the supply of equipment and related services in aerospace, defense and security.

Leonardo Kenya also acts as a regional hub for its parent company in Africa. Leonardo Kenya also provides technical and logistic support to various Aviation Authorities within Africa and beyond. Some of Leonardo Kenya's customers include civil aviation authorities and airports in Morocco, Djibouti, Ethiopia, Sudan, Maldives, Saudi Arabia, Senegal, Somalia, Sri Lanka and Kenya. Further, Leonardo Kenya has set up an aircraft maintenance, repair and overhaul lab in Nairobi which services customers in Africa. The Company therefore exports various services to different countries within the African continent and beyond.

Over the years Kenya has remained an important economic partner in East Africa and the larger African region and beyond owing to its strategic location. The country's seaport and coastline has facilitated numerous trading activities for both imports and exports. Kenya's investment in infrastructure and advancements in technology has also seen many tech-startup companies choose Kenya as a preferred innovation hub for East Africa and the wider Eastern and Central Africa Region.

Trade is a key contributor to Kenya's economic growth and development. Kenya's Vision 2030 policy framework targets the country's economic growth from trade at a rate of 10% per year. One of the strategies employed by Kenya to grow its trade is export-led growth. Kenya has a National Export Growth Agenda of an average of 25% export growth rate per year over the period of 2018 to 2022. According to a report by Ministry of Industry, Trade and Cooperatives – State Department for Trade, *Integrated National Export Development and Promotion Strategy, 2018*, the Kenyan Government, in a bid to support export-led growth was amongst the first countries to sign the World Trade Organisation ("WTO") Multilateral Agreements. The WTO consists of over 140 countries with which Kenya can now trade with. This further opened the horizon for Kenya's exports into the global market.

Further, the air transport industry, including airlines and its supply chain, is estimated to support up to 4.6% of the country's Gross Domestic Product ("GDP"), this is according to a report by the International Air Transport Association ("IATA"), 2018 ("the report") (extract attached as **Appendix 1**).

In 2020 and 2021 however, the aviation industry in Kenya and by extension world-over, has been greatly affected by the adverse economic effects brought about by the COVID-19 pandemic. This is owing to restricted movements of persons and tourists across borders as a measure to contain the spread of coronavirus.

In addition to the above, Kenya has established itself as a regional hub and gateway to East Africa and the larger Eastern and Central Africa region. Despite the challenges, Kenya's economy has grown significantly and continues to attract foreign direct investments.

The Finance Bill, 2021 which was published on 5 May 2021 and read for the First time in the National Assembly on 11th May 2021 proposes to *exempt from VAT the exportation of taxable services* with effect from 1 July 2021.

Currently such services are subject to VAT at the zero rate.

The exportation of services has been a contentious issue between the KRA and taxpayers who export taxable services. This is due to lack of clarity on the term "use and consumption" which has resulted in



differing interpretations between the KRA and taxpayers.

2. The Issue

The Bill which was published on 5 May 2021 and read for the First time in the National Assembly on 11th May 2021 proposes to exempt from VAT the exportation of taxable services with effect from 1 July 2021. Currently such services are subject to VAT at the zero rate. The proposed change in status of exported services from zero rate to exempt means that taxpayers will not be entitled to deduct input tax incurred to make these supplies. The non-recoverable VAT will inter alia increase the cost of doing business for companies exporting services from Kenya.

Further, the Bill has not addressed the contentious subject between the Kenya Revenue Authority ("KRA") and taxpayers with regard to the determination of whether or not services qualify as 'exported services' as defined in the VAT legislation. Exported services are defined as services supplied for 'use' or 'consumption' outside Kenya. However, the VAT legislation does not provide guidance on the determination of the place of "use" and/or "consumption".

Accordingly, the uncertainty on the correct VAT treatment of exported services will persist largely attributed to the lacuna in the VAT legislation. Further, the exemption of exported services does not remove the burden of VAT entirely from the system, rather it will increase the cost of making supplies to the final consumer. This is because, in practice, exemption means the supplier is unable to recover input VAT incurred on its purchases and its cost base increases. Consequently, increasing the cost of doing business in Kenya.

3. Impact of the proposed legislation

By exempting the exportation of taxable services, the input VAT incurred by companies dealing with these supplies, such as Leonardo Kenya will be non-deductible for VAT purposes. This is because the VAT Act prohibits input tax deduction incurred to make exempt supplies. Therefore, the input tax incurred by such companies will no longer be deductible and be charged as absolute cost hence increasing the cost of doing business.

We highlight below some of the negative impacts of exempting VAT on exported services:

3.1 Exemption of exported taxable services is contrary to the provision of International best practice guidelines

The Organization for Economic Co-operation and Development ("OECD") has provided VAT guidelines on International Trade and Services in Intangibles. The OECD guidelines provide for international neutrality when taxing cross border supply of services as envisaged under the *'destination principle'.* The *'destination principle'* as per the provision of chapter 1.9 of the OECD International Value Added Tax/Goods and Services Tax ("VAT/GST") Guidelines, provides that exports are not subject to tax in the country of supply with refund of input taxes (that is, "free of VAT" or "zero-rated"). The proposed exemption therefore contravenes this provision.

3.2 Exemption of exportation of taxable services does not address the issue of contention as relates to taxation of exported services

The Value Added Tax Act, 2013 ("the VAT Act" or "the Act") defines an 'export' to mean 'to take or cause to be taken from Kenya to a foreign country, a special economic zone enterprise or to an export processing zone'. The Act further defines a service exported out of Kenya as a 'service provided for use or consumption outside Kenya'.

The VAT Regulations have also sought to provide guidance on the interpretation of the provisions of the VAT Act concerning the exportation of goods and services from Kenya. Specifically, Regulation 13 (1) states that:

> *"An exportation shall be a taxable supply...*
>
> *a) ...*
> *b) in the case of services, when the taxable supply involves the services being provided to a recipient outside Kenya for use, consumption, or enjoyment outside Kenya, irrespective of where the payment is made from.*

In light of the above and based on the VAT Act, the primary determining factor as to whether there is an export of service or not is that the place of the use or consumption of the service is outside Kenya.

The above said, neither the VAT Act nor the VAT Regulations have provided for a definition of what constitutes 'use, consumption or enjoyment'. Consequently, this has been the subject of numerous disputes between the KRA and taxpayers.

The exemption of exportation of taxable services will therefore not address this contentious issue of the determination of what constitutes 'use, consumption or enjoyment outside Kenya'. Accordingly, until proper guidelines are issued to give clarity on 'use, consumption or enjoyment' of an exported service, the contention will remain.

3.3 Exemption will increase the cost of doing business for companies exporting services from Kenya

By exempting the exportation of taxable services, the input VAT incurred by companies exporting services from Kenya will be non-deductible for VAT purposes. This is because the VAT Act prohibits input tax deduction incurred in the making of exempt supplies. Accordingly, the input tax incurred by such companies will be an absolute cost to them.

In order to maintain profitability, Leonardo Kenya will be forced to pass the cost incurred from the non-deductible input tax to its customers thereby increasing the cost of its supplies. This will further make the Company's supplies unattractive in the export market in comparison to services offered by other companies from favourable tax jurisdictions, for example Ethiopia which is already an airport aviation hub. Consequently, this will have an impact on the Company's profitability and by extension the taxes paid by the Company to the Government of Kenya for example corporate income taxes and Pay As You Earn.

In addition, this will expose the country to the risk of investors leaving to other jurisdictions with favourable tax regimes.

3.4 Exemption will contradict the Government's effort in promoting export-led growth

Kenya has untapped potential in the export services industry. The National Export Development and Promotion Strategy aims to correct this through its vision which is to '*Transform Kenya's economy through export-led industrial, agricultural and trade in services development.*' Accordingly, the Government of Kenya has put in place measures and entered into Multilateral trade agreements with WTO in order to facilitate the country's trade in the global market.

The exemption of exportation of services will increase the cost of doing business in Kenya thereby making the country less favorable to investors and consequently will be detrimental to the

Government's effort to boost the export services sector.

3.5 Additional administrative costs to the industry

The aviation industry is capital intensive and services offered are complementary to the equipment purchased. Most of Leonardo Kenya's contracts with its customers involve purchase of equipment as well as installation of the equipment. It is therefore not easy to differentiate the value of equipment purchased and of the installation services offered.

The exportation of goods is zero rated. Exempting the exportation of services will require the Company to work out the value of the services offered as complements to the purchase of equipment. This is cumbersome, especially where the selling price is a lumped up figure including both the value of the equipment and services to be offered, and will lead to administrative challenges and additional costs to the Company to determine the value of the services and the taxable purchases attributable to the services for purposes of disallowing the input tax incurred.

4. Overview of Kenya's business environment and the export sector

Kenya has over the years remained an important economic player in East Africa by virtue of its strategic location, a seaport, coastline, an extensive manufacturing base, excellent resources for agriculture, tourism, a skilled workforce and well-developed infrastructure in East Africa. In addition, its membership to the East African Community and the Common Market for Eastern and Southern Africa ("COMESA") makes it an attractive base for foreign investors and companies looking to access the East and Central African market.

The country is a leading sub-Saharan producer and exporter of both goods and services. Specifically, Kenya is the leading exporter of floricultural products and is East Africa's hub of a broad array of well-developed service industries and service providers. This continues to make Kenya a promising country for increased export of services.

In addition to the above, globalisation has also necessitated export led growth strategies for most countries including Kenya. In an effort to diversify Kenya's export base, export of services has grown rapidly in the recent past. It is therefore imperative that GoK is purposeful in creating a conducive environment for rapidly growing sector; this we submit includes a conducive taxation regime.

The exported services sector makes a critical and significant contribution to Kenya's economic growth and job creation. A majority of Kenyan potential clients/ customers live outside Kenya; thus, export of services gives Kenya a chance to tap into new markets globally. It improves economic performance and provides a diverse range of both existing and new export opportunities. Furthermore, it enhances the growth of business process outsourcing which in turn increases state revenue.

It is important that Kenya sets itself up as a hub for the East Africa region and the African continent as a whole. This will attract investors into the country who will look to set up regional offices in Kenya. This will consequently lead to creation of jobs for the country's citizens, increase tourism and by extension boost the country's economy.

5. Current Practice

The Kenyan VAT legislation comprises the VAT Act, 2013 and the VAT Regulations, 2017.

The VAT Act defines export to mean *'to take or cause to be taken from Kenya to a foreign country, a special economic zone enterprise or to an export processing zone'* while a service exported

out of Kenya means a *'service provided for use or consumption outside Kenya.'*

Under section 2 of the VAT Act, a zero-rated supply is defined as a supply listed in the Second Schedule. We note that Paragraph 1 to the Second Schedule of the VAT Act, 2013 includes *'the exportation of goods or taxable services.'* In accordance with this provision, export of taxable services is taxable at the rate of zero in Kenya.

In a bid to operationalize the provision of the VAT Act, 2013, Regulation 13 of the VAT Regulations, 2017 provides for exportation of goods and services from Kenya. Specifically, Regulation 13 (1) states that:

> *'An exportation shall be a taxable supply...*
>
> > *(a) ...*
> > *(b) in the case of services, when the taxable supply involves the services being provided to a recipient outside Kenya for use, consumption, or enjoyment outsideKenya.*

From the foregoing, we note that the provisions of Regulation 13 do not expound on what constitutes use, consumption and enjoyment outside Kenya.

6. International Best Practice

6.1 Organization for Economic Cooperation and Development ("OECD") – Tax neutrality and the destination principle

The destination principle is the premise for taxation of cross border supplies. Under the destination principle, the OECD guidelines provides that internationally traded services and intangibles should be subject to VAT in their jurisdiction of consumption.

The OECD has developed VAT guidelines on International Trade and Services in Intangibles. These guidelines are a good reference point in understanding the applicability of VAT in the context of exported services from an international best practice perspective in the absence of domestic guidelines.This was the position in *Unilever Kenya Limited v The Commissioner of Income Tax (Income Tax Appeal No.753 of 2003)* where the court held that the OECD guidelines were applicable in determination of a transfer pricing dispute before the court. Accordingly, we note that since Regulation 13 has failed to provide any guideline on the "use, consumption or enjoyment" outside Kenya, there is need to turn to the OECD VAT Guidelines for clarity.

The OECD guidelines provide for the principle of tax neutrality whose dimensions, among others include absence of discrimination in a tax environment that is unbiased and impartial and the elimination of undue tax burdens and disproportionate or inappropriate compliancecosts for businesses. Guideline 2.2 provides that businesses in similar situations carrying outsimilar transactions should be subject to similar levels of taxation.

Foreign businesses should not be disadvantaged or advantaged compared to domestic businesses. They should not be subject to irrecoverable VAT compared to domestic businesses, however that outcome is achieved. The principle of neutrality allows for certain approaches to be adopted to ensure foreign businesses do not incur irrecoverable VAT. These include but are not limited to: application of zero-rate rules, refund mechanisms, shifting theresponsibility to locally registered suppliers/customers, and granting purchase

exemption certificates. The measures taken by a jurisdiction to protect its tax base need to be balanced against the objective of keeping compliance and administrative costs as low as possible. With regard to cross border supplies, this is achieved through the application of the destination principle which ensures that there is no double taxation - exports are free of VAT and importsare taxed on the same basis and at the same rate as domestic supplies.

The destination principle is the premise for taxation of cross border supplies. Under the destination principle, the OECD guidelines provide that internationally traded services and intangibles should be subject to VAT in **their jurisdiction of consumption.**

Guideline 3.1 provides that for consumption tax purposes internationally traded services andintangibles should be taxed according to the rules of the jurisdiction of consumption. This ensures that services and intangibles across borders are taxed according to the rules of the customer's jurisdiction irrespective of where they are obtained.

For the application of Guideline 3.1 on business-to-business supplies, Guideline 3.2 provides that the jurisdiction in which the consumer is located has the taxing rights over internationally traded services or intangibles. For the application of Guideline 3.2, Guideline 3.3 provides that the identity of the customer is normally determined by reference to thebusiness agreement.

From the foregoing, we submit that services exported from Kenya should only be taxed in the jurisdiction in which such services are consumed i.e. export country. Guideline 3.3 introduces a new aspect in the determination of the consumer or customer of the services. It provides that such consumer is to be determined by reference to the business agreement which would mean the terms of the contractual agreement for the export of services.

6.2 East African Community ("EAC") objectives

Facilitation and promotion of trade, investment and production are among the key objectivesof the EAC. Tax policies adopted by the member countries on the cross-border supply of services significantly affect the regional trade.

Trade facilitation is affected by changes in costs involved in the trade supply chain. Increased cost of doing business resulting from double taxation on exported services from Kenya discourages trade and is against the EAC objectives of facilitating and promoting trade, investment and production within the EAC.

6.3 Kenya's image as an Investment Destination

The Kenyan Government has established the Kenya Investment Authority to promote the country's image across the globe as a favourable investment destination. To maintain this status, it is imperative that Kenya's tax regime does not place additional tax burdens on international trade. It is important for the Government to consider the potential impact of subjecting export services to VAT on the ability to attract investors, facilitate trade in the region and maintain the country's image as a preferred place of doing business.

Our proposals in this paper *inter alia* seek to help Kenya retain its image and facilitate trade as a key objective of the EAC. Importantly, we note that export of services is key in ensuring Kenya's balance of payment is favourable by ensuring growth in our economy.

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6.4 Regional Best Practice

Uganda

Ugandan VAT regime is provided for by the VAT Act, Cap 349 enacted in 1996.

We note that the provisions of Paragraph 1 (1) of the Third Schedule to the VAT Act, Cap. 349 provides that the supply of goods or services where the goods or services are exported from Uganda as part of the supply shall be zero-rated for VAT purposes.

Paragraph 2 of the Third Schedule provides for the determination of services which are treated as exported from Uganda. It states that in the case of services, the services should be supplied for use or consumption outside Uganda as evidenced by documentary proof acceptable to the Commissioner General.

Tanzania

Tanzania's VAT regime is provided under the VAT Act, no.5 of 2014 which was enacted in 2014 to repeal the VAT Act, Cap.147 and the VAT (General) Regulations. Section 60 of the VAT Act, 2014 provides for the zero rating of services supplied for use outside the Republic. It provides as follows:

'(1) A supply of services directly related to land outside the United Republic shall bezero-rated.

A supply of services physically performed on goods situated outside the UnitedRepublic at the time the services are performed shall be zero-rated.

A supply of services, of which the services are physically received at no time andplace other than the time and place at which the services are physically performed, shall be zero-rated if the services are performed outside the United Republic of Tanzania.'

This approach by Tanzania to clearly outline the place of use for certain services exported outof Tanzania indicates a proactive approach by Tanzania to align the country's VAT regime with accepted international best practice.

South Africa

The South African VAT regime is provided for under the VAT Act 89 of 1991. Similarly to Kenya, the legislation has been drafted around the destination principle.

Services rendered to non-resident persons are zero rated as provided under Section 11 (2) ofthe VAT Act. However, the VAT law also provides for exceptions to the rule, which are unequivocal and known to both the taxpayers and the revenue authority.
The South African VAT Act contains specific guidelines which are applicable in determiningthe place of use or consumption of services.

For instance, services shall not be deemed to have been exported if the recipient of the services, whether resident or not, is present in South Africa when the services are rendered. Further, services may not be deemed to have been exported if they are rendered in respect of movable property which is located in South Africa at the time of supply of the services.

India

The Indian VAT regime has been very proactive in determining the place of taxation of services. In 2005, India formulated the "export of services rules" which sought to determine the place of taxation of services traded across borders. In a bid to determine if services qualifyas exported, the export of services rules categorised services into three broad categories: Services directly relating to immovable property; performance related services; and services taxed at the location of the recipient. The rules provided a clear guideline on the application of VAT on services traded across borders in line with the destination principle.

The "export of services rules" were then replaced with the "place of provision of services rules" which came into effect into 2012. The new rules clearly spell out the place of provisionof services and therefore the place of taxation of services traded across borders. These new rules are also based on the destination principle.

7. Our proposed amendment in the Finance Bill, 2021 and impact to stakeholders

We *propose the deletion of the proposed amendment seeking to exempt from VAT the exportation of taxable services. This will ensure that exportation of taxable services remains zero rated as currently provided for under Part A of the Second Schedule to the VAT Act.*

In addition to the above, it is important for the Government to create a conducive environment to encourage and facilitate export of services by reviewing legislation, regulation and administrative procedures relating to export of services. To eliminate uncertainty in relation to exported services, we propose that the Value Added Tax Regulations, 2017 be amended as follows -

i. In Regulation 2 by inserting the following new definitions in proper alphabetical sequence—

For purposes of Regulation 13:

"Business agreements" will include but not be limited to: legally enforceable contracts; general correspondence; purchase orders; invoices; payment instruments; receipts and other electronic forms such as emails; online ordering records and payments that are likely to emerge as technology develops."

"Location" of the "user or consumer" means: -

"(a) Where the user or consumer is incorporated, the registered place of business;

(b) Notwithstanding the provision in (a) above:

i. The location of his business establishment; or
ii. where services are used or consumed at a place other than the place of incorporation or business establishment, that is to say, a fixed establishment elsewhere, the location of such establishment; or

iii. *where services are used or consumed at more than one establishment, whether registered, business or fixed, the establishment most directly concerned with the use or consumption of the service; or*

iv. *in the absence of such places, the usual place of residence of the user or consumer or the billing address of the user or consumer.*

"User or consumer" means the person who seeks performance of services pursuant to a business agreement.

1. In Regulation 13 (2) (a) by deleting the paragraph "*a copy of the invoice showing the recipient of the supply to be a person outside Kenya*"; and substituting it with the following new clause "*tax invoice*".

2. In Regulation 13 (2) (c) by deleting the paragraph *"for services, such other documents as the Commissioner may require as proof that the services had been used or consumed outside Kenya" and substituting therefor the following new paragraph:*

   "for services, such other documentary proof that the services have been used or consumed outside Kenya."

3. In Regulation 13 by inserting the following new Regulation immediately after Regulation 13(3) -

   "Determination of the place of use, consumption or enjoyment of services"

   "13A. Except as is otherwise provided in the Regulations, the place of use, consumption or enjoyment of a service supplied from Kenya shall be the location of the user or consumer of the services."

8. Intended impact of our proposed amendment

The proposed amendment if passed into law in the Finance Act 2021 means that *exportation of taxable services* will continue to be subject to VAT at zero percent consequently enabling businesses to deduct input tax on their taxable purchases thereby making the supply of services more competitive in the global market. This is in line with the Government's initiative to promote export-led growth of the Kenyan economy.

Secondly, the proposed guidelines on determination of place of 'use, consumption or enjoyment' of a service will give much needed clarity to the KRA and the taxpayers thereby minimising the number of disputes arising as a result of the contention around the determination of place of 'use' or 'consumption'.

In addition, this amendment will ensure that consumers of exported services do not suffer double taxation on services acquired in Kenya.

Further, the introduction of guidelines on exported services will achieve the following:

a. Lead to harmonisation with international best practice such as the OECD and hence facilitating and encouraging international trade.



b. Encourage compliance, boost revenues, facilitate and encourage investment.

c. Increase competitive power of Kenyan businesses in the world markets.

d. Ensure alignment of the Regulations to the VAT Act.

9. Conclusion

As noted above, the proposed exemption of exportation of taxable services will have adverse impact to both taxpayers and the economy of Kenya. We therefore humbly request your office to consider our proposal and delete this proposal and retain the current the zero-rated VAT status of exportation of taxable services. Further, we implore your office to look favourably on the proposed VAT guidelines on exportation of services which will give much needed clarity on the determination of the place of 'use or consumption' of an exported service thereby minimising disputes between the KRA and taxpayers.

We thank you for your support and look forward to a favourable response.

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The Chairman and Members
Departmental Committee of Finance and National Planning
Main Parliament Building
Parliament Road
Nairobi

Attention: **The Clerk of the National Assembly**
Office of the Clerk

Sent via email to clerk@parliament.go.ke

2 June 2021

Dear Sir,

In the matters under consideration by the National Assembly – The Finance Bill, 2021

Pursuant to Article 118(1) (b) of the Constitution of Kenya, 2010 and pursuant further to Standing Order 127(3), The Clerk of the National Assembly, now considering the Finance Bill, 2021 ("the Bill") called for public participation and involvement in the legislative process.

PricewaterhouseCoopers Limited ("PwC", "Us", "We") are pleased to submit our memorandum containing our proposals on amendments to be included in the Bill under consideration.

We would be grateful for an opportunity to appear before the Committee or engage you through an online portal to further deliberate with your members on our proposals and recommendations. We are happy to provide any additional information on the above should you require us to.

Yours sincerely,
For: PricewaterhouseCoopers Limited

Titus Mukora
Director
cc:

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1. INCOME TAX ACT (CAP 470)

1.1. Recommendations relating to the Bill

#	Reference of the Bill	Issue of concern	Recommendation	Rationale/Justification
1.	**Part II Clause 2** Page 537	**Definition of control** The Bill proposes to provide a definition of the term control to include *(f) the person or a person designated by that person—* *(i) supplies at least ninety per cent of the supply of the purchases of another person; or* *(ii) in the opinion of the Commissioner, influences the prices or other conditions relating to the supply of the purchases of another person;* *(g) the person purchases or designates a person—*	We propose the following amendments: **Delete item (f), (g) and (h) under Clause 2(a)(f) of the Bill.**	This will eliminate instances of independent parties being considered related for tax purposes The provisions as worded would give the Commissioner unlimited powers in determining the treatment between two separate taxpayers.

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#	Reference of the Bill	Issue of concern	Recommendation	Rationale/Justification
		(i) to purchase at least ninety per cent of the sales of another person; or *(ii) in the opinion of the Commissioner, influences the price or any other condition of the sales of another person;* *(h) the person has any other relationship, dealing or practice with another person which the Commissioner may deem to constitute control* There is a risk that the new definition may capture entities which are truly independent and do not have any ties/ relations to each other but due to the nature of their transactions one is deemed to have control over the other entity. This would include a		

#	Reference of the Bill	Issue of concern	Recommendation	Rationale/Justification
		captive contract manufacturer who supplies to one customer or a captive specialised services provider where there is only one customer.		
2	**Part II Clause 7(a)** Page 542	**Interest restriction** The Bill proposes to restrict the deduction of interest for financial institutions and non-related resident companies	i. We recommend that the Section 16(2) (j) of the Income Tax Act is reworded as follows: *gross interest paid or payable to* ***non-resident*** *related persons* ~~***and third parties***~~ *in excess of thirty per cent of earnings before interest, taxes,* *depreciation and amortization of the borrower in any financial year:* and ii. We recommend that the insertion of a proviso under Section 16 (2)(j) of the Income as follows: (iii) this paragraph shall not apply to a financial institution specified under the	The proposed amendment will discourage the uptake of loans from financial intuitions. Further, taxpayers should not be penalised from the uptake of loans from third parties as the interest incurred is an actual cash outflow from the business and not a transfer of profits. Interest restriction should only be applicable to non-resident related party debt as the interest paid to resident related party will be taxable in Kenya on the resident person hence will not result in any tax leakage. This amendment would have a very significant negative impact on the effective tax rate of financial institutions where over 60% of their expenses consists of interest. The provision has been borrowed from OECD's Base Erosion and Profit Shifting

#	Reference of the Bill	Issue of concern	Recommendation	Rationale/Justification
			Fourth Schedule to the Act	Agenda, and according to OECD this is only applicable to non-resident related parties. Local parties are not shifting profits because the parties are both taxable in Kenya.

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1.2. Other recommendations

#	Issue of concern	Recommendation		Rationale/Justification
1.	**Minimum Tax - Not in the Bill**	i. We propose either of the following proposals A. Reduction of the minimum tax rate from 1% to 0.5% of gross turnover OR B. Amendment of the minimum tax base from gross turnover to provide for a different base such as Earnings Before Interest and Tax (EBIT).	We propose the following alternative amendments: i. **Proposal A** The Third Schedule to the Income Tax Act is amended in Heading B by amending Paragraph 11 to read as follows: *The rate of tax in respect of minimum tax under section 12D shall be **zero point five** per cent of the gross turnover.* *OR* **Proposal B** The Third Schedule to the Income Tax Act is amended in Heading B by amending Paragraph 11 to read as follows:	i. Kenya's minimum tax rate is higher compared to the other countries – Other comparable jurisdictions such as Nigeria, Tanzania and Ivory Coast all have minimum tax rates which are less than or equal to 0.5%. Taxes based on turnover have been tried, tested and they failed – Ivory Coast has currently suspended implementation of minimum tax, Uganda's discontinued its push to introduce minimum tax while Nigeria is constantly reviewing its minimum tax framework quite often thereby underscoring the need for Kenya's government to critically think of the proposed minimum tax. Further, the transition from turnover based taxes to net income-based taxes in the twentieth century is a clear indication that turnover based taxes do not yield the desired income in the long run. Taxes based on turnover are against the equity canon of taxation since they disadvantage low margin business.

			*The rate of tax in respect of minimum tax under section 12D shall be one per cent of the **Earnings Before Interest and Tax**.*	EBITDA is also a better tax base to use for high turnover/low margin businesses as taxes on turnover end up being taxes on capital Minimum tax may end up being consumption taxes – Minimum tax will be an additional cost of doing business since it will be expensed in the profit and loss account. There is a risk that minimum tax may be loaded to the cost of the goods/services to ensure that a business recovers this additional cost will be borne by the customer.
ii.	Amendment of minimum tax provisions to allow for offset against future corporate tax liabilities for entities in tax losses.	ii.	Section 12D of the Income Tax Act should be amended by inserting sub-section 3 to read as follows: *For entities in tax losses, minimum tax will be advance corporate tax payments and shall be used to reduced taxes due in subsequent periods.*	ii. Minimum tax is an advance tax in other comparable jurisdictions – In Cameroon, minimum tax is treated as an advance tax.

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2. TAX PROCEDURES ACT

2.1. Recommendations relating to the Bill

#	Reference of the Bill	Issue of concern	Recommendation	Rationale/Justification
1.	**Part V Clause 28 and 29** Page 561	**Statute of limitations and document retention** I. The Bill proposes to increase the period within which assessments may be issued/ amended by the Commissioner from five years to seven years. *II.* The Bill also proposes to increase the document retention period from five years to seven years.	**The proposals should be deleted from the Bill.**	The proposed amendment increases uncertainty for taxpayers as the window for amendment of assessments would be open for longer periods. The increased time period may erode the administrative efficiency of the KRA by reducing the incentive for the KRA to audit a taxpayer in a timely manner. Finally, the time period that a taxpayer can lodge a refund for tax overpayments is 5 years. Deleting the proposed amendment will align the statute of limitation applicable to all historical tax issues.
2.	**Part V Clause n 32** Page 562	**Removal of Withholding VAT exemption provisions** The Bill proposes to delete section 42A(4A), removing the option for qualifying suppliers to apply to the Commissioner for exemption from the provision of Withholding VAT ("WH VAT").	i. We propose the deletion of the proposed amendment effectively retaining Section 42A (4A) of the Tax Procedures Act which allows the Commissioner to grant an exemption from WH VAT if the supplier has demonstrated that they will be in a continuous VAT credit for a	With the proposed amendment, taxpayers who will be in a perpetual VAT credit position because of the application of WH VAT will no longer have a reprieve. This will have cash flow implications on taxpayers who have accumulated WH VAT credits over the years and who are unable to apply for refund of the accumulated credit owing to the restricted timelines within which to apply for a refund. Further, where such taxpayers lodge refund claims,

#	Reference of the Bill	Issue of concern	Recommendation	Rationale/Justification
			period of not less than twenty-four months.	the process of VAT refund claim payments are a tedious and time consuming. Retention of WH VAT exemption will offer a reprieve to taxpayers who are in a perpetual VAT credit as a result of the application of WH VAT.
3.	**Part V Clause 33** Page 562	**Refund of overpaid tax** The Bill proposes to include a provision where an overpayment when applied in accordance with Section 47(4)(a) and (b), interest and penalties will not accrue on the amount applied to the payment of outstanding tax from the date of notification of the ascertainment that tax was overpaid.	The proposal should be amended to read as follows: *"Where the Commissioner notifies a taxpayer that an application for a refund has been ascertained in accordance with subsection (3), and applies the refund to the payment of an outstanding tax in accordance with subsection (4)(a) or (b), interest or penalties shall not accrue on the amount applied to the payment of the outstanding tax from the date ~~of the notification~~* ***the overpayment arose.***"	While it is acknowledged that interest and penalties should not accrue where the taxpayer has overpaid taxes, the point at which the interest and penalties cease applying should be the date when the ***overpayment arises and not the date of notification by the KRA*** of the ascertainment of the overpayment.
4.	**Part V Clause 40** Page 564	**Whether denial of an order of stay can be legislated** *108A. Where any matter under a tax law is in issue in any ongoing criminal case and is also directly or*	**The proposal should be deleted from the Bill.**	This amendment should be deleted as it seeks to interfere with the judicial authority of the courts.

#	Reference of the Bill	Issue of concern	Recommendation	Rationale/Justification
		substantially in issue in any pending civil case, that fact shall not be a ground for any stay, prohibition or delay of either the criminal or civil case.		

2.2. Other recommendations

#	Issue	Challenge	Proposal	Rationale
1.	**Clarity on the priority of tax claims for an insolvent company -** **Not in the Finance Bill**	**Issues of concern:** i. There is a potential conflict between the Insolvency Act (IA), 2015 and the Tax Procedures Act (TPA), 2015 regarding the priority of tax claims during the distribution of an insolvent company's assets to the	Amend the TPA to align its provisions to the IA. Delete Section 34(2) of the TPA and replace with the following: ***If the person referred to in subsection (1) is liquidated or is declared bankrupt, taxes shall be paid to the Commissioner in accordance with the provisions [of the Second Schedule] to the Insolvency Act, 2015.***	i. The recovery of claims against a company in insolvency is globally governed by the provisions of the specific legislation governing a collective procedure which seeks to recover the claims of all creditors and that is what the IA, specifically its Second Schedule, appears to contemplate. The provisions of the TPA which appear to redefine the scope of the estate of an insolvent entity by taking out the tax items it sets out creates a conflict with the IA. ii. An insolvent entity is ordinarily incapable of discharging its debts including tax liabilities and thus the prescription by the IA for the company to pay its previous debts only under certain conditions. Elevating the tax liabilities, which in

company's creditors.

ii. Per the Second Schedule to the IA, taxes such as PAYE and withholding tax (WHT) rank as third priority claims after administration expenses and qualifying employee claims.

iii. On the other hand, Section 34(2) of the TPA appears to elevate the priority of tax claims as it indicates that such claims do not form part of the estate of the entity that is subject to insolvency

some instances could be significant, undermines the ability of the other creditors (including employees as well as the secured creditors who placed the company under administration) to recover their dues.

iii. The current Covid-19 pandemic has significantly affected businesses and there is an increased number of entities that are likely to be declared insolvent and placed under administration. The conflict outlined above will complicate the administration process as the administrators will be forced to seek clarification from the courts. Further, in the event the taxes are declared to rank higher than the other claims as envisaged in Section 34 of the TPA, other creditors are likely to lose a significant portion of the amount that would otherwise been recovered from the insolvent entity thus aggravating the impact of the pandemic on such businesses.

		proceedings.		
2	**Aggressive use of Agency Notice** **Not in the Finance Bill**	i. Section 96 (7) of the ITA gave the agent in an Agency Notice 30 days within which it ought to remit to KRA any monies held by it. This provision was repealed with the introduction of the TPA. ii. Section 42 (5) of the TPA provides that the agent must pay the monies specified in the notice by the date specified in the notice. iii. KRA's practice is to indicate in the notice that the amount should be paid "**immediately**".	Amend Section 42 (5) of the TPA to read as follows: "*An agent shall pay the amount specified in the notice* **within 30 days of receipt of the notice, or from the date that the amount owed by the agent to the taxpayer becomes due to the taxpayer or held on the taxpayer's behalf**"	i. In practice, KRA issues Agency Notices on taxpayers before issuing an assessment, a demand and perhaps without undertaking an audit. These enforcement measures are applied before a taxpayer is accorded the basic constitutional right of a hearing. ii. Agency notices disregard the constitutional right of a taxpayer to seek the court's intervention for a stay as KRA seizes the taxpayer's money" immediately" before their right of hearing is granted. Pursuing a refund thereafter is an onerous task with slim chances of success.



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3. VALUE ADDED TAX ACT

3.1. Recommendations relating to the Bill

#	Issue	Issue of concern	Recommendation	Rationale/Justification
1	**Part III Clause 21 (b) and Clause 22 (a)** Page 556	**Exemption of exported services** The Finance Bill, 2021 proposes to exempt exportation of services. This goes against the best practice and principles of VAT on exported services as provided for under the Organisation for Economic Co-operation and Development, International VAT/GST Guidelines. Further, the exemption of exported services does not address the uncertainty on the correct VAT treatment of exported services as relates to the determination of place of 'use' or 'consumption' of an exported service. In addition, the exemption of exported services will increase the cost of doing	We propose the following: i. Deletion of the proposed amendment. This will ensure that exportation of taxable services remains zero rated; ii. We propose that the Value Added Tax Regulations, 2017 be amended as follows- In Regulation 2 by inserting the following new definitions in proper alphabetical sequence— For purposes of Regulation 13: *"Business agreements" will include but not be limited to: legally enforceable contracts; general correspondence; purchase orders; invoices; payment instruments; receipts and other electronic forms such as emails; online ordering records and payments that are likely to emerge as technology develops."*	Retaining the zero-rated VAT status of exported services will make Kenya a favourable investment destination for companies looking to set up regional hubs thereby contributing to the revenue collection by the Government as relates to corporate income tax, employment taxes (PAYE) and levies. Further, the introduction of guidelines on exported services will achieve the following: i. Lead to a reduction of the number of disputes between taxpayers and the KRA on place of 'use' or 'consumption'. ii. Lead to harmonisation with international best practice and hence facilitating and encouraging international trade. iii. Encourage compliance, boost revenues, facilitate and encourage investment. iv. Increase competitive power of Kenyan businesses in the world markets. v. Ensure alignment of the Regulations to the VAT Act.

	business for companies exporting services from Kenya, making the country unfavorable to investors looking to operate regional hubs from Kenya and expose the country to the risk of investors leaving to more favorable jurisdictions.	*"Location" of the "user or consumer" means: -* *"(a) Where the user or consumer is incorporated, the registered place of business;* *(b) Notwithstanding the provision in (a) above:* *i. The location of his business establishment; or* *ii. where services are used or consumed at a place other than the place of incorporation or business establishment, that is to say, a fixed establishment elsewhere, the location of such establishment; or* *iii. where services are used or consumed at more than one establishment, whether registered, business or fixed, the establishment most directly concerned with the use or consumption of the service; or* *iv. In the absence of such places, the usual place of residence of the user or consumer or the billing address of the user or consumer.*

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"User or consumer" means the person who seeks performance of services pursuant to a business agreement.

1. In Regulation 13 (2) (a) by deleting the paragraph "*a copy of the invoice showing the recipient of the supply to be a person outside Kenya*"; and substituting it with the following new clause "*tax invoice*".

2. In Regulation 13 (2) (c) by deleting the paragraph *"for services, such other documents as the Commissioner may require as proof that the services had been used or consumed outside Kenya" and substituting therefor the following new paragraph:*

"for services, such other documentary proof that the services have been used or consumed outside Kenya."

3. In Regulation 13 by inserting the following new Regulation immediately after Regulation 13(3) -

"Determination of the place of use, consumption or enjoyment of services"

"13A. Except as is otherwise provided in the Regulations, the place of use,

			consumption or enjoyment of a service supplied from Kenya shall be the location of the user or consumer of the services."	
2.	**Part III Clause 21(a) (xxiv)** Page 553 **Exemption of specialized equipment for the development and generation of solar energy**	The Bill proposes to reintroduce exemption on specialized equipment for the development and generation of solar and wind energy, including photovoltaic modules, direct current charge controllers, direct current inverters and deep cycle batteries that use or store solar power, upon recommendation of the Cabinet Secretary responsible for matters relating to energy. Exemption will increase the cost of solar powered equipment. Thereby making the solar equipment unaffordable by the marginalized communities who use such equipment, for example, solar pumps to irrigate their farms. Further, the Government of Kenya has partnered with the World Bank on: Off-grid	We propose the deletion from the Bill the proposed paragraph 113 of the First Schedule of the VAT Act that currently reads: *"Specialized equipment for the development and generation of solar and wind energy, including photovoltaic modules, direct current charge controllers, direct current inverters and deep cycle batteries that use or store solar power, upon recommendation to the Commissioner by the Cabinet Secretary responsible for matters relating to energy."* Further, we propose the insertion of the above clause under the Second schedule of the VAT Act that provides for zero rating of taxable supplies.	The zero rating of these equipment will lower the cost of solar equipment for the final consumer making them accessible to the low-income earners and off grid customers who need access to an affordable source of energy. In addition, this will reduce over reliance on environmental unfriendly source of energy such as charcoal which will also save the environment. This is in line with the government's commitment to promote use of renewable energy for power generation activities among others (as provided in the Energy Act, 2019). This is in addition to promoting use of clean energy.

		Solar Access Project for Underserved Counties ("KOSAP") project to enhance adoption of solar energy through creation of mini-grids systems the country. Exempting the solar equipment and accessories from VAT will have a direct impact on increasing the cost of these products leading to decreased uptake and therefore defeating the spirit of this noble project.		

4. EXCISE DUTY

4.1. Recommendations relating to the Bill

#	Issue	Challenge	Proposal	Rationale
1.	**Part IV Clause 25 (c)** Page 558	**Excise duty on 'other fees' earned by financial institutions** **Issues of concern:** The Bill has proposed to amend the definition of 'other fees' by deleting the words 'fees or commission earned in respect of a loan' thereby bringing to excise	We propose deletion of the proposed amendment and to retain the current definition of 'other fees' as defined in the Excise Duty Act, 2015.	The determination of 'other fees' subject to excise duty has for a long time been an area of contention between the KRA and financial institutions. That said, the Finance Act, 2019 brought much-needed clarity when it clarified that 'fees and commissions earned in respect of a loan or any share of profit' are not subject to excise duty and thereby dissipating tax disputes between the KRA and financial institutions. Further, the exemption of 'fees or commissions earned in respect of a loan' from excise duty, leads to availability of

	duty charge 'fees or commissions earned in respect of a loan'. Bringing to excise duty charge 'fees or commission earned in respect of a loan' will lead to high cost of financing for the people of Kenya thereby impeding investment and development activities being undertaken. Further, this amendment will result in disputes between KRA and taxpayers on the determination of what constitutes 'fees or commissions earned in respect of a loan'.		cheap financing for the people of Kenya thereby encouraging developmental activities and investments.

4.2. Other recommendations

#	Issue	Challenge	Proposal	Rationale
1.	**Excise duty on bottled water** **Not in the Finance Bill**	**Issues of concern:** i. Paragraph 1, Part 1 of the First Schedule to the Excise Duty Act, 2015 imposes excise duty on bottled or similarly packaged waters at	Deletion of the provision in Paragraph 1, Part 1 of the First Schedule to the Excise Duty Act, 2015 imposing excise duty on bottled or similarly packaged waters at the rate of KES 5.74 per litre.	i. Bottled water is not a luxury, but a necessity to most Kenyans. According to UNICEF Kenya 2017 Impact Report, the Sustainable Development Goal (SDG) 6 baseline estimates for Kenya, indicate that just over half of the population (58 per cent) have access to drinking water from improved sources with less than a 30-minute round trip to fetch water.

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the rate of KES 5.74 per litre.

ii. Bottled water is also subject to VAT at the standard rate.

i. Subjecting both VAT and excise duty on bottled water increases its cost making it unaffordable for most Kenyans.

ii. Adequate access to safe water is central to achievement of better health and wellbeing of Kenya's population through facilitating prevention of waterborne diseases which in turn may reduce mortality rates and catastrophic health expenditure etc.

i. Article 43 of the Constitution of Kenya, 2010 recognizes access to safe water and improved sanitation services as a right of every Kenyan, a responsibility of the government. Therefore, removal of excise duty on bottled water will make it affordable to every Kenyan.

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5. Employment taxes

#	Issue	Challenge	Proposal	Proposed wording
1.	**Inflationary adjustments** Most of the reliefs and deductions that individuals are entitled to have not been reviewed for many years. **Not in the Finance Bill**	The proposed amendment of Section 31 of the ITA to qualify the contributions made by individuals to the National Hospital Insurance Fund ("NHIF") for insurance relief is a welcome move. However, we note that as per Paragraph 2 of the Third Schedule of the ITA, insurance relief remains capped to a maximum of 15% of the premiums paid, subject to a maximum of KES 60,000 per annum (or KES 5,000 per month). Given the current contribution rates for NHIF, we are of the view that the proposed adjustment is not going to generate a sufficiently large impact or financial incentive for individuals to take up more insurance.	We would like to propose that the limit for insurance relief is revised from the current maximum of KES 60,000 per annum (or KES 5,000 per month), to a maximum of KES 90,000 per annum (or KES 7,500 per month). There is also a need to regularly review and amend other reliefs and allowable deductions that are available to individuals to consider the prevailing levels of inflation and cost of living in Kenya. Please see **Appendix 5.1** below for a list of some of the reliefs and tax deductions which we propose to be reviewed.	We propose that Paragraph 2 of the Third Schedule of the ITA is amended to read as follows: ***2. Insurance Relief*** *The amount of insurance relief shall be fifteen percent of the amount of premiums paid but shall not exceed ninety thousand shillings per annum.*

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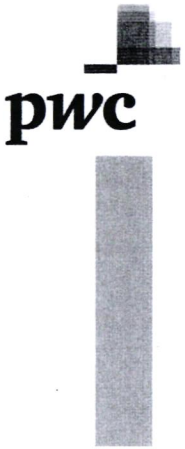
5.1 Further details on proposals for inflationary adjustments to tax deductions and reliefs

#	Benefit	Current Provision	Proposal*	Proposed wording
i.	**The tax-free threshold for meals provided to staff**	As per Section 5(4)(f) of the ITA, the staff meals tax-free threshold is currently KES 48,000 per annum (or KES 4,000 per month).	To increase the staff meals tax-free threshold to KES 72,000 per annum (or KES 6,000 per month). The proposed amendment is to consider inflation adjustment since this provision has not been amended since June 2014.	We propose that Section 5(4)(f)) of the ITA is amended to read as follows: *(f) the value of meals served to employees in a canteen or cafeteria operated or established by the employer or provided by a third party who is a registered taxpayer (whether the meals are supplied in the premises of the employer or the premises of the third party) where the value of the meal does not exceed the sum of seventy two thousand shillings per year per employee, subject to such conditions as the Commissioner may specify;*
ii	**The limit of deductible contributions to registered pension and provident funds**	• As per Section 22A(1)(c) of the ITA, employees are currently entitled to a tax-free contribution to a registered pension or provident fund of up to a maximum of KES 240,000 per annum (or KES 20,000 per month).	To increase the limit of the tax-free contributions to registered pension or provident funds to KES 360,000 per annum or KES 30,000 per month. The proposed amendment is to consider inflation adjustment since this provision has not been amended since July 2004.	We propose that Section 22A(1)(c) of the ITA is amended to read as follows: *(c) three hundred and sixty thousand shillings (or, where contributions are made to registered funds of the employer in respect of a part year of service of the member, thirty thousand shillings per month of service).*

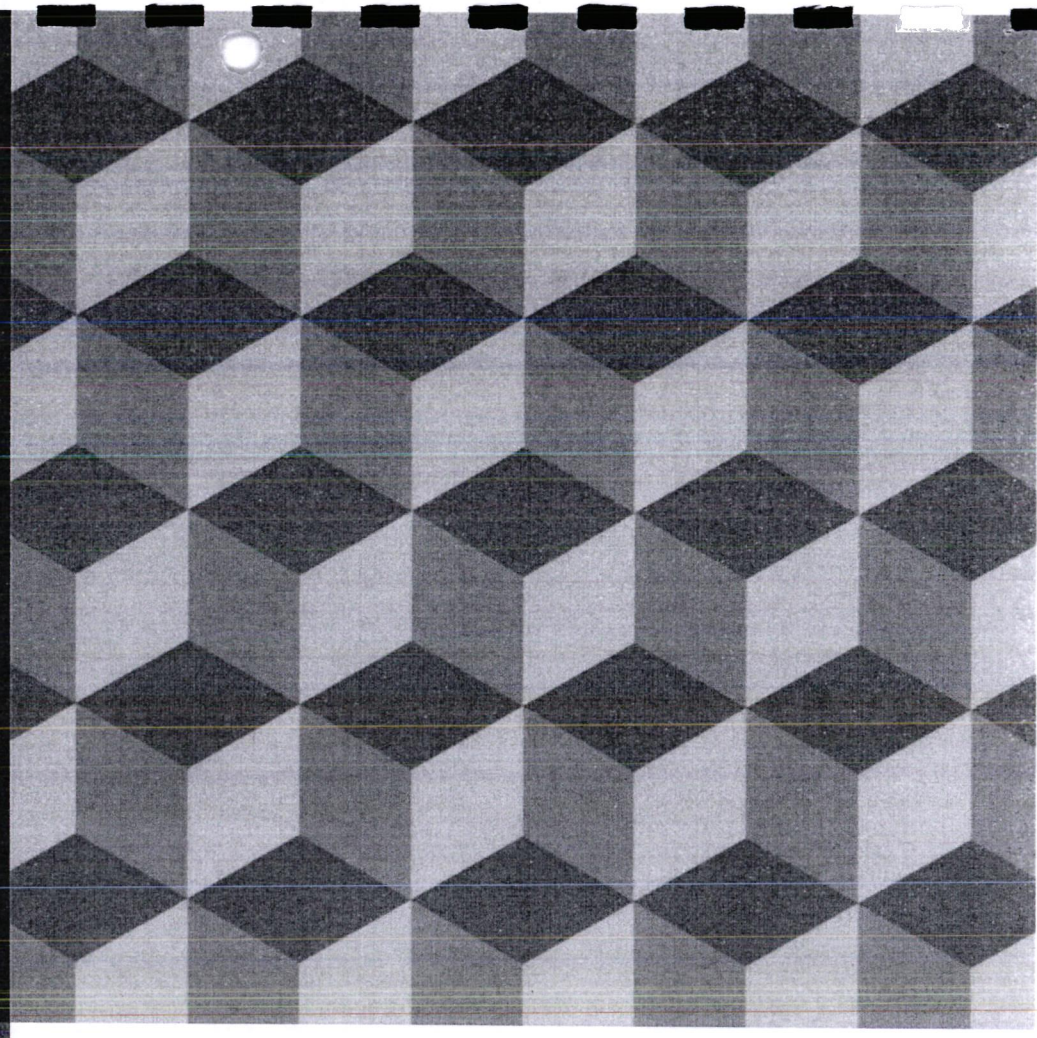
iii.	**The tax-free limit for payment of pension and retirement annuities**	Section 8(4) provides that the first KES 300,000 shillings of the total pensions and requirement annuities received by a resident individual from a registered fund or the NSSF shall be tax free.	i. To increase the tax-free pension and retirement annuities to the first KES 360,000 of the total pensions and retirement annuities received by a resident individual from a registered fund or the NSSF.	We propose that Section 8(4) of the ITA is amended to read as follows: *(4) Notwithstanding section 3(2)(c), the first three hundred and sixty thousand shillings of the total pensions and retirement annuities received by a resident individual from a registered fund or the National Social Security Fund in a year of income shall be deemed to be income not charged to tax.*
iv	**The tax-free limit for pension withdrawals**	Section 8 (5)(b)(i) and (ii) and Section 8 (5)(c)(i) provides that the current exempt amount on withdrawal from pension and provident funds is the lesser of the first KES 60,000 per year of pensionable service or the first KES 600,0000.	To increase the tax-free withdrawal to the lesser of the first KES 100,000 per full year of pensionable service or the first KES 1,000,000. The proposed amendment is to consider inflation adjustments since this provision has not been amended since January 2010. i.	We propose that Section 8 (5)(b)(i) and (ii) and 8 5(c)(i) of the ITA is amended to read as follows: *(b) in the case of a withdrawal from a registered pension or individual retirement fund upon termination of employment, the lesser of—* *i) the first one hundred thousand shillings per full year of pensionable service with that employer starting on the later of the date the pensionable service began, or, where the employee had previously received a lump sum payment from that same employer, the date the employee's pensionable service recommenced after receipt of that lump sum; or* *ii) the first one million shillings; or* *(c) in the case of a lump sum paid out of a registered provident fund (or a defined contribution registered fund deemed by the Commissioner to be a provident fund for the purposes of assessing under this paragraph accumulations*



for the payment of lump sums other than out of a pension) the total of—

the lesser of the first one million shillings or the first one hundred thousand shillings per full year of pensionable service with that employer starting on the later of the date the pensionable service began or, where the employee had previously received a lump sum payment from that same employer, the date the employee's pensionable service recommenced after receipt of that lump sum:

PricewaterhouseCoopers Limited Finance Bill 2021 proposals



For consideration in 2021/2022 fiscal year

June 2021

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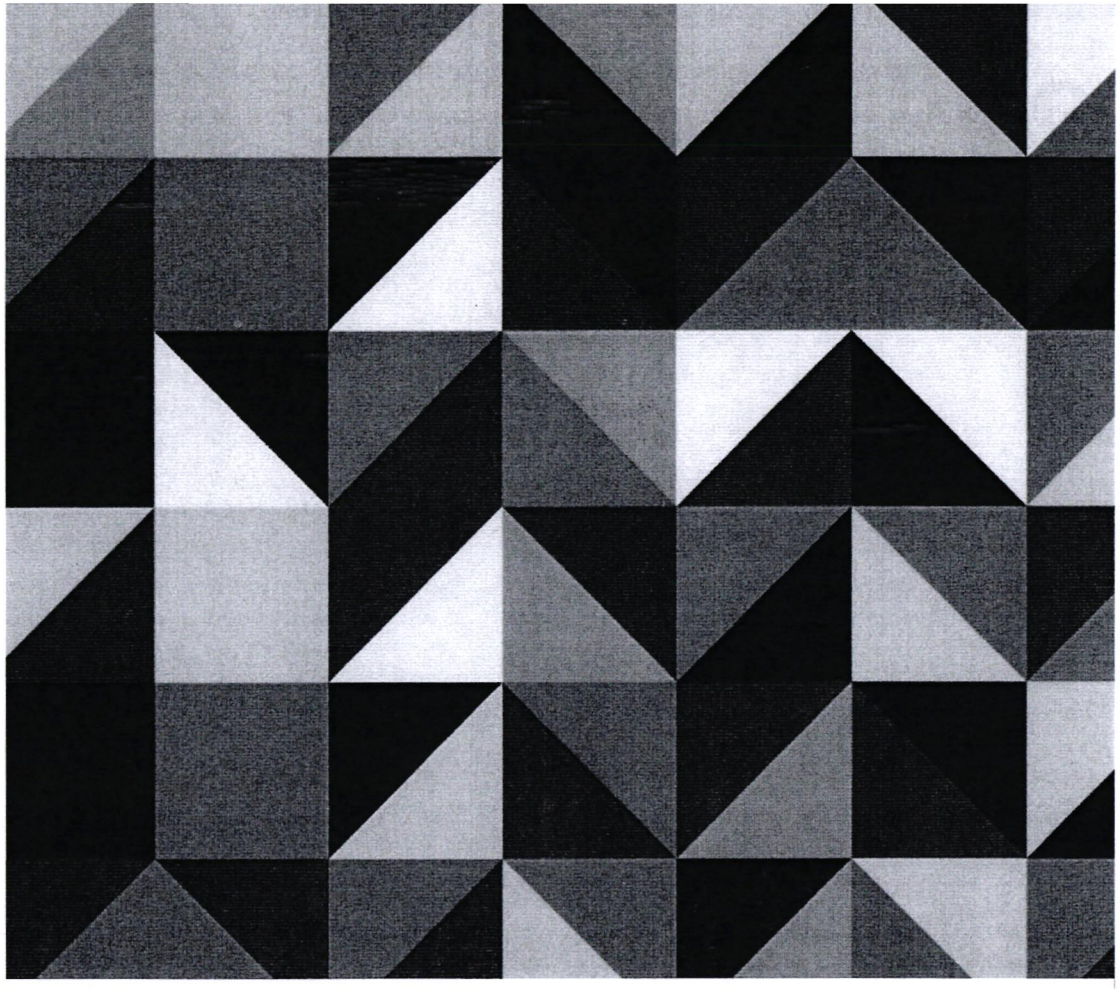
Corporate tax



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Legal provisions

Issue	Proposal/Impact
Part II Clause 2 Page 537 The Bill proposes to provide a definition of the term control. *….(f) the person or a person designated by that person supplies at least 90% of the supply of the purchases of another person;* *(g) the person purchases or designates a person to purchase at least 90% of the sales of another person; or,* *(h) the person has any other relationship, dealing or practice with another person which the Commissioner may deem to constitute control;*	We propose the following amendments: **Delete item (f), (g) and (h) under Clause 2(a)(f) of the Bill.** • The element of control for tax purposes should not apply to independent parties. • KRA will have unlimited powers in determining the treatment between two separate taxpayers.

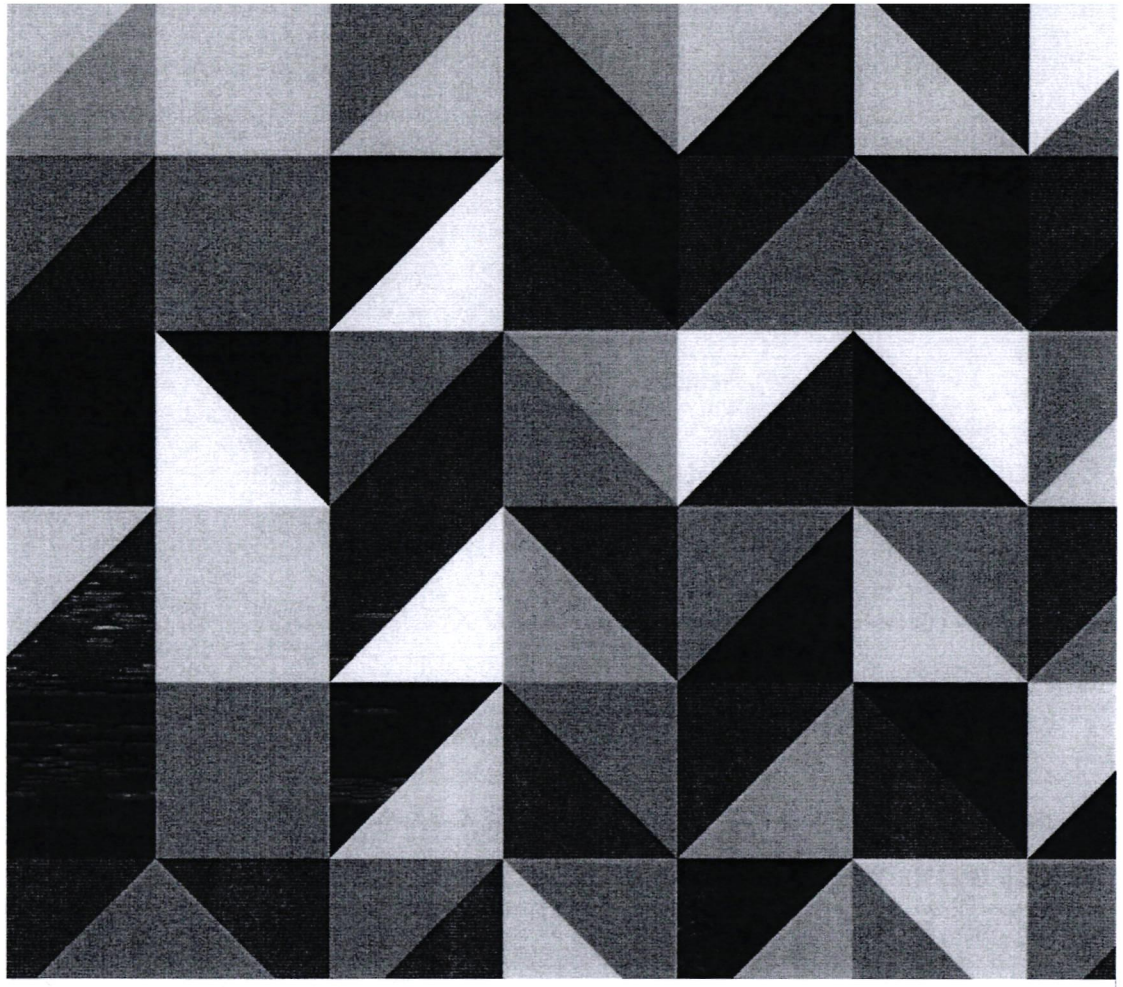
Legal provisions

Issue	Proposal/Impact
Part II Clause 7(a) Page 542 **Interest restriction** The Bill proposes to restrict the deduction of interest for financial institutions and non related resident companies	We propose the following amendments: **Reword Section 16(2) (j) of the Income Tax Act to apply only to non-resident related parties** **Include a proviso to exclude the applicability of interest restriction to financial institutions** • No tax leakage if the loan is provided by a resident taxpayer as the interest income earned will be subject to corporate income tax in Kenya. • Discourage loan update from third parties due to the adverse tax implications. • Negative impact on the effective tax rate of financial institutions where over 60% of their expenses consists of interest..

Legal provisions

Issue	Proposal/ Impact
Minimum Tax The current rate of 1% is higher compared to the other countries – Nigeria's rate is 0.25%, Tanzania – 0.5% The rate proposed does not consider low margin businesses **Not in the Finance Bill**	We propose the following amendments: 1. **Reduction of the minimum tax rate from 1% to 0.5%** **OR** **Amendment of the minimum tax base from gross turnover to EBITDA.** 2. **Minimum tax as an advance tax** – Minimum tax may end up being a consumption tax – Taxes based on turnover are against the equity canon of taxation since they disadvantage low margin business

Tax administration



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Tax administration

Issue	Proposal/Rationale
Part V Clause 28 and 29 Page 561 **Statute of limitations and document retention** I. The Bill proposes to increase the period within which assessments may be issued/ amended by the Commissioner from five years to seven years. II. The Bill also proposes to increase the document retention period from five years to seven years.	**Proposal** The proposal should be deleted from the Bill. **Rationale** 1. The increased time period may erode the administrative efficiency of the KRA. 2. Align the time with that of tax overpayments.
Part V Clause 32 Page 562 **Removal of Withholding VAT exemption provisions**	**Proposal** The proposals should be deleted from the Bill. **Rationale** 1. Some taxpayers will be in a perpetual VAT credit position. 2. Cash flow implications on taxpayers who have accumulated WH VAT credits over the years.

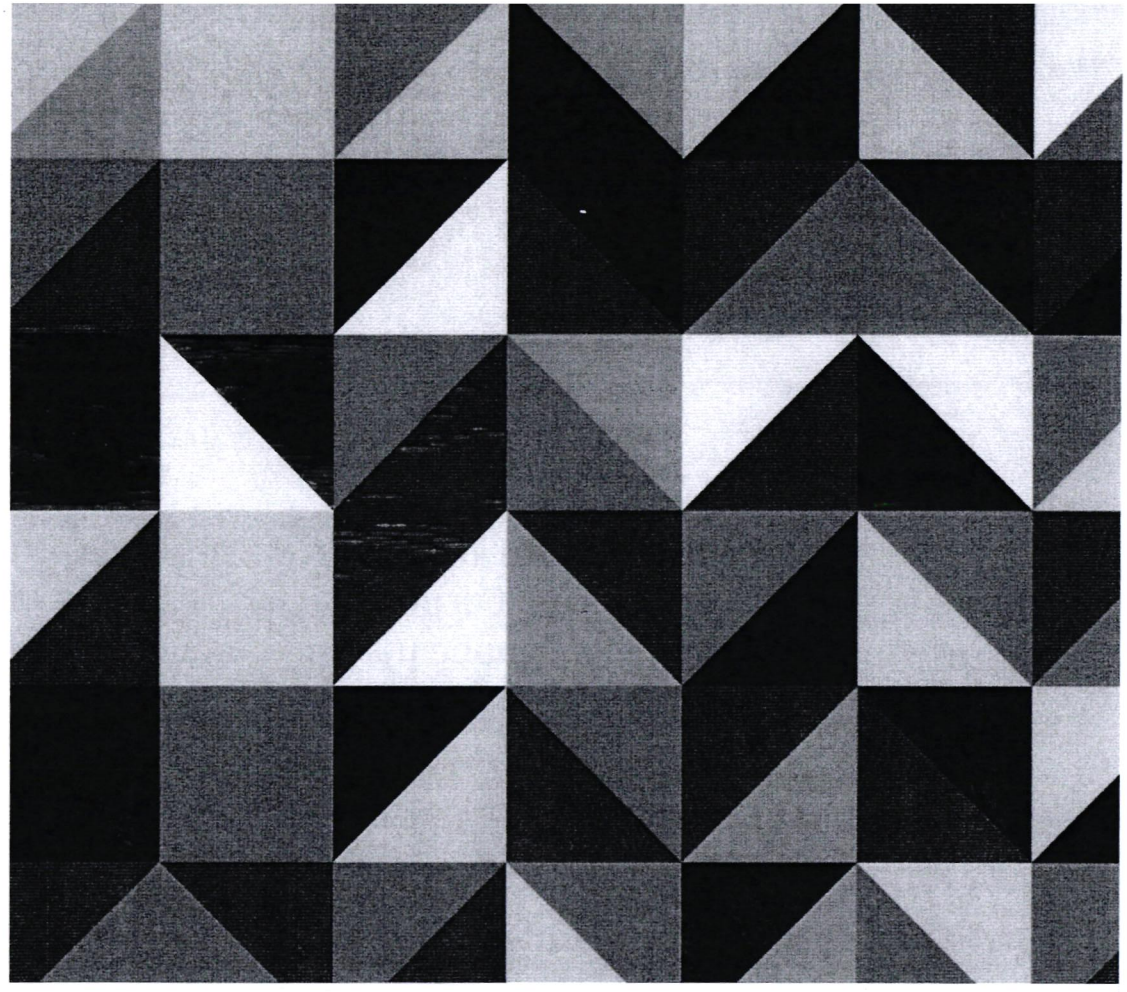
Tax administration

Issue	Proposal/Rationale
Part V Clause 33 Page 562 **Refund of overpaid tax** The Bill proposes to introduce penalties and interest from the date the overpayment arises and the date of notification by the KRA of the ascertainment of the overpayment.	**Proposal** Interest and penalties cease applying should be the date when ***the overpayment arises and not the date of notification*** by the KRA . **Rationale** No penalty and interest should apply where a taxpayer has overpaid tax and has applied to the commissioner to utilise the overpaid tax
Part V Clause 40 Page 564 **Whether denial of an order of stay can be legislated** The Bill proposes to legislate denial of a stay order *108A. Where any matter under a tax law is in issue in any ongoing criminal case and is also directly or substantially in issue in any pending civil case, that fact shall not be a ground for any stay, prohibition or delay of either the criminal or civil case.*	**Proposal** The proposal should be deleted from the Bill. **Rationale** This amendment should be deleted as it seeks to interfere with the judicial authority of the courts.

Tax administration

Issue	Proposal/Rationale
Linkage between Insolvency Act and Section 34 of the TPA on ranking of tax as a debt to the State during insolvency. **Insolvency Act provisions** Tax debts are third priority claims **TPA provisions** Tax debts are first priority claims **Not in Finance Bill**	Alignment of the TPA to the provisions of the Insolvency Act
Aggressive use of Agency Notice to remit the funds on receipt of the notice. **Not in Finance Bill**	• An agent should be allowed 10-30 working days to remit the funds held on the tax payers behalf.

Value Added Tax



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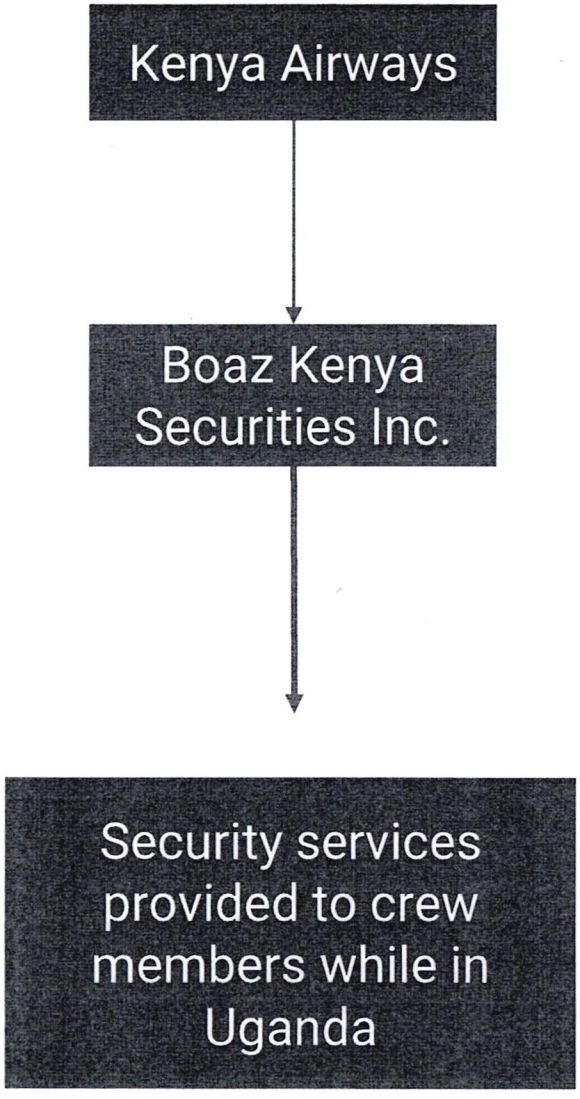
Exported services

Issue	Proposal/Rationale
Part III Clause 21 (b) and Clause 22 (a) Page 556 The Finance Bill, 2021 proposes to exempt from VAT, exportation of taxable services. The terms 'use' and 'consumption' have not been defined by the VAT Act nor the VAT regulations	**Proposal** Deletion of the proposed amendment. This will ensure that exportation of taxable services remains zero rated; We propose the introduction of Value Added Tax guidelines on exported services. **Rationale** 1. The exemption goes against best practice and principles of VAT on exported services as provided for under the OECD 2. Increase in the cost of doing business for companies exporting services from Kenya. 3. Increase in disputes given lack of guidelines on the terms 'use' and 'consumption'

Illustration 1



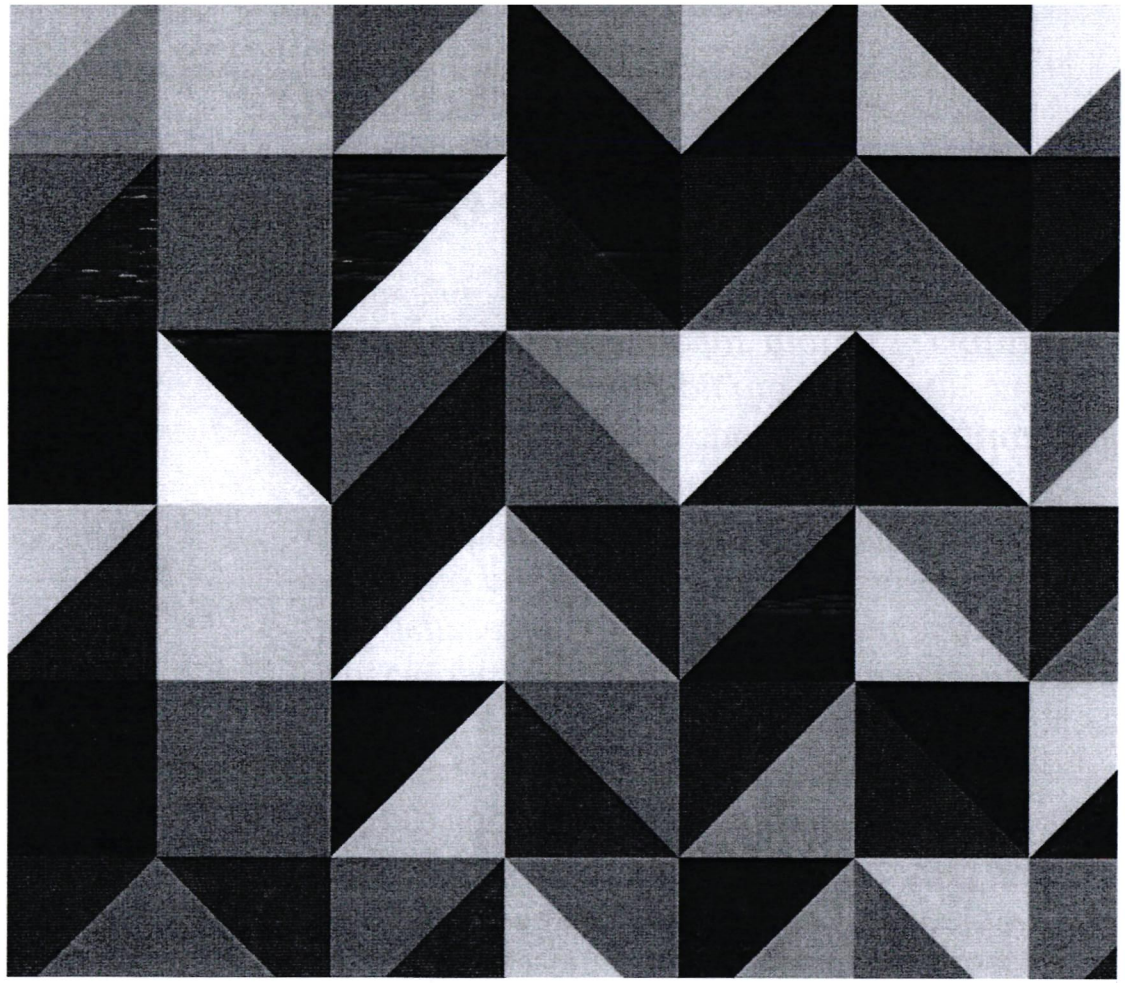
- ★ Boaz Kenya Security Inc. enters into a contractual arrangement with Kenya Airways for provision of security services for crew members while in Uganda.
- ★ The Company bills Kenya Airways for the services provided to crew members while in Uganda.

This amounts to an export of services (Note the recipient is not a person outside Kenya)

Exemption of specialized equipment for the development and generation of solar energy

Issue	Proposal/Rationale
Part III Clause 21(a) (xxiv) Page 553 The Bill proposes to reintroduce exemption on specialized equipment for the development and generation of solar energy	**Proposal** We propose the deletion of the proposed amendment from the Bill. Further, we propose the insertion of the clause below under the Second schedule of the VAT Act that provides for zero rating of taxable supplies. *"Specialized equipment for the development and generation of solar and wind energy, including photovoltaic modules, direct current charge controllers, direct current inverters and deep cycle batteries that use or store solar power, upon recommendation to the Commissioner by the Cabinet Secretary responsible for matters relating to energy."* **Rationale** Exemption will increase the cost of solar powered equipment.

Excise duty



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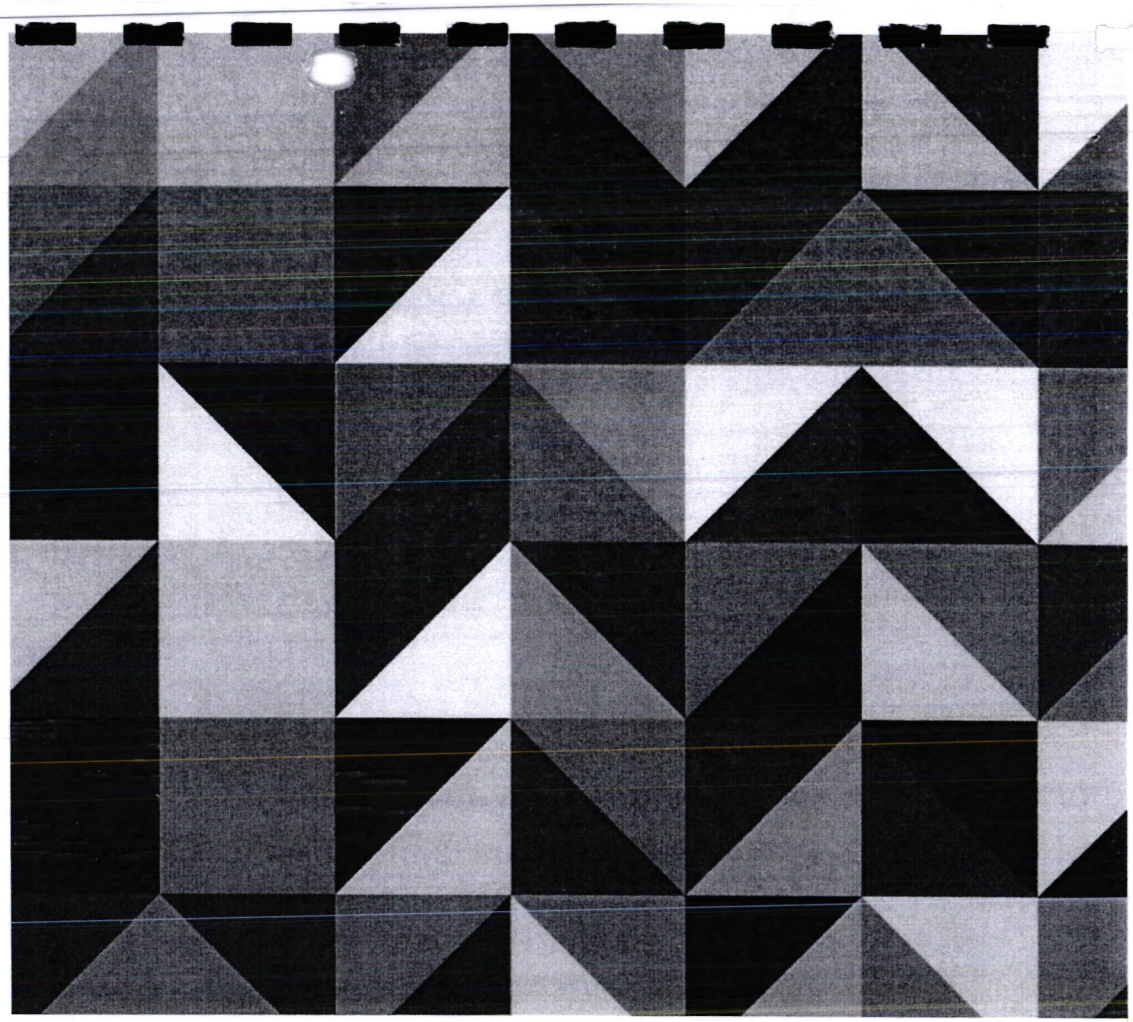
Excise duty on 'other fees' earned by financial institutions

Issue	Proposal/Rationale
Part IV Clause 25 (c) Page 558 The Bill proposes to amend the definition of 'other fees' by deleting the words 'fees or commission earned in respect of a loan' thereby bringing to excise duty charge 'fees or commissions earned in respect of a loan'.	**Proposal** Deletion of the proposed amendment and retain the current definition of 'other fees' as defined in the Excise Duty Act, 2015. **Rationale** 1. High cost of financing for the people of Kenya thereby impeding investment and development activities being undertaken. 2. Increase in disputes between KRA and taxpayers on the determination of what constitutes 'fees or commissions earned in respect of a loan'.

Excise duty on bottled water

Issue	Proposal/Rationale
Excise duty is applicable on bottled water at the rate of KES 5.74 per litre Bottled water is also subject to VAT at the standard rate.	**Proposal** We propose removal of excise duty on bottled water **Rationale** 1. Subjecting both VAT and excise duty on bottled water increases its cost making it unaffordable for most Kenyans who do not have access to safe drinking water

Employment taxes



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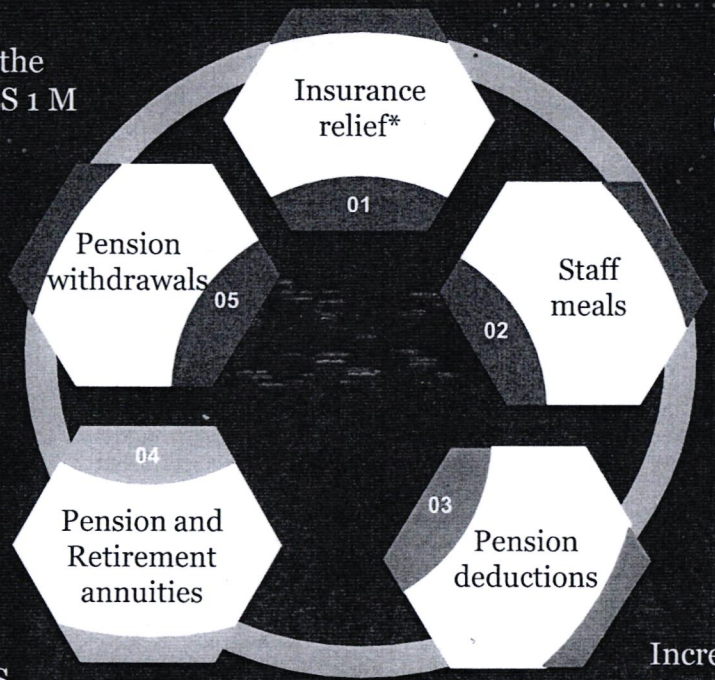
Proposal to increase the current thresholds for tax reliefs and deductions for individuals.

Increase relief cap to a maximum of KES 90,000 p.a. (or KES 7,500 p.m.)

Increase tax free withdrawal limit to the first KES 100,000 p.a. or the first KES 1 M

Increase tax free limit to KES 72,000 p.a. (or KES 6,000 p.m.)



Increase tax free payments to KES 360,000 p.a. (or KES 30,000 p.m.)

Increase tax free contributions limit to KES 360,000 p.a. (or KES 30,000 p.m.)

*As per Clause 9 of The Finance Bill 2021, NHIF will be included in the calculation of insurance relief going forward. However, the insurance relief cap remains at KES 5,000 p.m. or KES 60,000 p.a. Some of the above reliefs have not been reviewed for more than a decade despite inflation and cost of living increases.

Questions?

“

You can’t tax business. Business doesn’t pay taxes. It collects taxes.

Ronald Regan



PwC

Thank you

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The Chairman and Members
Departmental Committee on Finance and National Planning
Main Parliament Building - 1st Floor
Parliament Road
Nairobi, Kenya

Attention: The Clerk of the National Assembly
Office of the Clerk

02 June 2021

Dear Sir,

Subject: In the matters under consideration by the National Assembly The Finance Bill,2021

I. Introduction

1. Pursuant to Article 118(1)(b) of the Constitution of Kenya, 2010 and pursuant to Standing Order 127(3), The Departmental Committee on Finance and National Planning, now considering the Finance Bill, 2021 has called for public participation and involvement in the legislative process.

2. PricewaterhouseCoopers Limited ("PwC", "us", "we") are pleased to submit a memorandum on behalf of our client, Ecart Services Kenya Limited ("Jumia") containing a proposal on amendments to be included in the Finance Bill, 2021.

3. We would be grateful for an opportunity to appear before the Committee, to deliberate with your members, our proposal and recommendation.

II.Background

4. Ecart Services Kenya Limited, trading as Jumia Kenya, was incorporated in Kenya in May 2013 and started operations in 2014. The company is owned by Jumia Technologies A.G., a firm listed in the New York Stock Exchange.

5. Jumia acts as a platform where buyers and sellers interact to purchase and sell goods and services respectively. It employs the Business-to-Consumer (B2C) model of e-commerce which involves products being sold directly by the business to the consumer.

6. Jumia makes its income through charging commissions on the cost of goods and services traded through its platform. As an intermediary platform, Jumia does not own these goods and services.

7. Jumia's success, similar to other E-commerce platforms world over, is highly reliant on the volumes of goods and services being traded on their platform. This calls for high investment in marketing costs to onboard both the sellers and customers onto the platform.

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8. Over and above the buyers, sellers and the platform, several other players are involved in the functioning of the e-commerce ecosystem. These include financial institutions which facilitate payments via payment aggregators, mobile payments or other payment modules; logistic companies in ensuring swift and unified delivery, storage and packaging amongst others. Consequently, tax policies targeting platform owners such as Jumia should be put in place bearing in mind that platform owners are only one part of the e-commerce cogwheel .

Jumia's contribution to the Kenyan economy

a) Employment

9. Initially starting with 3 employees in 2014, Jumia presently has a staff complement of over 500 direct staff and thousands of indirect jobs around delivery associates, entrepreneurs, third party logistic companies among others. Note that each of the sellers on average employ 1-5 people so as the Jumia platform grows it catalyses more employment.

b) Taxes

10. Jumia is currently in accounting losses due to the factors elaborated in the latter sections of this Memorandum. However, despite this dismal business performance, since 2015, Jumia has contributed close to KES 1.5 Billion to the exchequer as enumerated below:

Tax head	Amount (KES)
Pay-As-You-Earn	535,220,467
Value Added Tax	321,195,394
Corporate Income Tax	7,069,002
Withholding Tax	520,143,866
VAT Withholding Tax	97,112,864
Total	**1,480,741,593**

III. Issue

11. Section 12D of the Income Tax Act, CAP 470 imposes a tax known as minimum tax which is chargeable at the rate of one percent (1%) of the gross turnover and payable in instalments of fourth, sixth, ninth and twelfth month of the year of income.

12. E-commerce as a sector requires huge capital investments from the initial set up stages and throughout the business life. Firstly, investments in technology is mandatory as the industry is principally reliant on technological advancements. Further, aggressive marketing is required to drive traffic, customer base and thereby increase volumes traded. Moreover, onboarding of vendors calls for further investments. Arising from the foregoing, the sector is characterised with a longer break-even period.

13. Kenya's e-commerce sector is at the infancy stage of growth characterised by significant tax losses and far from reaching its break-even point. In countries where e-Commerce is more advanced, the industry grew on the back of fiscal incentives such as 0% Sales tax which created a competitive advantage.

Consequently, saddling this sector with minimum tax, which is a sunk cost, will increase the break-even period which is already long. In addition, this will amount to taxation of capital since the industry is currently in tax losses.

14. Further, e-commerce margins are very small, and profitability is driven by volumes. The profit margin ranges from between 5% - 10% depending on the nature of goods sold on the platform. Minimum tax as currently formulated, does not take into account the low margin businesses. One of the impacts of minimum tax is that the additional cost will be borne by customers, making the goods sold on the platform more expensive. As a result, customers would rather buy goods from physical stores and this will lead to the death of the e-commerce sector.

15. Additionally, e-commerce is integral in accelerating the Big Four Agenda and a key pillar in Kenya's Digital Economy Strategy. Kenya's Economic Recovery post Covid-19 Blueprint also recognizes e-commerce as integral in Kenya's recovery amidst the Covid-19 pandemic.

16. According to the International Financial Corporation ("IFC"), in Kenya 40-50% of e-commerce sellers are women and any efforts targeted at increasing women participation in eCommerce helps to close the gender gap in equal opportunities. Further, according to the Consultative Group to Assist the Poor ("CGAP") the more money in women's hands, the more impact on financial inclusion as such is deployed to improve household wellbeing.

17. The IFC further observes that Africa's e-commerce economy has the potential to reach $180bn by 2025. In the spirit of nursing the industry which is currently at its infancy stage, formulation of e-commerce friendly laws and policies is requisite.

IV. Request

18. To incentivise investments in the e-commerce space and foster additional jobs and income for the Country in the long-term, we propose either of the following two changes in the minimum tax provisions:

    a) The base for minimum tax should be changed from gross turnover to EBITDA; or

    b) The minimum tax rate should be reduced to 0.5% of gross turnover.

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#	Issue	Tax law to be amended	Justification for the proposed amendment
			i)
1.	Reduction of the minimum tax rate from 1% to 0.5% of gross turnover	The Third Schedule to the Income Tax Act is amended in Heading B by amending Paragraph 11 to read as follows: *The rate of tax in respect of minimum tax under section 12D shall be **zero point five** per cent of the gross turnover.*	i) **Kenya's minimum tax rate is higher compared to the other countries** – Other comparable jurisdictions such as Nigeria, Tanzania and Ivory Coast all have minimum tax rates which are less than or equal to 0.5%. Recently, Nigeria changed its rate to 0.25%. ii) **Adverse financial implications** – Kenya's e-commerce sector is at the infancy growth stage characterised by tax losses. Consequently, saddling this sector with minimum tax, which is a sunk cost, will increase the break-even period which is already long. Minimum tax therefore threatens the existence and growth of the e-commerce sector.
2.	Amendment of the minimum tax base from gross turnover to a different base such EBIT .	The Third Schedule to the Income Tax Act is amended in Heading B by amending Paragraph 11 to read as follows: *The rate of tax in respect of minimum tax under section 12D shall be zero point five per cent of the **Earnings Before Interest and Tax**.*	i) **Minimum tax may end up being consumption taxes** – Minimum tax will be an additional cost of doing business since it will be expensed in the profit and loss account. There is a risk that minimum tax may be charged to the cost of the goods/services to ensure that a business recovers this additional cost thereby making e-commerce expensive and counterproductive to the government's objective of digitalisation of the economy. ii) **Taxes based on turnover are against the equity canon of taxation since they disadvantage low margin business.**

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19. If the above proposals are implemented, the e-commerce sector would be on an upward trajectory in Kenya. This will not only result in increased employment opportunities for Kenyan residents but in additional revenues for the Country as well. It is on this basis that we request that the Government undertakes deliberate protectionist tax policies that would aid in encouraging e-commerce companies to participate in the economy actively by setting up entities in Kenya.

V. Conclusion

20. In summary, if the above proposals are implemented, Kenya stands to reap from the benefits of a digitalised economy as follows:

    a) A digitalised economy means that the informal economy is brought into the tax net;

    b) The government can implement tax compliance measures due to the open nature of digital transactions; and

    c) Achievement of the government's macroeconomic policies is hastened since the booming digital economy will be a significant contributor to the attainment of these policies;

We are happy to provide any additional information on the above should you require us to.

Should you wish to discuss the contents of this Memorandum, please do not hesitate to contact Edna Gitachu or the undersigned us on +254 20 285 5000 at your convenience.

Yours faithfully,
For and on behalf of PricewaterhouseCoopers Limited

Simeon Cheruiyot
Director

CC: The Chief Executive Officer
Ecart Services Kenya Limited
Apollo Center, 2nd Floor
Parklands Road
Nairobi, Kenya

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The Chairperson and Members
Departmental Committee on Finance and National Planning
Main Parliament Building
P.O. Box 41482 - 00100
Parliament Road
Nairobi, Kenya

Sent via email to clerk@parliament.go.ke

Attention: Clerk of the National Assembly

31 May 2021

Dear Sir,

Subject: In the matters under consideration by the National Assembly – The Finance Bill, 2021 (National Assembly Bill No. 18 of 2021)
Submissions of representations for exemption from Value Added Tax ("VAT") of taxable goods supplied to fisheries and fish processors on behalf of Victory Farms Limited

Pursuant to Article 118(1)(b) of the Constitution of Kenya and pursuant to Standing Order 127(3), The Departmental Committee on Finance and National Planning, now considering the Finance Bill, 2021 ("the Bill"), has called for public participation and involvement in the legislative process.

PricewaterhouseCoopers Limited ("PwC", "us", "we") are pleased to submit a memorandum on behalf of our client, Victory Farms Limited ("Victory Farms"), proposing an exemption from VAT on taxable goods supplied to fisheries and fish processors.

We would be grateful for an opportunity to appear before the Committee to deliberate with our proposal and recommendations. Should you wish to discuss further, please do not hesitate to contact Nicholas Kahiro or the undersigned on +254 20 285 5000 at your convenience.

Yours faithfully,
For and on behalf of PricewaterhouseCoopers Limited

Maurice Mwaniki
Associate Director

CC:
The Cabinet Secretary
The National Treasury & Planning
Treasury Building
Harambee Avenue
Nairobi

B
ACKGROUND

Introduction

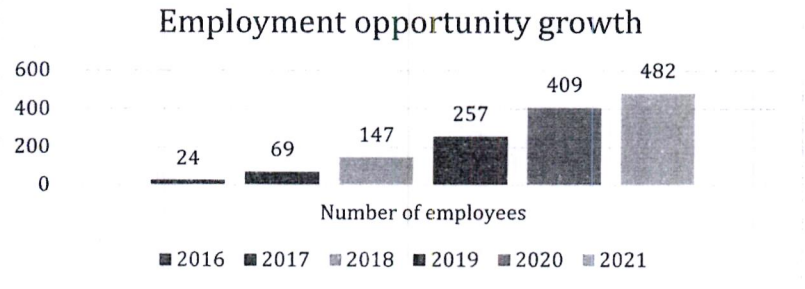
Victory Farms is an aquaculture fish farm founded in 2016. In just five years, Victory Farms, based in Roo, Homa Bay, is the largest fish producer in East Africa. The company is also sub-Saharan Africa's fastest-growing fish farm. The company currently sells an average of 25 metric tons of fish a day, equivalent to more than 20 million high protein meals per year. 95% of the fish produced at Victory Farms is supplied to low-income communities.

Victory Farms is a vertically integrated aquaculture business, owning hatchery ponds, deep water cages, a processing plant, and cold chain distribution to mass markets in Nairobi and Western Kenya. Victory Farms only sells fish in the local market. In the long term, the company has plans to start exporting fish making it a potential foreign exchange earner for Kenya.

Victory Farms' contribution to the economy

a) Employment

When Victory Farms started operations in Kenya in 2016, they had 24 employees. The number of employees has grown over the last five years to reach 482 employees. Victory Farms is the largest employer in Homabay, and 70% percentage of their workforce are women. Below is graph showing the employment opportunities Victory Farms has created over the last five years.



In addition to creating direct employment, Victory Farms has created indirect employment in their supply chain. They supply about 6500 market women with fish for sale through the company's retail branch network in Western Kenya and Nairobi. .

b) Taxes

On average, Victory Farms pays on average KES 4 million per month in Pay As You Earn ("PAYE") to the exchequer. Since 2016, the company has paid KES 116 million in PAYE and this figure will continue to grow as it employs more and more people.

c) Solution to 'sex for fish trade'

Difficulty in accessing fish has led to the practice colloquially known as 'sex for fish' between fishermen and vulnerable women fish sellers. The 'sex for fish' trade has been a means for women fish sellers to get supplies for their business. This practice of 'sex for fish' has long been one of the main factors driving the spread of Human Immunodeficiency Virus ("HIV") and Acquired Immunodeficiency Syndrome ("AIDS") among the fisherfolk living along Lake Victoria. Victory Farms provides an alternative source of fish to the women fish sellers, enabling them to shun trading sexual favors in exchange for fish.

d) Creating shared value

Victory Farms has invested over KES 3 million in community projects such as rescue boats and life jackets, infrastructure development, education scholarships, solar lights and potable water supply. Victory Farms budgets annually for such projects.

Aquaculture contribution to the Kenyan economy

According to the Economic Survey 2020, fishing and aquaculture contributed a paltry 0.5% to Kenya's Gross Domestic Product ("GDP") as of 2019. The Kenya Agricultural and Livestock Research Organization estimates that aquaculture currently employs over 50,000 Kenyans along the fish value chain who are engaged in aquaculture inputs and production, post-harvest handling and processing, services provision, marketing, and trade.

Fish catch from aquaculture stood at 18.5 thousand tonnes, accounting for only 12.8 % of the country's fish output in Kenya. Production of fish through aquaculture has declined by 23% from peak production in 2014 which stood at 24 thousand tonnes.[1] The decline in production has been attributed to inadequate water retention capacity of ponds in some counties, poor extension services, inadequate capacity support, poor husbandry practices, low quality and quantity of fish farm inputs, poor marketing infrastructure, dependency syndrome on government/donor support and lack of value addition.[2] This underscores the need to continually invest in the sector and enact tax policies that nurture sustainable growth in production.

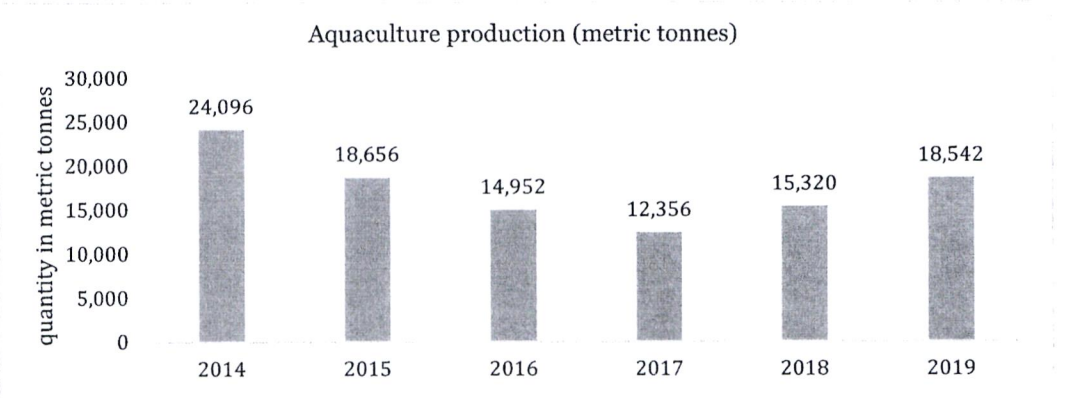


Figure 1: Aquaculture production 2014 – 2019

1.1.1. Fish Consumption in Kenya

Fish in particular, is a cheaper source of protein, healthy fats, and unique essential nutrients and therefore has a vital role in addressing food and nutrition insecurity in Kenya. Fish provides high-quality essential amino acids, omega-3 fatty acids, minerals, especially iron, zinc, and vitamins. As such, fish is widely recognized as "nature's superfood". Fish are a source of high quality protein that contributes to nearly 20% of global animal protein intake. Fish has a low feed conversion rate meaning the amount of feed required for fish is much less than that of other animal proteins for example Tilapia can be produced using just 20% of the feed required to produce an equivalent volume of beef. Fish is thus a healthy, more efficient and sustainable source of protein than beef, pork and poultry.

The Budget Policy Statement 2021 estimates the per capita fish consumption in Kenya as 4.6 kg per capita per year. Kenya's per capita fish consumption is lower than Africa's per capita fish consumption, which stands at 10.1 kg per capita, and further, than the global level which stands at 19.8 kg per capita.[3] The share of fish in Kenya's animal protein intake declined from 10 percent in the early 1990s to 8 percent in the early 2010s. The share of fish in Kenya's animal protein intake is again much lower than the global average (20%).

The downward trend in production through wild capture and aquaculture has led to reliance on imported frozen fish, which put competitive pressure on domestic fish production. Imported frozen fish is smaller and less nutritious due to the preservation techniques used hence consumers pay more for less.

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[1] Obiero K, Meulenbroek P, Drexler S, Dagne A, Akoll P, Odong R, Kaunda-Arara B, Waidbacher H (2019) The Contribution of Fish to Food and Nutrition Security in Eastern Africa: Emerging Trends and Future Outlooks.

[2] Mary A. Opiyo, Esther Marijani, Patriciah Muendo, Rezin Odede, William Leschen & Harrison Charo-Karisa (2018) A review of aquaculture production and health management practices of farmed fish in Kenya.

[3] The Contribution of Fish to Food and Nutrition Security in Eastern Africa: Emerging Trends and Future Outlooks.

1.2. How aquaculture interacts with Kenya's macroeconomic policies

1.2.1. Aquaculture as an enabler of the Big Four Agenda

The Big Four Agenda is the Government's set of priority programs and reforms to foster economic development and provide solutions to various socio-economic problems facing Kenyans.

The Big Four Agenda is hinged on four pillars: food security and nutrition, universal healthcare, affordable housing, and manufacturing. In the Big Four Agenda, the Government seeks to ensure 100% food and nutrition security through expansion of food production and supply, reduction of food prices to ensure affordability and support of value addition in the food processing value chain. One of the specific initiatives identified by the Government to ensure food security is enhanced large-scale production through aquaculture. Increased aquaculture can contribute to ensuring food and nutrition security through:

(i). **Increasing food availability** - Increased aquaculture production will enhance the overall food supply for the general population. Aquaculture can provide year-round fish supplies which will satisfy the growth in fish demand and reduce pressure on wild fish stocks, which are highly susceptible to climate change.

(ii). **Increasing access to food** - The aquaculture value chain can positively contribute to employment creation, poverty alleviation, and income generation. Aquaculture can give opportunities to food-insecure households, providing them a critical source of income and livelihood.

(iii). **Increasing nutrition security** – Increased fish supply through aquaculture will provide a cheap source of sufficient protein containing all essential amino acids, fatty acids, vitamins, and minerals required for a healthy diet. Increased consumption of fish can reduce the risks of both malnutrition and non-communicable diseases. Fish produced through aquaculture has more constant nutrient composition than wild catch fish, whose environment, food and access to food varies during the year. By controlling the composition of aquaculture feeds and other inputs, healthy fish and healthful fish products with the optimal nutritional composition can be supplied.

In the 2021 Budget Policy Statement, fisheries and aquaculture are among the programmes the Government is prioritizing to facilitate the attainment of food nutrition and security in the Medium-Term Expenditure Framework ("MTEF") period 2021/2022 and 2023/2024. In the MTEF period, it is intended for aquaculture production to grow to 84 thousand metric tonnes and for fish consumption to increase from 4.6 kg to 10 kg per capita per year. Considering the foregoing, the National Assembly should consider tax policies that will foster growth and investment in aquaculture and facilitate the achievement of the food and nutrition security pillar of the Big Four Agenda.

PROPOSAL WHICH WE ARE REQUESTING TO BE INCLUDED IN THE FINANCE BILL 2021

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VALUE ADDED TAX ACT – 2013			
No	**Clause**	**Proposed Amendment**	**Justification**
1	There is no clause in the Finance Bill,2021.	We propose an amendment that reintroduces the VAT exemption under the First Schedule Part I of the VAT Act, that applies to all fisheries – whether inland or not: *"Taxable supplies including for fish feeding and handling, water operations, cold storage, fish cages, pond construction and maintenance, and fish processing and handling, imported or purchased for* ***direct and exclusive use*** *in the operations of fisheries and fish processors upon recommendation by the relevant state department."*	There has been a history of VAT incentives for the fishing sector to reduce cost and encourage growth and investment. The Finance Act, 2017 introduced paragraph 14 of Part A of the Second Schedule of the VAT Act under which "taxable goods supplied to marine fisheries and fish processors upon recommendation by the relevant state department" were zero rated. The provision only applied to 'marine fisheries' which meant the provision would only apply to activities conducted to extract fish from the ocean. This provision would exclude inland fisheries which according to FAO are defined as activities conducted to extract fish and other aquatic organisms from 'inland waters'. This in effect meant that the provision did not apply to most aquaculture operations as they are conducted in 'inland waters' which includes rivers, lakes, dams, ponds and streams. In 2018, the Tax Laws (Amendment) Act, 2018 deleted the zero-rating provision and made "taxable goods supplied to marine fisheries and fish processors upon recommendation by the relevant state department" exempt from VAT under paragraph 97 of Part I of the First Schedule of the VAT Act. The exemption was repealed through the Tax Laws (Amendment) Act, 2020 with effect from 25 April 2020. One of the challenges facing aquaculture in Kenya is the high cost of inputs which account for 75% of the total production costs. These inputs are subject to VAT at 16%. Currently, the supply of fish is exempt from Value Added Tax ("VAT") under paragraph 19 of the Value Added Tax Act, 2013 ("VAT Act"). Therefore, aquaculture companies such as Victory Farms cannot claim input VAT incurred on inputs utilized to produce, process, or store fish. Inevitably, a portion of the irrecoverable input VAT incurred on the inputs is passed on to the consumer; this cost can be up to 55% of the total VAT cost incurred. The high cost of the inputs plus the irrecoverable VAT cost makes domestic fish more expensive and less competitive compared to imported frozen fish With the VAT exemption of the supplies above will significantly reduce the cost of the fish supplied within Kenya thus providing an affordable and nutritious source of protein to Kenyans, especially low-income and food-insecure communities.

			Inputs account for the largest percentage of costs for aquaculture companies. An exemption from VAT on the supplies above would ensure more capital is available for investment and promotion of growth within the sector. Increased investment in aquaculture will increase fish production, which is a policy priority in Kenya's economic blueprint. With the VAT exemption, fish produced domestically will be more competitive against imported fish. This will reduce dependence on fish imports to support the growing demand for fish. Other jurisdictions provide for exemptions, Kenya will not be unique in providing exemptions for inputs used in aquaculture. Other African countries such as Rwanda, The Gambia and Cameroon have implemented VAT exemptions for inputs used in aquaculture.

U.S. Commercial Service
U.S. Embassy Nairobi

June 2, 2021

The Clerk of the National Assembly
Office of the Clerk, Main Parliament Buildings
P.O. Box 41842 – 00100
Nairobi, Kenya

Dear National Assembly Clerk Hon. Sialai,

Subject: Submissions on the Finance Bill 2021

The Commercial Section of the United States Embassy is pleased to share its views and convey those from the American Chamber of Commerce in Kenya following the National Assembly notice dated May 21, 2021 calling for submission of memoranda on the Finance Bill 2021. The attached industry comments and proposals address four outlined areas including amendments to clauses relating to Income Tax act, Value Added Tax 2013, Excise Duty Act, 2015 and the Tax Procedures Act, 2015. In consultation with U.S. industry, we propose the following, with the goal of ensuring equal treatment for all entities operating in Kenya:

We encourage the Government of Kenya to retain the original definitions relating to the Digital Services Tax. Specifically, the expanded scope of definitions related to non-residents could form an overly burdensome tax policy resulting in the multilayer taxation of non-resident companies providing digital services. Additionally, the downstream effect of this amendment would mean that non-residents bear much of the tax burden, increasing the cost of doing business in Kenya.

Further, the proposed definition of non-residents is likely to create an imbalance in the digital economy landscape, which would be contrary to global efforts to address disparities while creating mutual solutions.

The United States remains concerned about measures that could be construed to single out American firms for taxation and could potentially lead the United States to pursue 301 investigations. The United States is committed to finding multilateral solutions to international tax issues. We welcome the progress that has been made and hope to find a path to resolution of the set of issues around Digital Services Taxes in the OECD negotiations.

We remain available to share any more information as relating to best practices in line with current engagements occurring at the multilateral level.

Sincerely,

Diane Jones
Commercial Counselor
United States Embassy Nairobi

REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY- FIFTH SESSION
FINANCE BILL, 2021 (NATIONAL ASSEMBLY BILL NO. 18 OF 2021)

SISTEMA.BIO
FINANCE BILL, 2021 (NATIONAL ASSEMBLY BILL NO. 18 OF 2021)

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
1	New Clause for inclusion.	The First Schedule to the Value Added Tax Act, 2013, is amended– in Section A of Part I by– inserting the following new paragraphs immediately after paragraph 133– **134**. Taxable goods locally purchased orimported by manufacturers or importers of clean cooking stoves for direct and exclusive use in the assembly, manufacture or repair of clean cookstoves. **135.** Stoves, ranges, grates, gas cookers, electric cookers, barbeques, braziers, gas-rings, plate warmers and similar non-electric domestic appliances, and parts thereof, or iron or steel of tariff numbers7321.11.00,	Reintroduction of VAT on Clean Cooking products will force the investors, producers and manufacturers to increase product prices, transferring the cost of production to the end-user; There is a concern that the VAT re-introduction will have negative long-term ramifications as most investors will shy away from investing in Kenya. The 16% VAT on cooking products may raise US$450 mil (KES 48 billion) funds for the Government through 2030, but will eventually cause nearly US$900 mil (KES 94 billion) in negative socio-economic impacts including: time lost; environmental costs (climate change and carbon emissions) and health costs; The VAT harms business growth and employment, with the lower rates of adoption of locally manufactured clean cooking products likely to translate into significant job losses in the sector, at least among those enterprises who pay the VAT. Widespread cooking with inefficient cookstoves and fuels is a major driver of indoor air pollution. The Ministry of Health states that over 21,500 deaths annually in Kenya are attributable to indoor air pollution caused by dirty cooking

		7321.19.00, 7321.82.00, 7321.83.00 and 7321.90.00. **136.** Pre-fabricated biogas digesters **137.** Biogas **138.**Leasing of biogas producing equipment	fuels, including deaths from acute respiratory infections, neonatal conditions and burns. This is more than three times the annual deaths from road accidents. Over 50% of the deaths occur in children under 5 years old. The continued reliance on inefficient cookstoves and fuels leads to a wide variety of environmental problems including land degradation, air pollution, and climate change. Burning dirty fuels like charcoal and kerosene is the single biggest contributor to Nairobi's urban smog and particulate emissions that are six times WHO safe limits. Kenya's Forest Policy 2014 recognizes the critical role that forests play as the country's water towers and catchments, where over 75% of the country's renewable surface water originate, and therefore serve critical water regulation roles which are important for human livelihoods and agriculture. Clean cooking products (stoves and biogas) are essential in converting rural populations from over reliance on toxic fuels such as firewood and kerosene. This is key for preservation of individual health and reduction in environmental degradation. The proposed clauses will fast track Kenya's international commitments on reduction of carbon emissions and SDG7 targets and attainment of the Clean Cooking Agenda of the Ministry of Energy for 2030. Enhanced access to Biogas will improve the livelihoods of smallholder farmers by providing access to clean energy (Biogas) and sustainable farming, savings, and increased productivity. Taken together, the effect of these clauses is to reduce the cost of clean cooking products. The proposed clauses will fast track Kenya's international commitments on reduction of carbon emissions and SDG7 targets.

CLEAN COOKING ALLIANCE

Value-Added Tax on Cleaner Cooking Solutions in Kenya

Costs outweigh benefits and impede national climate and sustainable development goals

A key policy objective of the Government of Kenya (GoK) is to meet the Sustainable Development Goal (SDG) 7 target of universal access to clean cooking solutions by 2028. This objective—publicly announced at the Nairobi Clean Cooking Forum in November 2019—is motivated by the many benefits of cleaner cooking solutions, including improved livelihoods, health, environmental quality, and climate change mitigation. However, since only 18% of households currently use clean fuels and only 23% of households use improved cookstoves (ICS),[1] Kenya needs to rapidly expand access to cleaner cooking solutions in order to achieve this goal.

Against this backdrop, in June 2020 the GoK passed the Finance Act, 2020, which levies the full 16% Value-Added Tax (VAT) on previously exempt or partially exempt ICS[2] and liquefied petroleum gas (LPG). LPG was granted a one-year extension during which it maintained a zero-rating, but it is expected to face the standard rate starting in July 2021.

This brief explores the impacts of the VAT on the clean cooking sector, analyzing the likely impacts on stove and fuel use, the likely consequences for stove and fuel companies operating in Kenya, and the trade-off between revenue gains to the GoK and the corresponding negative impact of these taxes on households and society.

Key messages

- The 16% VAT on ICS and LPG is expected to raise KES 48.6 billion (USD 457 million)[3] for the GoK Treasury through 2030, but will generate nearly double the cost—KES 94.6 billion (USD 889 million)—in negative socio-economic impacts, as well as negative effects on employment (which this study did not quantify).



- The increase in tax revenues would add at most 0.05% of GDP equivalent revenue in any given year. This would not substantially reduce the GoK's debt.
- Kenya is already off track for achieving the SDG 7 target related to universal access to clean cooking energy. The VAT will further harm this trajectory, as the number of households using clean fuels and ICS will decline at the expense of traditional biomass technologies. This also complicates Kenya's path to meeting its Nationally Determined Contribution commitments, threatening billions of KES in potential carbon finance investments.
- The Kenya Off-Grid Solar Access Project (KOSAP) and other results-based financing (RBF) programs are expected to underperform their targets, as increasing costs

mean that funds are able to subsidize fewer stoves, with shortfalls especially likely in rural areas.

- The GoK can better achieve its social and environmental policy goals by reinstating the VAT exemptions for ICS and by maintaining exemptions for clean cooking fuels like LPG. Imposing the full 16% VAT on kerosene,[4] which is a highly polluting fuel and currently faces a reduced VAT rate of 8%, would speed the transition away from this fuel, generate revenue in the short term, and more than compensate for the reduced revenue from not taxing ICS.
- More generally, the GoK should work to reduce taxation of socially beneficial technologies like ICS and clean fuels and maintain consistency in these policies over time. Over the past decade, numerous changes in the VAT and other duties have discouraged private sector investment.

Introduction

Reliance on polluting open fires and inefficient stoves and fuels for cooking leads to health and economic burdens that disproportionately fall on women and girls. Transitioning to cleaner stoves and fuels has the potential to reduce deaths from smoke-related illnesses, save households time, mitigate climate change, and improve local environmental quality. In Kenya, over 80% of households still rely on polluting fuels (i.e., firewood, charcoal, and kerosene) for cooking, of which about 85% use an inefficient or "traditional" cookstove. About 17% of households use LPG as their primary fuel, and very small numbers (less than 1%) use other clean fuels such as ethanol, biogas, and/or electricity.[5] Moreover, most households using cleaner fuels simultaneously use polluting ones; only 2% of households exclusively use LPG and other clean fuels.[6]

Kenya's National Energy Policy of 2018 calls for an aggressive transition to cleaner cooking solutions, and the GoK has supported a number of recent projects and policies to increase access to ICS and clean fuels. These include the US$150 million KOSAP project, which aims to increase access to clean energy in underserved counties of Kenya; EnDev activities to support results-based financing, skills training, and sector coordination efforts; and the Promotion of Climate-Friendly Cooking Project, supported by the

Analyzing the impacts of the VAT on the cleaner cooking sector in Kenya: Overview of study methods

To understand the impacts of the reintroduction of VAT on the sector, this study combined interviews of key sector stakeholders with quantitative, model-based counterfactual analysis comparing a no-VAT baseline to two different scenarios including the VAT: one with the VAT imposed on both ICS and LPG fuel, and the other with the VAT only on ICS (defined to also include LPG stoves). The interviews were used to document short-term responses and long-term expectations from a broad range of stakeholders.[1] To enhance understanding of trends in sales of ICS, sales data were also collected from a small set of companies willing to share such information.

To quantify and monetize the impacts of the VAT reform, the study built on previous cost-benefit and policy analyses conducted globally and in Nairobi, to develop a cost-benefit analysis for Kenya.[2] The model relied on a range of data sources but used recent publicly available, nationally representative secondary data sources whenever possible, relying most heavily on the Kenya Household Cooking Sector Study (2019) and the Multi-Tier Framework survey (2016).

The cost-benefit model allows for comparison of the revenues gained from the VAT reform with the monetized impacts of reduced transitioning to cleaner solutions over time, as well as households back-sliding toward traditional stoves and fuels when they do not replace their ICS at the end of their useful lives, owing to these solutions' increased costs. Costs and benefits are aggregated to the national level, in the two scenarios described above.

1. These stakeholders included ICS and clean fuel suppliers, government officials, NGOs and donors helping to support progress towards SDG 7, and households in peri-urban Nairobi, who represent the diversity of different cooking technologies used nationally.
2. Jeuland and Pattanayak 2012, Jeuland et al. 2018, Das and Jeuland 2020

Table 1. Changes in VAT and import duty for the cooking sector (Note: Ethanol imported before 2016 was not used as a cooking fuel).

	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
LPG VAT	0%	16%	16%	16%	0%	0%	0%	0%	0%	16%
Kerosene VAT	0%	16%	16%	16%	16%	16%	8%	8%	8%	8%
ICS import duty	25%	25%	25%	25%	10%	10%	10%	10%	25%	25%
ICS VAT	0%	0%	0%	0%	0%	0%	0%	0%	16%	16%
Ethanol VAT	16%	16%	16%	16%	16%	16%	16%	16%	16%	16%
Ethanol import duty	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%

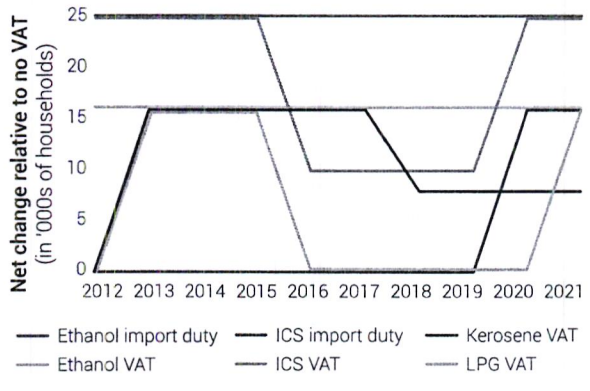

Figure 1. Changes in VAT and import duty for the cooking sector.

Green Climate Fund. The latter aims to disseminate ICS to 1.9 million households by leveraging USD 20 million in grant financing and an additional USD 8.8 million in co-financing from the GoK and others.

In recent years, the GoK has also instituted various fiscal incentives that have helped make ICS and clean fuels more affordable for low-income households. These incentives include a VAT zero-rating on clean cooking solutions like LPG and biogas stoves, a VAT exemption on ICS, and an excise duty reduction on ethanol fuel used for cooking purposes. These policies have contributed to a six-fold increase, from 0.6 million to 3.7 million, in the number of Kenyan households using LPG for cooking over the last two decades.[7]

Amidst these efforts, in June 2020 the GoK reintroduced a 16% VAT on ICS and LPG fuel in the Finance Act, 2020 (LPG was granted a one-year extension during which it maintained a zero-rating, therefore the effective date of the change in its VAT status is July 2021).[8] These changes coincided with the COVID-19 pandemic, which placed substantial new strain on public resources from both a revenue and expenditure perspective.[9]

The GoK's revenue needs notwithstanding, the recent reinstatement of VAT fits into a pattern of multiple changes to the taxes and duties levied on cooking solutions over the past decade. This policy instability has created confusion and uncertainty in the Kenyan market (*table 1 and figure 1*). For example, the standard VAT on LPG was introduced in 2013 and then removed in 2016 in an effort to induce higher adoption of that clean fuel. The import duty on ICS (which were also VAT-exempt at the time) was also reduced substantially in 2016, but in 2020 the standard VAT was reintroduced. Further highlighting the lack of policy coordination, use of kerosene, which is highly polluting, has rightfully been discouraged through levies since 2018, but is still favored with a relatively reduced VAT rate of 8%. This unpredictability in the tax regime discourages the capital investment needed to scale up commercial production of cleaner cooking solutions, hindering the success of Kenya's SDG 7 efforts.

The VAT sharply reduces the number of households adopting cleaner cooking solutions

Relative to a no-VAT counterfactual, the number of households using wood and charcoal ICS and LPG declines, as these solutions become less affordable (*figure 2*). Focus group discussions with consumers in Kenya confirmed that they are very price sensitive regarding choice of cooking stoves and fuels. As such, higher taxes on ICS in Scenarios 1 and 2 push households away from taxed charcoal and

firewood ICS, and LPG stoves, and toward untaxed traditional firewood and charcoal stoves and fuels. The substitution toward traditional solutions is greater in Scenario 1 as the VAT on LPG fuel makes LPG particularly expensive. The effects on kerosene use (not shown) are relatively modest, because kerosene is predicted to phase out by 2029 even without the VAT, based on that fuel's current use trajectory. With the VAT, the transition away from kerosene moves up to 2027.

Stakeholder interviews support these model results. Some ICS companies have already started to pass the full cost of the VAT to customers. Those who have not are subsidizing their stoves in the short term through climate finance or by tightening their profit margins. However, this subsidization is not sustainable in the long run. Assuming the VAT reform remains unchanged, these companies expect to pass on an average of 52% of the VAT to customers, and anticipate an average decline in sales of about 25%. This will have knock-on effects for GoK programs like KOSAP, which acknowledged that the price increase will decrease the number of stoves that can be disseminated through its RBF fund.

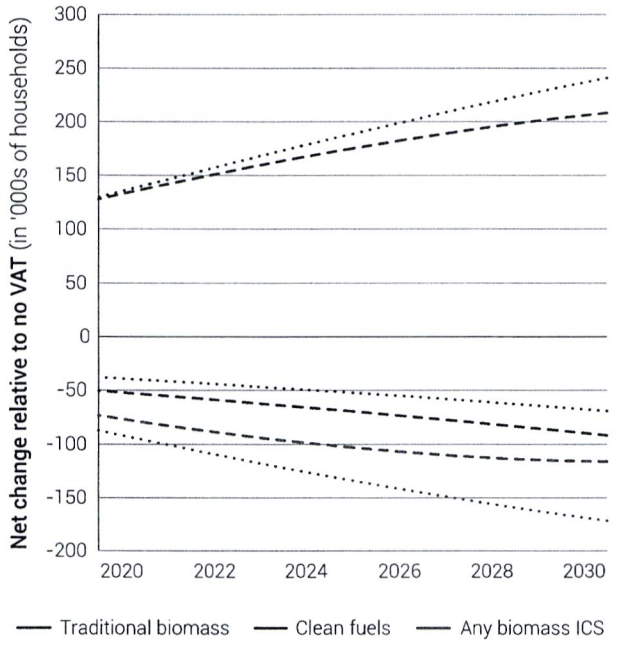

Figure 2. Effects of the VAT policy scenarios on the numbers of households using different technologies, relative to a no-VAT counterfactual. The wider dash represents Scenario 1 (tax on ICS and LPG), and the dotted dash represents Scenario 2 (tax on ICS only).

The VAT has negative overall impacts on Kenya

The impacts of the tax on net money savings from stove and fuel purchases by households, the value of time losses resulting from longer cooking and fuel collection time, and the environmental and health damages are summarized in Figure 2, aggregated over the years 2020–2030 ("S1" and "S2" refer to Scenario 1 and Scenario 2). **While GoK revenue increases, the costs in both scenarios far outweigh the revenue benefits, especially in Scenario 2.** Even disregarding the climate emissions costs, which are a global benefit that may not entirely benefit Kenya, the costs of the VAT outweigh the revenue benefits by a large amount. Moreover, it is possible that the GoK could be compensated by donors and investors for the climate benefits of transitioning to cleaner cooking through carbon and adaptation financing. By slowing down the transition to cleaner cooking solutions, the VAT may cut off a significant amount of climate finance.

The VAT will add thousands of deaths and many new cases of illness

Large costs are associated with negative health impacts due to reduced transitioning to cleaner cooking solutions, reaching an undiscounted total cost of KES 37.8 billion in Scenario 1 and KES 30.7 billion in Scenario 2. About 93% of these costs are due to increased mortality (1,633 additional deaths in Scenario 1 and 1,329 in Scenario 2) especially among young children and the women most directly involved

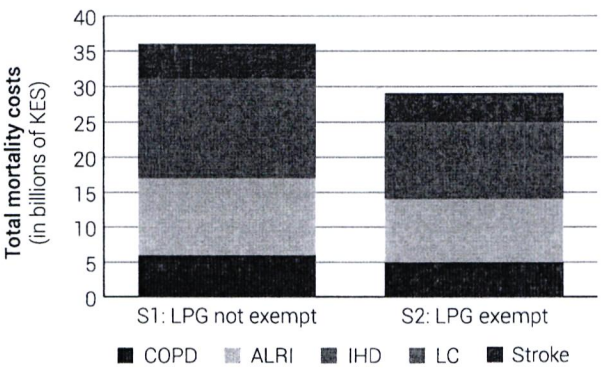

Figure 3. Total mortality costs from the VAT on ICS and clean fuels from 2020-2030. **COPD** = Chronic obstructive pulmonary disease; **ALRI** = Acute lower respiratory infection; **IHD** = Ischemic heart disease; **LC** = Lung cancer

			Gains due to VAT	Changes unclear	Losses due to VAT			
			Public revenue increases	Net money costs for fuels and stoves	Time losses	Wood fuel stock loss	Higher morbidity & mortality	Increase in CO2 emissions
S1	VAT on LPG	VAT on stoves	+48.6	-37.2	-6.2	-1.0	-37.8	-12.4
S2	No VAT on LPG	VAT on stoves	+13.5	+6.1	-5.0	-0.9	-30.7	-11.4

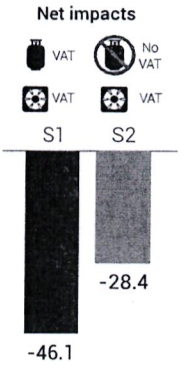

Figure 4. Net effects of the VAT policy scenarios. All totals are in billions of KES, undiscounted over the period 2020–2030. S1 is the scenario with both ICS and LPG fuel not exempt (per the policy starting in 2021); S2 is the scenario with ICS not exempt and LPG fuel exempt (per the current policy in 2020).

in cooking (*figure 3*). The morbidity costs represent the public and private costs associated with these illnesses.[10]

The VAT mostly increases household stove and fuel costs

Over the 10-year period, net stove and fuel costs increase for Kenyan households by KES 37.2 billion in Scenario 1 but decrease by KES 6.1 billion in Scenario 2 (*figure 4*). There are four reasons for these cost changes: First, households save on net stove costs by switching from higher-cost ICS to traditional technology, which is offset by increased costs for those who retain ICS and now pay the VAT. Second, in Scenario 1, households who continue to use LPG fuel pay more. Third, households switching away from more expensive fuels (namely kerosene and LPG) save money by using cheaper biomass. Fourth, consumers, mostly women, increase the time needed to harvest wood fuel, valued using the economic concept of the opportunity cost of time.

The VAT will lead to women losing hundreds of millions of hours of their time

The costs associated with time losses from reduced transitioning to cleaner cooking solutions amount to KES 6.2 billion in Scenario 1 and KES 5.0 billion in Scenario 2. This is because women spend more time cooking with inefficient technology (545 million hours in Scenario 1 and 437 million hours in Scenario 2), again valued using the economic concept of the opportunity cost of time.

The VAT will increase Kenya's emissions of climate-harming pollution

The costs associated with additional climate-forcing emissions from reduced transitioning to cleaner cooking solutions amount to KES 12.4 billion in Scenario 1 and KES 11.4 billion in Scenario 2. This is a social cost that is imposed on the globe (an additional 7.2 and 6.6 million tonnes CO2-equivalent in Scenarios 1 and 2, respectively), valued at the social cost of carbon. Note that without the VAT, Kenya might recover some or all of this amount from the sale of carbon credits. Thus, these additional emissions represent a potential loss of revenue and carbon finance for investments in the country.

The VAT will cause loss of forest stock

Finally, the wood fuel stock depleted due to slower transitioning, valued at the replacement cost for unsustainably harvested biomass, **is projected at KES 1.0 billion and KES 0.9 billion for Scenarios 1 and 2 respectively**. This loss amounts to 840 million tonnes of wood in Scenario 1 and 760 million tonnes in Scenario 2.

Revenue impacts of the VAT reform

Of course, the VAT imposed on cleaner cooking solutions will raise revenue (*figure 5*). Revenues are substantially larger when LPG fuel is taxed (Scenario 1), and this revenue grows over time because Kenyans will continue to transition to that fuel, albeit more slowly, as time goes on. In comparison,

revenues decline over time when LPG is exempt, largely because kerosene initially provides the majority of revenues but is phased out over the course of the decade. The revenue at the end of the decade in Scenario 2 therefore comes exclusively from taxed ICS sales.

To put the revenue numbers in perspective, the sum of the undiscounted revenues over the whole decade is estimated to be KES 48.6 billion in Scenario 1 and KES 13.5 billion in Scenario 2. **Although this revenue is significant, the total over 10 years only represents 0.5% and 0.1% of Kenya's 2019 annual GDP in each scenario and would thus add at most 0.05% of GDP equivalent revenue in any given year. This would not substantially reduce the GoK's debt.**

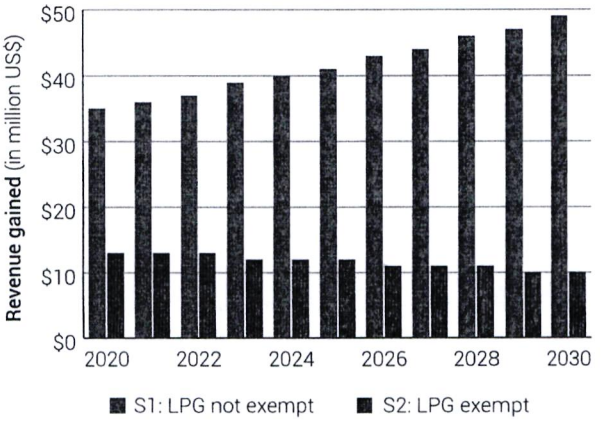

Figure 5. Government revenue gained from VAT on cleaner cooking solutions between 2020-2030.

Calls to Action

Given the results of this analysis, we recommend the following:

Recommendation 1: Reinstate the VAT exemptions for ICS solutions that were removed in 2020. The monetized time and fuel savings and environmental and health benefits of improved cooking solutions that would be lost under the VAT are at least twice the value of revenues gained. Moreover, the VAT complicates Kenya's path to meeting the SDG 7 target of universal access to clean cooking solutions and its Nationally Determined Contribution commitments, threatening billions of KES in potential carbon finance investments.

Recommendation 2: Maintain the VAT exemption for LPG fuel and allow an exemption for LPG stoves. LPG is currently the most scalable and viable clean fuel available in Kenya, and provides environmental, health, and time productivity benefits to the economy that greatly outweigh its costs. Continued aggressive promotion of this fuel is an essential part of Kenya's SDG commitments.

Recommendation 3: Commit to a five-year exemption of all taxes and duties for all clean cooking products. Maintaining exemptions on ICS, LPG, and other clean cooking products for a fixed amount of time would give the private sector the confidence to invest and set realistic, long-term growth plans. This approach has been deployed with much success in the off-grid, renewable power sector, and other nascent, socially beneficial sectors.

Recommendation 4: Maintain and work towards increasing levies on kerosene. Kerosene is a highly polluting fuel, and the GoK's efforts to move to a kerosene-free Kenya are a step in the right direction. Imposing the standard 16% VAT (kerosene currently faces an 8% reduced VAT) on household use of kerosene would speed the transition away from this fuel, generate revenue in the short term, and more than compensate for the reduced revenue from not taxing ICS.

Recommendation 5: Further enhance efforts to increase the affordability and availability of ICS and expand usage of clean fuels. Kenya is not on track to meet the SDG 7 target or the more ambitious national objective of universal access to clean cooking energy by 2028. Major efforts are needed to enhance the affordability of socially beneficial clean fuels and stoves, not only through reduced taxes, but also through subsidies and other complementary efforts. A broad array of policies that promote the viability of clean fuels like electricity, ethanol, and biogas as cooking energy sources should also be ramped up. These could include donor-supported initiatives, supply chain development, financing provided by microfinance institutions, and awareness raising campaigns—especially in rural areas.

Notes

1. In this brief, the term "improved cookstoves (ICS)" is used to refer to a broad and variable set of cooking technologies that have enhanced efficiency relative to "traditional" biomass stoves. Clean fuels are fuels that burn cleanly from the perspective of household air pollution (HAP), such as liquefied petroleum gas (LPG), electricity, ethanol, biogas, and solar cookers, consistent with the WHO definition of clean stoves, described **here**. "Cleaner cooking solutions" encompasses ICS and clean fuels.
2. Importantly, ICS produced in the informal sector do not pay the VAT. In practice, this creates a price wedge that may benefit informal products, which also tend to be less efficient.
3. Exchange rate applied: 1 USD to 106.4 KES
4. The WHO does not consider kerosene to be a clean fuel and therefore does not recommend it for household cooking.
5. Stoner et al 2020; KCCS 2019.
6. KCCS 2019
7. KCCS 2019
8. Other cooking fuels in Kenya are differentially subject to the VAT: Ethanol currently faces the standard 16% rate and kerosene faces an 8% reduced VAT. In contrast, woodfuels (e.g., firewood and charcoal) are locally harvested and produced and not subject to the VAT, and therefore have a relative price advantage.
9. VAT makes up about 22% of the GoK's revenue and allows the GoK to fund needed development programs and services (IMF 2021). Moreover, VAT exemptions are costly overall: the IMF estimated that Kenya lost 478 billion KES (USD 4.7 billion) in revenue in 2017 as a result of 152 VAT-exempt or zero-rated goods and services (IMF 2020).
10. For more thorough discussion of these health, time, and environmental consequences in non-monetary terms, please refer to the full study report. Note that these do not represent the total burdens associated with use of non-clean cooking solutions (which are much larger), but rather represent the incremental costs imposed only by the VAT policy.

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MEMORANDUM ON FISCAL POLICY FOR RENEWABLE ENERGY IN KENYA

SUBMITTED TO
THE NATIONAL ASSEMBLY - DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

BY

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CHIEF EXECUTIVE OFFICER
CLEAN COOKING ASSOCIATION OF KENYA

MEMORANDUM ON FISCAL POLICY FOR RENEWABLE ENERGY IN KENYA SUBMITTED TO THE NATIONAL ASSEMBLY - DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING: TAXATION OF CLEAN COOKING PRODUCTS

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1. Introduction

This memorandum is submitted by the Clean Cooking Association of Kenya (CCAK).

CCAK advocates for an enabling environment at both national and county level to catalyse the growth of the Clean Cooking sector through awareness on adoption of clean cooking technologies, capacity building of the sector and sector coordination.

This Memorandum is presented to The National Assembly - Finance and National Planning Committee in response to challenges that the Renewable Energy Sector in Kenya is undergoing with the introduction of Value Added Tax (VAT) on the sector in the Finance Act 2020.

This memorandum seeks the support of the Finance and National Planning Committee towards amendments to the Value Added Tax Act, No. 35 of 2013 to make **Clean Cooking solutions** affordable to all Kenyans by reversing price increases implemented in the industry over the past year due to provisions in the Finance Act 2020. Affordable Clean Cooking products will facilitate the realization of universal access to clean cooking and the right to health and to dignity for all Kenyans by 2028 as espoused in the Bioenergy Strategy 2020.

The taxation of Clean Cooking products is a key concern as:

- **70% of households** in Kenya still use inefficient cooking solutions which are harmful to their health, with 59% of households in Kenya using Three Stone Open Fires (TSOF) majority of whom are in the rural areas;
- Kenya will not meet its ambitious target of achieving 100% universal access to modern cooking solutions by 2028;
- According to the Kenya Household Cooking Sector Study 2018, there will be an increased number of households and families exposed to Indoor Air Pollution, contributing to 21,560 deaths annually due to increased use of traditional and unclean cooking fuels; and
- Clean Cooking has an abatement potential of 10% of the 32% target of reducing Green House Gases emissions by 2030 (Kenya National Determined Contribution commitment).

This disenfranchisement has paved the way for alternative Clean Cooking solutions in order to give a chance for all Kenyans to live a life with dignity and to provide access to basic rights.

This Memorandum advocates for the protection and realization of basic rights by providing a favourable taxation environment enabling all Kenyans to afford access to renewable energy technologies, specifically clean cooking solutions.

2. Memorandum Linkage to Key Development Agenda/Priorities.

a) Alignment with National Priorities: Vision 2030 and the Sustainable Development Goals (SDGs)

Vision 2030 aims to transform Kenya into a newly industrializing upper middle-income

country providing a high quality of life to all its citizens in a clean and secure environment by 2030. It has mainstreamed the Sustainable Development Goals (SDGs) which Kenya has committed to into the Medium-Term Plans and specifically in the Third Medium Term Plan (MTP III) for the period 2018 - 2022. The achievement of these goals greatly contributes to the realization of the global goal, SDG 7; affordable and clean energy. This puts an obligation on Kenya to put in place the relevant policy and legislative framework to accelerate access to affordable and clean energy.

b) Constitutional Foundation of the Memorandum

The right to a clean environment

The right to a clean and healthy environment is guaranteed under the Constitution of Kenya 2010. This includes the right to have the environment protected for the benefit of present and future generations. Parliament has a mandate to come up with laws that will ensure the sustainable exploitation, utilization, management and conservation of the environment and natural resources. This includes the elimination of processes and activities that are likely to endanger the environment.

Kenya has ratified the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement. Under these instruments, Kenya has committed to increase and promote the use of clean energy technologies to reduce its carbon emissions.

The 2019 census showed firewood, charcoal, kerosene and LPG as the leading sources of cooking fuel. The first three (3) fuel sources are harmful to people, the environment and ecosystems owing to their carbon emissions and their ultimate contribution to climate change. Women and children are the most affected when these sources are used for domestic cooking.

The Ministry of Health attributes 21,560 deaths every year to pollution from harmful cooking fuels. It has also been shown that the COVID-19 virus disproportionately affects those with pre-existing respiratory problems. These problems are more common in lower income households where wood, charcoal and paraffin fuels are most prevalent.

Kenya relies on hydro generated power though there is a gradual shift to geo-thermal generated electricity. Over the past few years, Kenya has experienced some of the adverse effects of Climate Change for example unprecedented droughts, floods and food insecurity. The latter has led to a nation-wide electricity rationing program encouraging a departure from over reliance on hydro generated power[2].

3. Memorandum Justification: - Economic, Health, Environmental and Social Impact on the Clean Cooking Sector.

a) Impact of the Finance Act 2020 and the Tax Laws (Amendment) Act 2020

The adoption of Clean Cooking solutions in Kenya has been on a steady increase over the last few years. This growth has been spurred primarily by fiscal incentives - the most notable of which is the VAT exemption on inputs and products. The following goods have been VAT

exempted since 2016: -

(a) taxable goods locally purchased or imported by manufacturers or importers of clean cooking stoves for direct and exclusive use in the assembly, manufacture or repair of clean cook stoves;

(b) Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating) barbeques, braziers, gas-rings, plate warmers and similar non-electric domestic appliances, and parts thereof, or iron or steel of tariff numbers 7321.11.00, 7321.12.00, 7321.19.00, 7321.81.00, 7321.82.00, 7321.83.00 and 7321.90.00;

(c) Plastic bag biogas digesters;

(d) Biogas; and

(e) Leasing of biogas producing equipment.

The exemption from paying VAT was removed via the Finance Act 2020 and the Tax Laws (Amendment) Act 2020. The justification provided was the need to enhance Government revenue. Recent research conducted by the Kenya Renewable Energy Association (KEREA) however reveals that the revenue to be realized via taxation will be substantially diminutive. This is because the resultant increase in the cost of clean cooking products will drive down their demand, thus the tax will be counterintuitive.

b) COVID-19 Pandemic Impact on the Renewable Energy Sector

The Covid-19 Pandemic has affected and continues affecting vulnerable communities disproportionately and calls for a special duty of care when legislating for these communities. That the virus is most harmful to those with pre-existing respiratory[3] problems, makes it all the more important to adoptlegislative measures whose net effect is to boost the uptake of clean energy.[1]

The Pandemic has also impacted entities dealing in Renewable and Clean Energy products to a great extent. A survey conducted by KEREA on the industry's response to removal of exemptions on VAT and import duty and also to COVID-19 shows there has been a dip in sales and after-sale services for solar and clean cookingproducts.

The demand for these sector products has gone down. Additionally, companies have had to drop sales agents due to the reduced sales of the clean cooking solutions as government restricts movements within various borders. For these entities to continue supplementing the Government's efforts towards universal access to energy, legislative measures are necessary to cushion them from the harsh economic realities.

c) Key Findings from Fiscal and Impact Analysis on Tax Implications for Clean Cooking Sector

The Clean Cooking Sector has experienced growth over the past years, with more

[1] https://www.health.go.ke/cas-dr-aman-confirms-16-new-cases-of-covid-19-nairobi-friday-april-24-2020/

stakeholders and investors joining this nascent and potential sector to Economic, Environmental and Social growth. Since 2016, Clean Cooking products have been VAT Exempt promoting investment and adoption in line with local development goals and international/Climate Change commitments. This Exemption was removed through the Finance Act 2020 through the introduction of a 16% VAT on clean cooking products.

An economic impact assessment study on the impacts of Value Added Tax conducted by CCAK in May, 2021 indicates that:

- The impact of the VAT change on sales ranges from 0% to -52%, and the impact on revenue ranges from 0% to -40% for companies;
- Reintroduction of VAT on Clean Cooking products will force the investors, producers and manufacturers to increase product prices, transferring the cost of production to the end-user;
- Companies expect the price of improved cook stoves to rise by 15% on average for both urban and rural areas.
- Companies expect sales to decrease 10-50%, with an average of 25% across urban and rural regions, this is due to the increased costs of these clean cooking solutions making them unaffordable to consumers.
- As prices for Clean Cooking solutions increase, households are likely to revert back to the use of traditional biomass technology, posing health and environmental impacts;
- Majority of the stakeholders were concerned that VAT costs were likely to decrease affordability and strain household cooking budgets;
- The 16% VAT on cooking products may raise US$450 mil (KES 48 billion) funds for the Government through 2030, but will eventually cause nearly US$900 mil (KES 94 billion) in negative socio-economic impacts including: time lost; environmental costs (climate change and carbon emissions) and health costs;
- There is a concern that the VAT re-introduction will have negative long-term ramifications as most investors will shy away from investing in Kenya.
- In urban areas, kerosene use has fallen sharply over the past 20 years; matched by an increase in LPG and firewood use. Charcoal use rose through 2012 and then began to fall (due to greater regulation of the charcoal sector, including attempts to ban the fuel).
- The VAT harms business growth and employment, with the lower rates of adoption of locally manufactured clean cooking products likely to translate into significant job losses in the sector, at least among those enterprises who pay the VAT.
- Challenge to affordability would especially harm Improved Cookstoves' promotion efforts in low-income regions. The Kenya Off-grid Solar Access Project (KOSAP) focusing on ensuring universal access to clean energy by 2022 will be lagged as the subsidies on the improved cooking solutions expected to increase, thereby limiting number of stoves funded and compromising program targets

The research findings indicate that with VAT exemptions, the adoption of Clean Cooking solutions would increase as sector businesses will thrive. However, it may be difficult to promote these clean solutions more so in the rural areas where the penetration is still very low as cooking is dominated by use of traditional methods (use of firewood and open three

stone fire).

4. Legislative Submission: Proposal for Enactment of the VAT (Amendment) Bill, 2021

For the reasons explored above, Clean Cooking Association of Kenya **(CCAK)** prays that The Finance and National Planning Committee considers the following proposals for addition to the Finance Bill 2021 or VAT (Amendment) Bill, 2021.

Proposed Clause	**Justification**
1) The First Schedule to the Value Added Tax Act, 2013, is amended– in Section A of Part I by– inserting the following new paragraphs immediately after paragraph 133– **134.** Taxable goods locally purchased or imported by manufacturers or importers of clean cooking stoves for direct and exclusive use in the assembly, manufacture or repair of clean cookstoves. **135.** Stoves, ranges, grates, gas cookers, electric cookers, barbeques, braziers, gas-rings, plate warmers and similar non-electric domestic appliances, and parts thereof, or iron or steel of tariff numbers 7321.11.00, 7321.19.00, 7321.82.00, 7321.83.00 and 7321.90.00. **136.** Pre-fabricated biogas digesters **137.** Biogas **138.**Leasing of biogas producing equipment **139.** Sustainable fuel briquettes for household and commercial use.	• Reintroduction of VAT on Clean Cooking products will force the investors, producers and manufacturers to increase product prices, transferring the cost of production to the end-user; There is a concern that the VAT re-introduction will have negative long-term ramifications as most investors will shy away from investing in Kenya. • The 16% VAT on cooking products may raise US$450 mil (KES 48 billion) funds for the Government through 2030, but will eventually cause nearly US$900 mil (KES 94 billion) in negative socio-economic impacts including: time lost; environmental costs (climate change and carbon emissions) and health costs; • The VAT harms business growth and employment, with the lower rates of adoption of locally manufactured clean cooking products likely to translate into significant job losses in the sector, at least among those enterprises who pay the VAT. • Challenge to affordability would especially harm Improved Cookstoves' promotion efforts in low-income regions. The Kenya Off-grid Solar Access Project (KOSAP) focusing on ensuring universal access to clean energy by 2022 will be lagged as the subsidies on the improved cooking solutions expected to increase, thereby limiting number of stoves funded and compromising program targets. • Widespread cooking with inefficient cookstoves and fuels is a major driver of indoor air pollution. The Ministry of Health states that over 21,500 deaths annually in Kenya are attributable to indoor air pollution caused by dirty cooking fuels, including deaths from acute respiratory infections, neonatal conditions and

	burns. This is more than three times the annual deaths from road accidents. Over 50% of the deaths occur in children under 5 years old. • The continued reliance on inefficient cookstoves and fuels leads to a wide variety of environmental problems including land degradation, air pollution, and climate change. Burning dirty fuels like charcoal and kerosene is the single biggest contributor to Nairobi's urban smog and particulate emissions that are six times WHO safe limits. • Kenya's Forest Policy 2014 recognizes the critical role that forests play as the country's water towers and catchments, where over 75% of the country's renewable surface water originate, and therefore serve critical water regulation roles which are important for human livelihoods and agriculture. • Clean cooking products (stoves and biogas) are essential in converting rural populations from over reliance on toxic fuels such as firewood and kerosene. This is key for preservation of individual health and reduction in environmental degradation. • Sustainable fuel briquettes replace the unsustainable produced charcoal and fuel wood thereby protecting the forest cover through reduced deforestation and protection of Kenya's forest cover. • Taken together, the effect of these clauses is to reduce the cost of clean cooking products. The proposed clauses will fast track Kenya's international commitments on reduction of carbon emissions and SDG7 targets.

2) The first Schedule to the Value Added Tax Act, 2013, is amended in Part A by – **(a)** by inserting the following new paragraph immediately after paragraph 20 in proper sequence **21.** "the supply of denatured ethanol of tariff number 2207.20.00 [for household cooking and heating]" **22.** Denatured bioethanol of tariff number 2207.20.00	• Denatured bioethanol is ultra clean and delivers the same health and environmental impacts as LPG. • VAT collections on denatured bioethanol today are minimal. The effect of imposition of VAT is therefore disproportionate, since the 16% VAT adds KSh 15 per litre to the retail price. This means that Kenyan consumers have to pay more for a life-changing and potentially life-saving clean fuel product. • The cooking fuel market in Kenya is estimated at KSh 100 billion per year, the vast majority of which is spent on woodfuel in the informal economy which delivers no revenue to Treasury. • Kenya is the global leader in the nascent bioethanol cooking fuel sector, which replaces charcoal, wood and kerosene used in low-income households. • KES 3.5 billion has been invested to date into this new Kenyan industry, with 250,000 Kenyans today having access to low-cost clean bioethanol cooking fuel. Should the Government of Kenya decide to exempt bio-ethanol cooking fuel from VAT and import tariffs, industry forecasts being able to convert an additional 1.7 million Kenyan households in 3 years to clean bioethanol cooking. • The industry has contributed over KES 550 million to date in Treasury revenue. The net positive taxation revenue impact to Treasury from implementing this tax policy is estimated at KES 30 – 50 billion over a 10-year period. • With an enabling policy environment, the opportunity exists to unlock KES 20 – 40 billion of new climate finance into the Kenyan sugar industry, in a manner that delivers a major boost to farmer incomes. Over the medium term, the formalization of the cooking fuel sector will drive material new Treasury revenues, with net positive taxation revenue from employment and corporate income taxes across the supply chain more than offsetting the impact of zero-rating VAT and tariffs. • The Government of Kenya's stated policy (via Ministry of Energy) is to ensure universal

	access to clean cooking solutions by 2028. Rolling out an affordable clean cooking solution like bioethanol is also a key measure in achieving at least 8 of the UN SDGs. • Denatured technical alcohol cannot be diverted for alternative end uses. A chemical bittering agent causes vomiting if ingested. The water content within technical alcohol makes it unusable for blending with petrol, as it causes immediate engine failure.

Deputy Director In-charge
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Directorate of Departmental Committees

NATIONAL ASSEMBLY
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03 JUN 2021
CLERK'S OFFICE
P. O. Box 41842, NAIROBI

DANONE NUTRICIA
Early Life Nutrition

Mr. Michael R. Sialai,
Clerk of the National Assembly
Parliament Buildings
Nairobi

31 May 2021

Ms. Kerubo Nyangweso please deal 3/6/21

D/D C 3/6/21

Dear Sir

RE: MEMORANDUM ON FINANCE BILL, 2021 – PROPOSALS FOR VAT EXEMPTION ON INFANT FORMULA

Following your notice dated 21 May 2021 inviting memoranda in response to the proposals set out in the Finance Bill, 2021 (National Assembly Bill No. 18 of 2021), I am pleased to submit to your attention a memorandum from Danone in respect of the proposed amendments to the Value Added Tax Act, 2013.

Danone, is a world leading food company, headquartered in Paris, France, with a mission to 'bring health through food to as many people as possible'. We aim to create nutritional solutions for a range of vulnerable groups, such as pregnant women, infants, children, and patients suffering from certain chronic diseases.

1). **Essential Dairy & Plant-Based Products**, In Kenya, Danone owns stake at one of the local dairy outfit,
2). **Drinking water**- Evian water among other brands (Europe based),
3). **Medical Nutrition** -products for those weakened by illness or chronic conditions
4). **Early Life Nutrition**-infant food & cereals, namely Cow & Gate, Neocate and Aptamil among others, Aptamil is the biggest baby formula brand in Europe.

Danone Early Life nutrition combines science & experience to support parents, healthcare professionals & caregivers globally, to provide infant food to mothers who are unable to breast-feed, either due to health complications, death, or abandoned babies, or when breast milk is not enough, or and when infants require special nutrition, e.g premature or and lactose intolerance infants.

Infant formula is high-priced in Kenya, as compared to most countries, due to high taxes. It is listed among the most stolen items in Kenya supermarkets. A 400-gram tin of Premature baby feed retails at Kes 1700, while a similar tin retails at equivalent of Kes 900 at United Kingdom, making it inaccessible to most mums in Kenya.

The Finance Bill, 2021 proposes to amend the First Schedule to VAT act, 2013, to exclude from exemption, milk specifically prepared for infants under tariff code 0402.99.10 while retaining the exemption in respect of the following:

- **0402.21.00;** Milk in powder, granules or other solid forms, of a fat content, by weight, exceeding 1.5%, not containing added sugar or other sweetening matter
- **0402.29.00;** Other milk in powder granules or other solid forms, of a fat content, by weight, exceeding 1.5%
- **0402.91.00;** Other milk not containing added sugar or other sweetening matter.

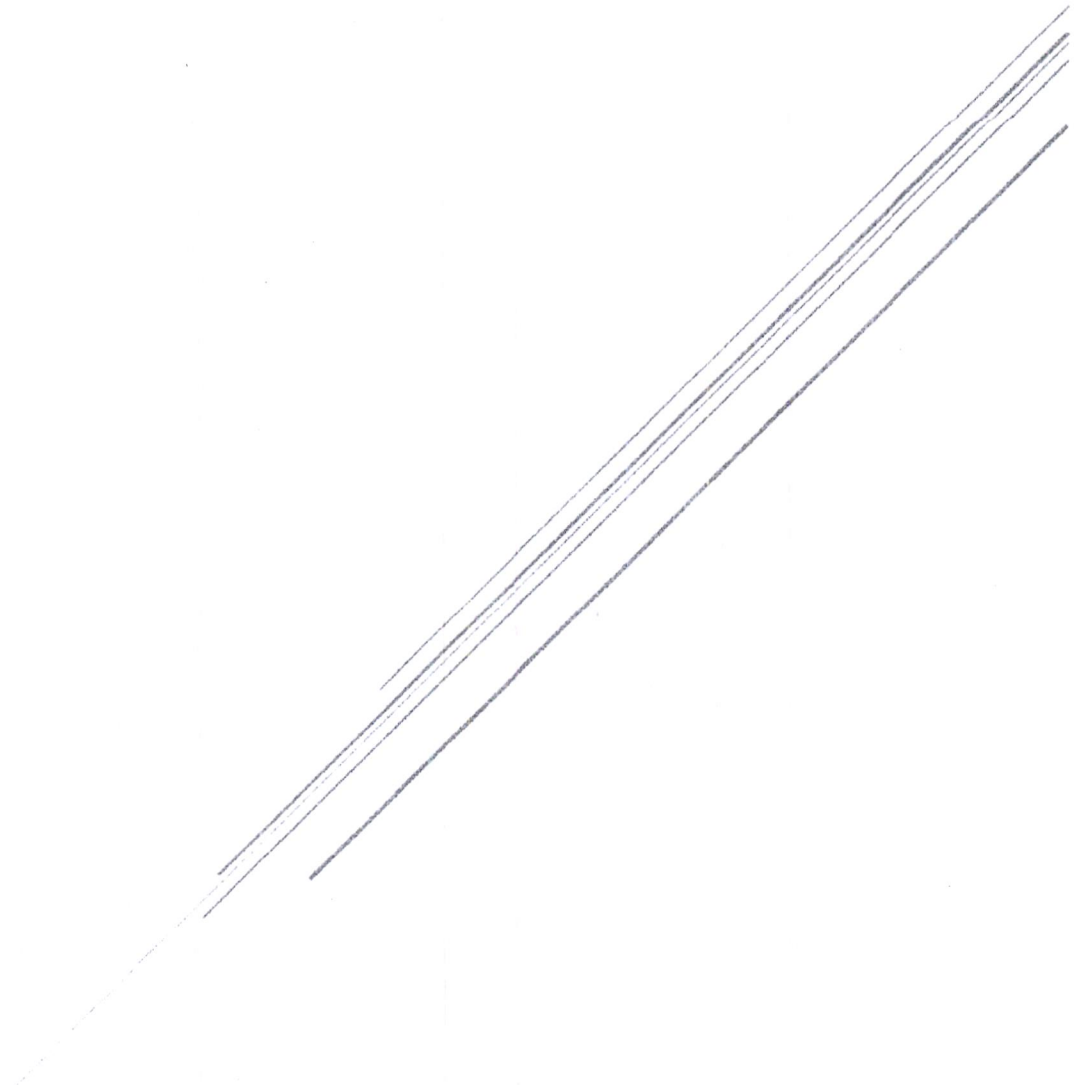
In the run-up to the preparation of the Budget, infant food industry, through KAM, put forward a proposal to have infant food, classified under **tariff code 1901.10.00,** to be accorded similar exemption under the VAT Act, 2013, which was not favorably considered. We write to seek Parliament's intervention, through Departmental Committee on Finance & National Planning, to grant VAT exemption of infant food under **tariff code 1901.10.00**, based on the grounds set out in the detailed proposal attached hereto.

Yours sincerely

George Kiongo
Country Manager East Africa

Danone Nuticia Africa & Overseas
Kasarani Road, Kasarani, P. O. Box 1826 - 00621, Nairobi, Kenya. **Tel:** +254 20 4442149, 4442143/5/6.
Mobile: +254 725 801546 ***Email:*** *Info.Dnao-Esa@danone.com*

MEMORANDUM IN RESPONSE TO THE FINANCE BILL, 2021:



PROPOSAL FOR VAT EXEMPTION ON INFANT FOOD, FROM THE INFANT FOOD INDUSTRY

EXECUTIVE SUMMARY

The Ministry of Health ('MOH'), UNICEF and the WHO recommend exclusive breastfeeding of infants for the first 6 months of their life. Thereafter, as the infant is introduced to additional types of food, breastfeeding continues up to the age of 2 years (World Health Organization, 1981).

However, we recognize situations where exclusive breastfeeding of infants is not possible or is severely restricted due to several factors or circumstances, such as:

- Ill health or death of the mother,
- Abandonment or separation between the mother and her baby.
- The mother is unable to exclusively breastfeed due to her inability to produce sufficient milk
- The mother returns to work and is unable to express milk in a hygienic set up and store the milk for her baby (partly due to lack of access to lactating rooms in most organizations and in public facilities such as markets, bus stops, etc.).
- When the baby is pre-term or has low birth and therefore needs special infant food to give her additional nutrients and supplement the breastmilk (if available).

In such instances, mothers have resorted to alternative solutions such as cow's milk, cereals such as porridge, fruits and vegetables such as pawpaw, butternut, etc. as illustrated in the Kenya Demographic and Health Survey 2014 (Kenya National Bureau of Statistics, 2015). Research has demonstrated that these alternatives (animal milk, porridge, etc.), on a varying scale, are not appropriate for the babies as their digestive systems are underdeveloped, they do not have some or most of the required nutrients and have adverse consequences on the growth and development of the babies.

In the absence of breastmilk, infant food has been shown to be the most suitable source of nutrition for a developing baby as the nutrients are adapted to meet the infant's nutritional needs as stipulated by governing bodies such as CODEX standards and Kenya Standards on Infant food (as prescribed by the Kenya Bureau of Standards ('KEBS')). However, the benefits of infant food are not accessible to a vast majority of those who would benefit from it mainly due to the price of the formula.

One of the biggest determinants of price and affordability is the tax structure. Currently, infant milk formula is subject to the following taxes: Import Declaration Fees (3.5%); Railway Development Levy (1.5%), Import Duty (25%), VAT (16%) and Dairy Tax (10%). These comprise approximately +56% of the customs value or 30 % of the recommended retail price, thus significantly affecting their affordability, making infant food more than twice as expensive in Kenya compared to most of the other countries.

In order to improve affordability and therefore increase vulnerable mothers and infants' access of these products, we request they be exempted from VAT, as other countries have done.

These tax policy interventions are in line with similar changes that have been introduced in the past to contribute to the health and wellbeing of Kenyans. Examples include exemptions and zero-rating on agricultural inputs, essential food items (flour, milk, rice, etc), pharmaceutical products and industrial inputs.

As a consequence of the tax reductions on infant food, it shall become more affordable to those who need it most and result in additional health benefits to infants, which may result in savings occasioned by a reduction in health expenses incurred due to malnutrition. In addition, uptake of infant food (instead of unsuitable breastmilk substitutes) could result in higher payment of corporation and payroll taxes.

INTRODUCTION

The Ministry of Health ('MOH'), UNICEF and the WHO recommend exclusive breastfeeding of infants for the first 6 months of their life. Thereafter, as the infant is introduced to additional types of food, breastfeeding continues up to the age of 2 years (World Health Organization, 1981).

However, there are circumstances when exclusive breastfeeding is not possible, such as:

- if the mother faces health complications during or after childbirth that result in her inability to breastfeed her child.
- due to economic circumstances, the mother returns to work and is therefore unable to fully attend to breastfeeding.
- if the child is born premature and requires specialized nutritional support when it is not possible for the mother to express breastmilk.
- when children are abandoned by the mother and therefore must be taken care of by relatives or taken to a children's home or orphanage, and.
- where the mother passes on at childbirth.

Whenever a mother is unable to exclusively breastfeed within the first 6 months, she turns to various alternatives, including infant food, other milk such as fresh, tinned and powdered milk, other liquids such as fruit juices, and grains such as porridge and fortified baby food.

The WHO recognizes instances where exclusive breastfeeding is not possible, infant food should be considered as a source of nutrition (World Health Organization, 1981). This recognition is backed by the findings of a study undertaken by Krueger (Krueger, et al., n.d.). basis for this recognition is more particularly set out in Appendix 1. However, infant food is not easily accessible in Kenya, relatively to other countries, due to its high retail cost.

It is believed that a reduction in the taxes imposed on the formula will reduce its overall cost and make it more affordable to a larger population of mothers who would otherwise not be able to afford it. Our justification for the request is set out in the following sections of the proposal.

1. The Current Tax Structure and its Impact on Pricing of Infant foods

Infant food is subject to the following taxes upon importation:

1. Import Declaration Fees (3.5%).
2. Railway Development Levy (2%).
3. Dairy Tax (10%).
4. Import Duty (25%); and
5. VAT (16%).

Others

6. KPA Charges (0.5%)
7. Clearing charges (~2%)

These comprise approximately 57% of the customs value or 30 % of the recommended retail price, thus significantly affect their affordability. A tin of infant formula retails at approximately Kes 1250, which taxes being at ~Kes 376 per a tin of 400g.

Basis of the request for tax concessions:

The request for the tax concessions is anchored on the following:

- Infant foods are an important source of nutrition in several situations as detailed in Appendix 1. The impact of the taxes on these formulas has impeded their accessibility and therefore hampered the role of the formulas in contributing to the fight against infant mortality.
- Taxes on these products are a significant contributor to their pricing.
- International examples exist to demonstrate that infant food is subjected to minimal taxes as a means of increasing affordability and accessibility.
- The VAT concessions being sought have been granted to milk specially prepared for infants under a different tariff code (0402) and were not extended to infant food, under tariff code 1901.
- Basic food commodities (e.g milk, rice, bread, cereals) consumed by adults have been exempted or zero-rated for VAT, and similar treatment needs to be accorded to basic food commodities for infants such as milk formula
- The concessions being sought have been granted for other products of similar importance, such as pharmaceuticals.

1. Importance of Infant foods as a source of nutrition to Infants

a) Formulas for special needs/therapeutics (preterm infants)

Preterm birth is said to be the leading cause of child mortality around the world. Also, when not managed appropriately, preterm births increase the risk of neurodevelopmental impairment, psychiatric challenges, and incidents of Non-Communicable Diseases (Krueger, et al., n.d.). To address these challenges, the nutrition for pre-term babies needs to be as close as possible to intrauterine growth.

Breastmilk is the preferred nutrition for preterm or low birth weight babies. However, where breast milk is not available, pre-term infant food is the best alternative. Based on health professionals' assessment, where breast milk is available, special formulae called Breast Milk Fortifiers are used to fortify breastmilk to ensure adequate growth and development of the baby.

b) Infant food for Infants with Allergies

Allergic ailments such as eczema, asthma, hay fever and food allergies arise due to a combination of genetic and environmental interactions. Infant nutrition may alleviate or exacerbate the risks and severity of these allergies.

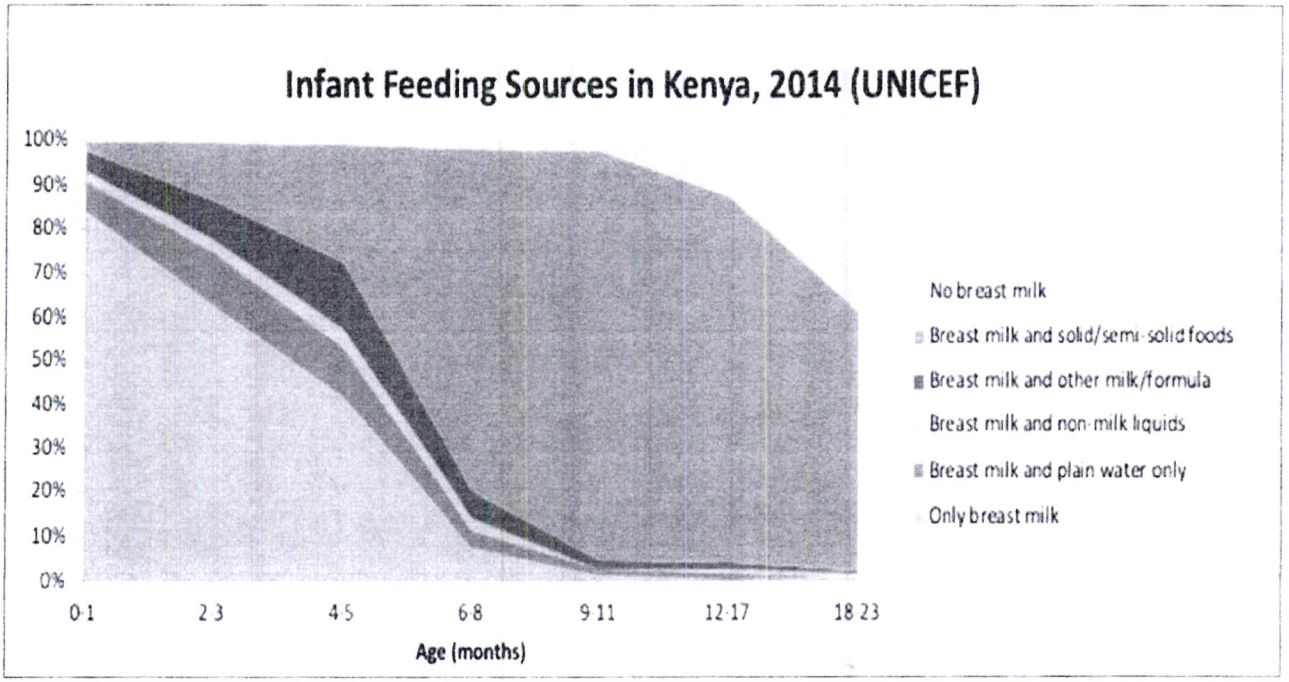
In some instances, specific nutrient intervention prevents the onset of these allergies by modifying immune and metabolic programming during development of the infant's immunity. While exclusive breastfeeding is recommended for such cases, specially prepared formula (hypoallergenic hydrolysed cow's milk formula) is considered beneficial in those instances when breastfeeding is not possible (Krueger, et al., n.d.).

c) Infant food for Infants and Toddlers

Whenever breastfeeding is not possible due to the reasons spelt out above, mothers/ caregivers' resorts to other alternatives, such as cow's milk, porridge, fruit juices, broth, etc.

The active usage of these alternatives as a key source of nutrition may have long term negative effects on the baby, such as allergies, malnutrition, obesity, stunted growth, etc. It is noteworthy that, while the incidence of breastfeeding in Kenya is considered amongst the highest in the world, there is also a very high incidence of stunting amongst infants and children. This is best illustrated in the following graph:

GRAPH: NUTRITIONAL STATUS OF CHILDREN BY AGE



Key Insights:

At 0 – 6 Months:

- About 61% of babies are exclusively breastfed in Kenya. This is one of the highest prevalence of exclusive breastfeeding in the world
- Only 2% of babies less than 6 months are exclusively fed on infant food
- 30% of infants consume breastmilk and plain water at 4-6 months. This puts the children at risk of diarrhoea and malnutrition if the water is not clean.
- 37% of these babies use unsuitable breastmilk substitutes such as porridge, juice and animal milk
- Exclusive breastfeeding at 4-6 months stands at 42%

At 6-24 months:

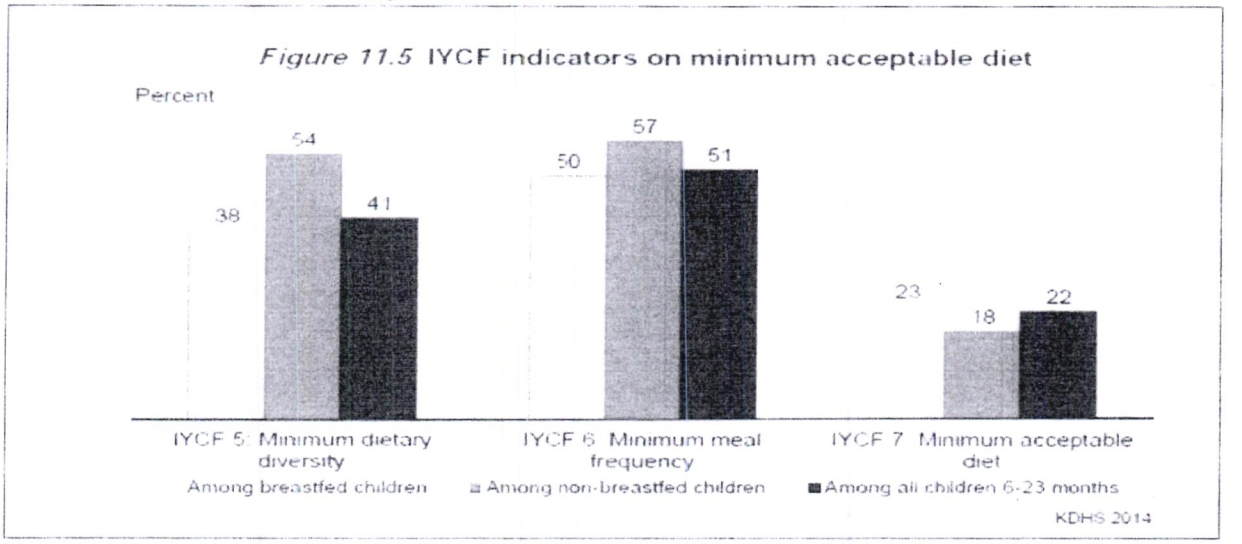
- 80% of infants are introduced to solid, semi-solid or soft foods at 6-8 months
- Continued breastfeeding up to 1 year stands at 90%
- Continued breastfeeding at 2 years is at 53%

Appendix 2 gives further details of the challenges mothers face and the alternatives used when they cannot breastfeed.

The effect of these feeding incidences is twofold:

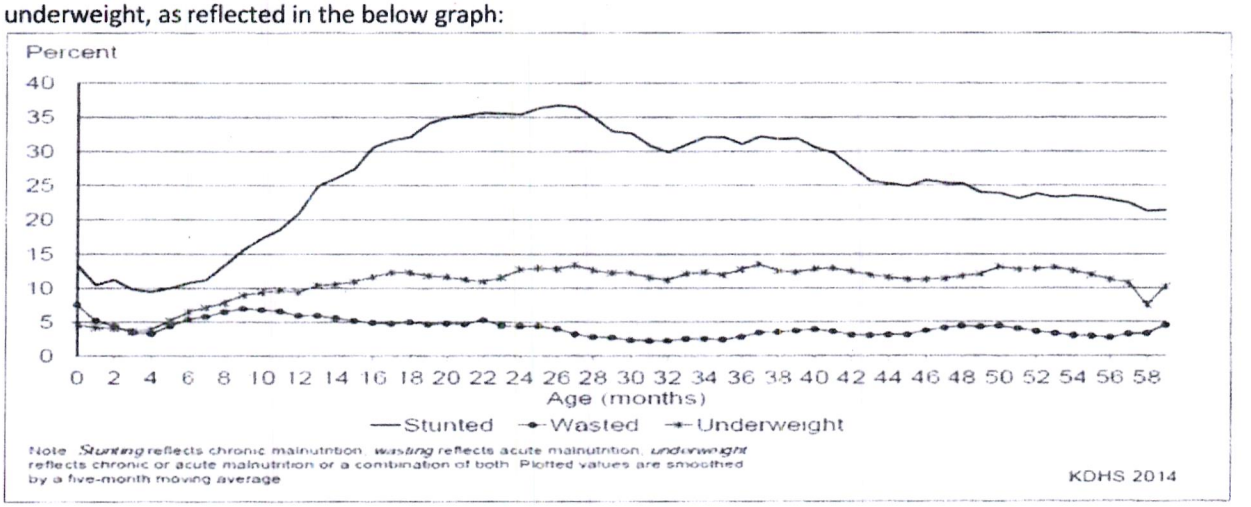
- Majority of the infants and toddlers do not get the minimum dietary requirements daily
- There is a high prevalence of stunting.

The graph below illustrates this point:



From the above table, it is clear that, as per the Kenya Demographic and Health Survey (2014) only 18 – 23% of the children surveyed have their minimum acceptable dietary needs met. This could be a factor of the nature of liquid, semi-solid and solid foods given to them from 6 – 23 months of age.

Lastly, because of the low minimum acceptable diet incidence, there is a high level of stunting, wasting and underweight, as reflected in the below graph:



As illustrated above, there is an exponential increase in the levels of stunting and underweight from 6 months onwards. Based on infant feeding sources data, the prevalence of breast milk and solid/semi-solid food consumption increases after 6 months of age and as shown above, the most common foods consumed after 6 months include bread, rice and noodles (greater than 80% after 9 months), whereas fortified baby food consumption remains low (less than 7% between 6-23 months). Consumption of foods with lower nutrient-density (e.g., bread, rice noodles), may not be sufficient to meet specific dietary needs of children in Kenya, which could be contributing to stunting and underweight.

A key factor to the lower consumption of the fortified baby food (including infant food) could be the taxes imposed on these products, which makes them unaffordable to a vast majority of those who need it most.

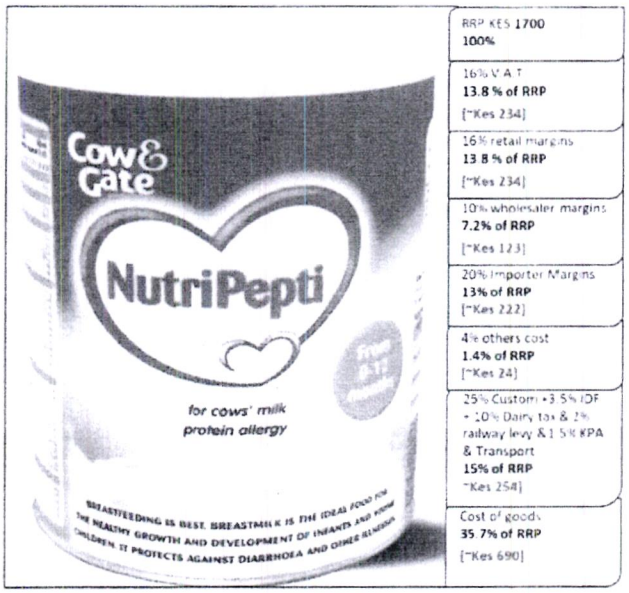
2. Impact of taxes on pricing of infant food

Producers/Distributors incur the following taxes upon importation of its infant foods:

1. Import Declaration Fees (3.5%)
2. Railway Development Levy (2.0%).
3. Dairy Tax (10%).
4. Import Duty (25%); and
5. VAT (16%).

Other levies and charges include: KPA Charges (0.5%) & Clearing charges (~3%)

The following illustrates the impact of taxes on the landed cost of a 400g tin of infant food:

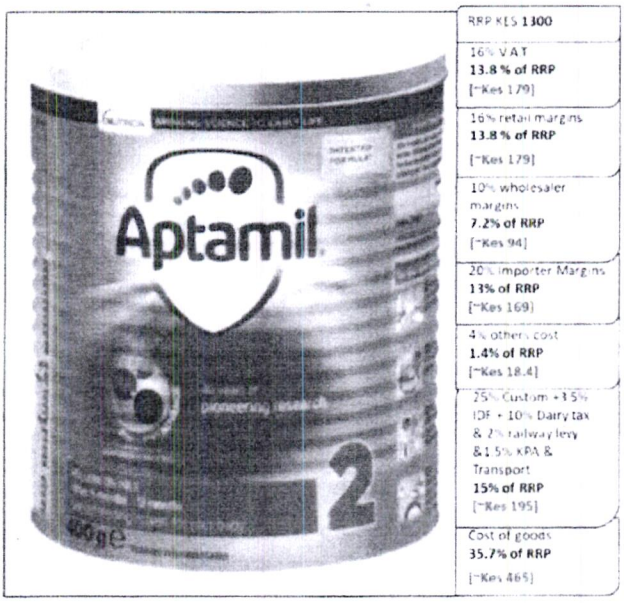


Preterm products are mainly procured by hospitals, so are lactose free products, which are priced around ~Kes 1600 to ~Kes 1700 per 400g tin. An infant usually consumes a 400g tin in 7-10days, making such products inaccessible to most parents, irrespective of their infant issue.

Taxes on a tin is about ~Kes 488 per tin, in-order to feed a premature infant.

As illustrated here, the landed cost of a tin inclusive of taxes, ~Kes 1202 per tin of 400g (from a cost base of ~Kes 690).

Ps- cow & gate 800g retails at a GBP equivalent of Kes 1200 in the UK, implying a 400g tin is Kes 600, yet in Kenya mothers are paying the same at Kes 1250 for a 400g tin



Aptamil retail at Kes 1300 for a 400g tin & at Kes 2400 for an 800g tin in Kenya, yet an 800g of Aptamil retails at 11 pounds in the UK, equivalent to Kes 1650. Meaning they are cheaper by upto 31%.

Infant formula is cheaper in most countries than it is in Kenya, including Mauritius, Egypt, Madagascar, Uganda, Cameroon, Nigeria, Senegal, South Africa among others.

Exempting infant food from VAT would lead to a reduction of its landed cost by Kes ~157 to Kes 235 per tin, an almost 20% reduction.

This benefit would then be passed on to the vulnerable infants who would need to access the infant food for nutritional reasons but are unable to due to the current cost structure.

3. Comparative analysis of taxes applied on Infant food in various African countries

A comparative analysis was recently undertaken to examine the taxes applied on infant food in several African countries where its products are sold. The following table summarises the taxes applied:

Country	Taxes** applied on imported infant food
Kenya	57%
Uganda	43%
Rwanda	43%
Cameroon	18%
Senegal	14%
South Africa	15%
Ghana	22.5%
Nigeria	5%

*** Taxes include import duty, VAT, fees and levies*

From the foregoing, it is clear that the taxes applied on infant food in Kenya are among the highest in Africa. A reclassification of infant food from standard rated to exempt would bring the tax burden down by up to 20%.

It is also noteworthy that Ethiopia and Madagascar recently removed VAT on infant food as a means of making it more affordable to vulnerable mothers and infants. A direct consequence of the tax structure is that the products in the countries where taxes are higher are more expensive than those in countries with little or no tax.

The following tables illustrate these price differences (translated into Kes equivalent):

Country	Product retail price (Kes)
Kenya	1300
South Africa	515
United Kingdom	518
Ghana	876
Mauritius	515
Egypt	508
Nigeria	743

Kenya infant formula is about 130%- 189% more expensive than the same in the UK, Mauritius, South Africa and Egypt.



	KENYA			EGYPT	MAURITIUS	ETHIOPIA	S/AFRICA	CAMEROON	NIGERIA	LONDON/UK	GHANA	DUBAI
PACKAGING; GRAMS	400	400	800	400	400	400	400	400	400	800	900	400
CONSUMER PRICE IN LOCAL CURRENCY	KES 1,200	KES 1,250	KES 2,995	EGP 79.45	MUR 205.0	Br 300.0	R83.59	3,600 CFA	N 2,800	£7.99	GHC 114	AED 28.50
EQUIVALENT PRICE IN USD	USD 12.00	USD 12.50	USD 29.95	USD 5.08	USD 5.15	USD 8.02	USD 5.15	USD 6.40	USD 7.43	USD 10.35	USD 19.72	USD 7.76
EQUIVALENT PRICE IN KES FOR 400/GRAM TIN	KES 1,195	KES 1,235	KES 1,498	KES 508	KES 515	KES 802	KES 515	KES 640	KES 743	KES 518	KES 876	KES 776
PRICE/GRAM	2.963	3.088	3.744	1.270	1.288	2.005	1.288	1.600	1.858	1.294	2.191	1.940
PRICE INDEX	229%	239%	289%	98%	100%	155%	100%	124%	144%	100%	169%	150%

A 400-gram (equivalent) tin of baby formula retails at Kes 518 at the UK, while in Kenya, the same tin goes for around Kes.1,300 (making it inaccessible for many mothers who cannot breastmilk). Ethiopia is 38% cheaper than Kenya, while Nigeria is 42% cheaper than Kenya, and Cameroon is 50% cheaper than Kenya. See Appendix 4 for additional information.

Despite relatively *lower pricing noted above, mothers in the UK still consider the cost of infant food to be high and therefore have urged for lower pricing. For instance, in 2018, a Parliamentary Inquiry into the impact of austerity measures on infant feeding found that the cost of infant food had a negative impact on family budgets, and families with tight budgets may resort to unsafe practices to feed their babies* - such as skipping feeds, watering down formula or adding cereals (UNICEF, 2018)(Article attached as Appendix 5).

4. **Exempting or zero-rating infant food would be an important policy intervention for the following reasons:**
    - It would bring parity to the VAT treatment accorded to similar milk products
    - Similar exemptions and zero-rating have been accorded to basic food products meant for adults without according similar treatment to infant food.
    - Zero-rating and exempting products from VAT has been used as a means of alleviating suffering or spurring growth in various sectors.

Zero-rating or exempting infant food would bring parity based on the tax on other infant milk products

Under the First Schedule of the VAT Act, milk specially prepared for infants under the following tariff codes is exempt from VAT:

- 0402.99.00,
- 0402.91.00,
- 0402.29.00 and
- 0402.21.00.

The exemption of these products was a noble initiative whose intention was to make these products more affordable and accessible to infants. However, this exemption was not extended to infant food under the tariff code 1901.10.00. It is our view that this was an inadvertent omission on the part of the policymakers. Exempting or zero-rating the infant food under tariff code 1901.10.00 through the 2021 Finance Bill would therefore correct this anomaly and address the intentions of the initial exemptions granted under the VAT Act 2013.

It is recognised that the tariff code 1901.10.00 encompasses additional products, not just infant food. However, it is possible to create a sub-code under the 1901 to specifically refer to the infant food and thereby allow for an exemption to specifically apply to infant food and not just all the products that fall under the tariff code 1901.10.00.

In addition, the VAT Act also zero-rated milk and cream that is not concentrated or containing added sugar or other sweetening matter, under the following tariff codes:

- 0401.10.00,
- 0401.20.00,
- 0401.40.00 and
- 0401.50.00.

These products are mainly consumed by adults and may not be suitable for use by infants. Having these as zero-rated while retaining the standard VAT rate on infant food makes them more attractive as a supplement to breastmilk, though they would not be appropriate for their use. Based on the exemption and zero-rating of these products, a request for similar consideration for infant food would not be out of step with the status accorded to the abovementioned products. It shall also make the products more affordable to those that need it most.

Similar exemptions and zero-rating have been accorded to basic food products meant for adults without according similar treatment to infant food:

The VAT Act has zero-rated or exempted several food products considered as basic for the general population. These include bread, rice, milk, and cereals. However, VAT on infant food has been retained. It is our considered view that infant food should be accorded the same VAT treatment as these products, so as to cater for a more vulnerable section of the population.

VAT Exemptions and Zero-rating have been used as a means of alleviating suffering or to spur growth

Traditionally, zero-rating or exemptions have been used as a policy intervention to drive penetration of various socio-economic initiatives or to make various products more accessible and/or affordable.

For example, VAT exemptions have been granted in the following areas and for the following reasons:

a. To promote investment in and usage of renewable energy resources, various solar equipment, and accessories such as solar water heaters and deep cycle sealed batteries which exclusively use or store solar power.
b. Sanitary towels (pads) and tampons, to make these more affordable and accessible especially to girls who would otherwise miss out on school attendance.
c. Made-up fishing nets of man-made textile material of tariff No. 5608.11.00, to promote fish farming activities and make the inputs more affordable.
d. Mosquito nets of tariff No. 6304.91.10, to make them more affordable and thereby aid in the fight against malaria.
e. Goods imported or purchased locally for use by the local film producers and local filming agents, upon recommendation by the Kenya Film Commission, subject to approval by the Cabinet Secretary to the National Treasury.

Based on these and several other examples found in the VAT Act, the exemption or zero-rating of infant food would be a viable policy intervention that would drive its affordability and uptake by vulnerable infants.

Our request for VAT exemption on infant food, and the resultant impact on the pricing and therefore accessibility by those who need it most, is best illustrated by the following examples which demonstrate the extent of the need for lower pricing, which the exemption would assist in achieving.

a. Hospitals' outreach to vulnerable mothers:

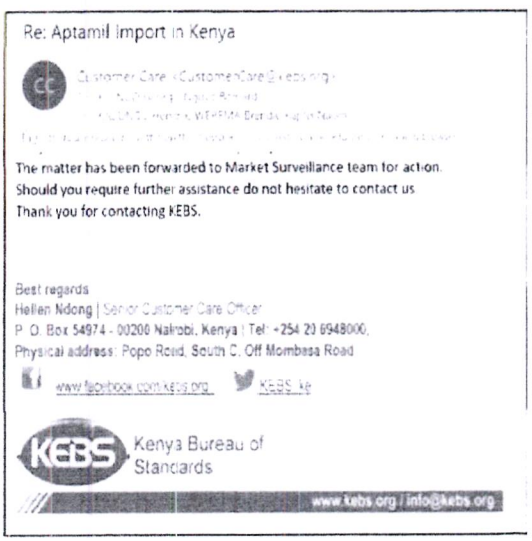
A hospital in Nairobi runs an outreach clinic to assist mothers from neighbouring slums who, according to health care providers, require infant food. These mothers are mostly unemployed or self-employed without a steady source of income hence must fend for themselves daily. As a result, they may not be able to exclusively breastfeed their babies for the recommended first 6 months from birth. Because they cannot afford infant food, the hospital provides these to them on condition that the infants' vital growth statistics are recorded between visits. As a result of this initiative, most babies whose mothers attend the clinic have grown in weight and height at levels that are recommended for healthy babies.

It has also been noted that infant food is essential in hospitals whenever infants who are not able to breastfeed are required to stay in hospitals for prolonged periods.

b. Children's Homes:

Several Children's homes receive abandoned or orphaned infants who are unable to access breastmilk. In such cases, infant food is the default source of nutrition for those who are less than 6 months' old, and a key supplement for those above 6 months who are weaned – when they can access it.

It is noteworthy that most Children's homes are run by charitable organisations that depend on well-wishers for funding and any reduction of price on formula will go a long way.


Re: Aptamil Import in Kenya

CC [redacted]

The matter has been forwarded to Market Surveillance team for action.
Should you require further assistance do not hesitate to contact us
Thank you for contacting KEBS.

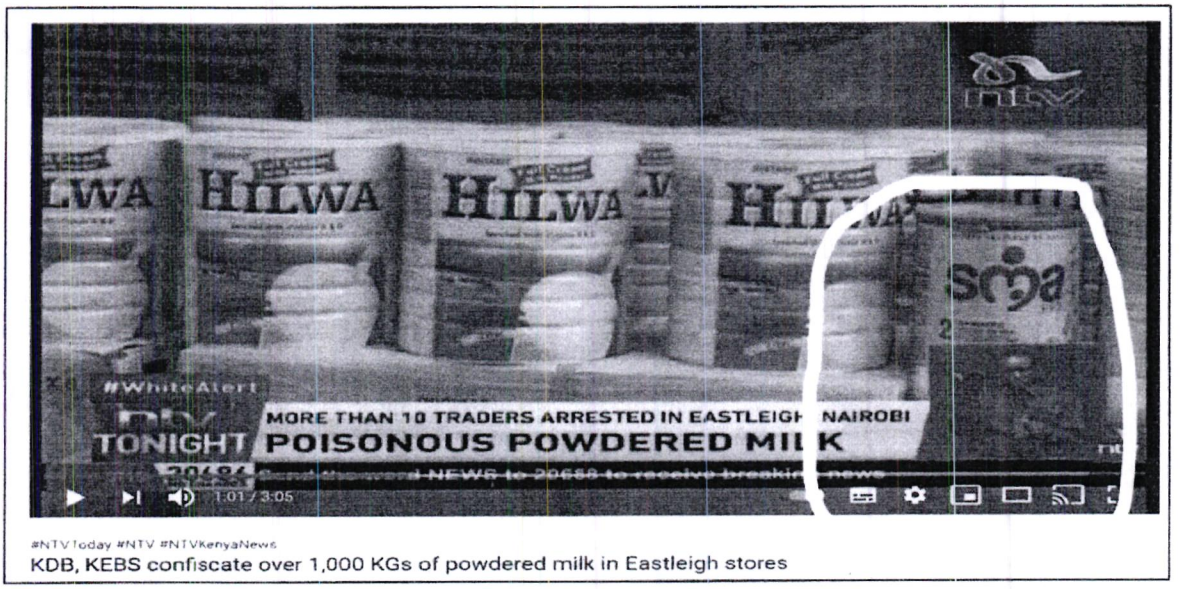
Best regards
Hellen Ndong | Senior Customer Care Officer
P. O. Box 54974 - 00200 Nairobi, Kenya | Tel: +254 20 6948000,
Physical address: Popo Road, South C, Off Mombasa Road
www.facebook.com/kebs.org KEBS_ke
KEBS Kenya Bureau of Standards
www.kebs.org | info@kebs.org

a. *Influx of infant imports, without Kebs sticker or and duty paid.*

In the course of our market surveillance activities, we have noted a rise in the influx of imports of infant formula, brought in through different avenues and finding their way into mainstream outlets such as pharmacies. These products are unlikely to be duty paid as they were not sourced through any formal distribution channels known to us and have no KEBS stickers.

It is likely that the high cost of infant formula (when legitimately imported and on which duties have been paid) are creating a parallel market for cheaper formula, whose cost is driven by failure to pay the right taxes. Exempting the infant formula from VAT would help reduce demand for these uncustomed imports and help to safeguard government revenue that is collected from import duties, PAYE, and corporation tax. Kebs has arrested & confiscated infant formula before, yet high taxes have created a vacuum, which

https://www.youtube.com/watch?v=njEIUZf1o3c



#NTVToday #NTV #NTVKenyaNews
KDB, KEBS confiscate over 1,000 KGs of powdered milk in Eastleigh stores

b. *Incidents of shoplifting at various supermarkets*

Measures taken by supermarkets to safeguard against shoplifting of infant food & children homes procuring baby formula



Anecdotal evidence received from various supermarkets (and backed by media reports – see Business Daily Extract in Appendix 3) indicate that infant food is one of the most highly targeted items for shoplifting, to the extent that they have put in place various measures (pictured below) to act as a deterrent for shoplifters. Several times, those caught shoplifting have begged for leniency just for the sake of the children, who they are unable to feed well with breastmilk alone.

CONCLUSION AND SUMMARY OF PROPOSAL

Proper and adequate nutrition is one of the most important contributing factors to the growth and wellbeing of infants. Infant food has been shown to be the most viable option, adapted to the nutritional needs of the baby when breastfeeding is not possible. However, infant food is not available to most infants primarily due to its the cost.

The key drivers negatively impacting the affordability of infant food are the taxes imposed upon their importation – 25% import duty, 14% VAT, 10% dairy tax, 3.5% import declaration fees and 1.5% railway development levy. These comprise approximately 56.5% of the customs value, or 30% of the recommended retail price. Elimination of the import duty and dairy tax, and exemption or zero-rating of VAT on the formula would also reduce its cost and bring parity to the treatment accorded to similar products such as milk and cream specially prepared for infants under tariff code 0402, milk consumed by adults under tariff code 0401, and other basic food commodities consumed by adults such as rice, bread, and cereals.

Exempting the infant food from VAT is bound to bring down its cost and make it more affordable and therefore more easily accessible to those who need it most. It would also be in line with regional and international best practice as most countries have little or no indirect taxes imposed on infant food.

Bibliography

Kenya National Bureau of Statistics, 2015. The Kenya Demographic and Health Survey 2014. Nairobi: s.n.

Krueger, B. et al., n.d. First 1000 Days Medical Source Book. s.l.:s.n.

UNICEF, 2018. Cost of infant food negatively impacting family budgets, says parliamentary inquiry. [Online] Available at: https://www.unicef.org.uk/babyfriendly/cost-of-infant-formula-inquiry/ [Accessed 30 October 2020].

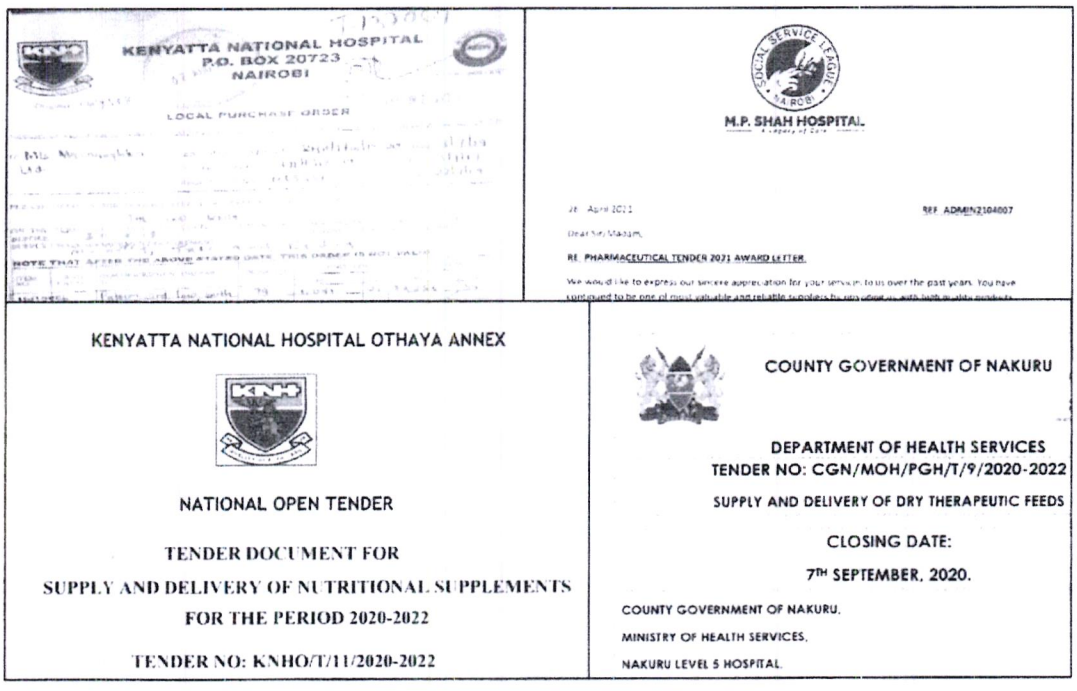
World Health Organization, 1981. International Code of Marketing of Breast-milk Substitutes. Geneva: s.n.

APPENDIX 1: ADVANTAGES OF USING PRETERM FORTIFIED INFANT FOOD (IN THE ABSENCE OF BREASTMILK):

Using preterm fortified infant food when breastfeeding is not possible has several advantages (Krueger, et al., n.d.):

- It has been shown to aid good growth, particularly short-term improved weight gain and head growth.
- In cases where breastmilk is unavailable or insufficient, infant food provides high energy, protein, vitamins, and minerals to support development.
- In addition, arachidonic acid (AA) and DHA added to formula have been shown to aid in development of vision and cognitive functions, and development of immune phenotypes.
- It has also been demonstrated that formula has a long-lasting effect on IQ development. Comparatively, a diet with standard nutrient content was associated with lower verbal IQ even after social factors were controlled.
- Further, the protein components of the fortified infant food aids weight gain and linear and head growth, while inadequate protein intake (absent of sufficient breastmilk or infant food) is at least partially responsible for poor growth of very low birth weight infants.
- It has been noted that overall brain development depends on providing sufficient quantities of key nutrients such as proteins, long chain polyunsaturated fatty acids (LCPUFAs), iron, copper, vitamins A1, B6 and B12, iodine, zinc, and folic acids. These are typically present in the infant food and aid the baby's growth towards attainment of the desired milestones.

Below are medical institutions that buy Preterm, Lactose free & standard formula from Danone or and other organisation, with intent to bridge the gap.


KENYATTA NATIONAL HOSPITAL
P.O. BOX 20723
NAIROBI

LOCAL PURCHASE ORDER

NOTE THAT AFTER THE ABOVE STATED DATE THIS ORDER IS NOT VALID

M.P. SHAH HOSPITAL

RE: PHARMACEUTICAL TENDER 2021 AWARD LETTER.

KENYATTA NATIONAL HOSPITAL OTHAYA ANNEX

NATIONAL OPEN TENDER

TENDER DOCUMENT FOR

SUPPLY AND DELIVERY OF NUTRITIONAL SUPPLEMENTS FOR THE PERIOD 2020-2022

TENDER NO: KNHO/T/11/2020-2022

COUNTY GOVERNMENT OF NAKURU

DEPARTMENT OF HEALTH SERVICES

TENDER NO: CGN/MOH/PGH/T/9/2020-2022

SUPPLY AND DELIVERY OF DRY THERAPEUTIC FEEDS

CLOSING DATE:

7TH SEPTEMBER, 2020.

COUNTY GOVERNMENT OF NAKURU.

MINISTRY OF HEALTH SERVICES.

NAKURU LEVEL 5 HOSPITAL.

APPENDIX 2:

Further information on breastfeeding prevalence, alternatives used by mothers and impact on infants and young children:

The following table illustrates the challenges faced and the alternatives used when breastfeeding is not possible or not sufficient:

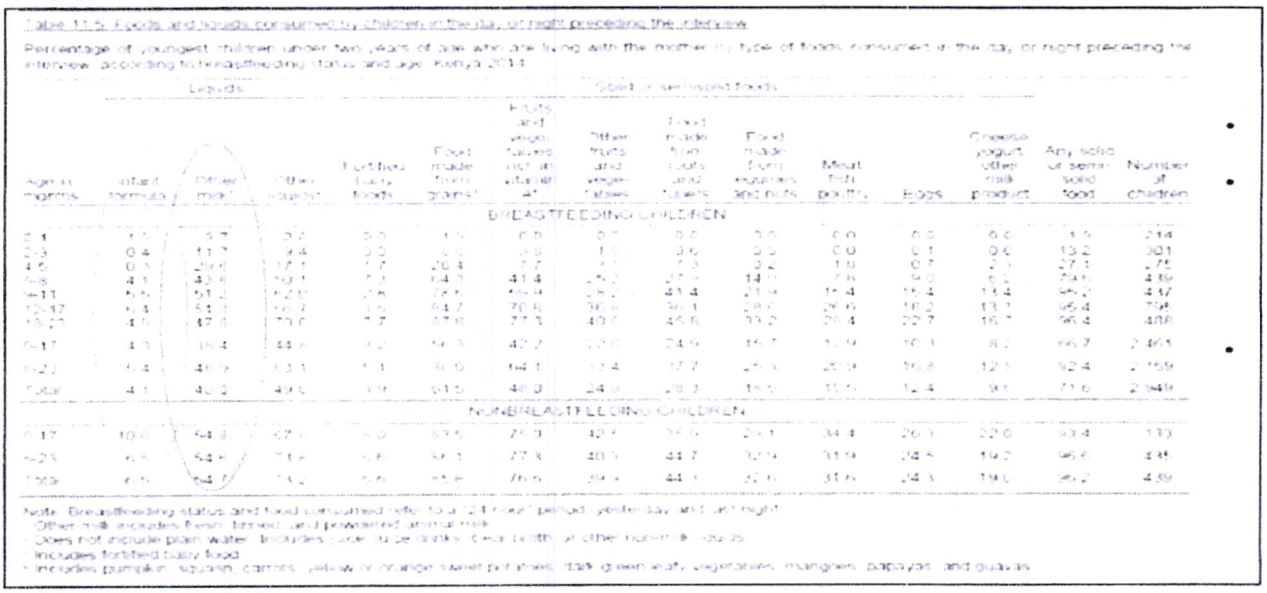


Table 11.5 Foods and liquids consumed by children in the day or night preceding the interview

Percentage of youngest children under two years of age who are living with the mother by type of foods consumed in the day or night preceding the interview, according to breastfeeding status and age, Kenya 2014

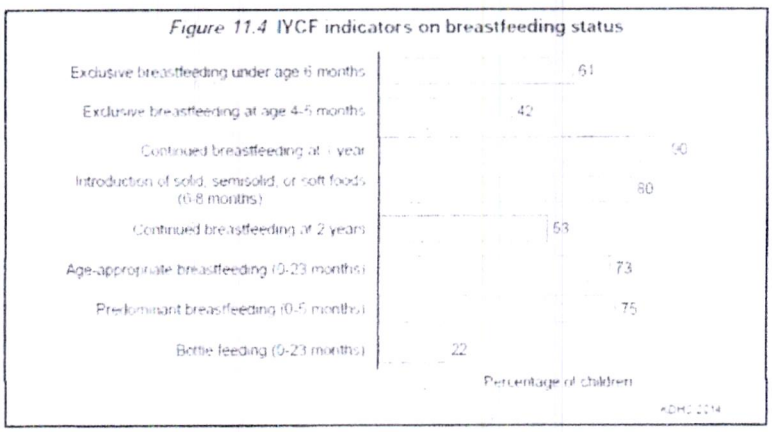
Age in months	Liquids			Solid or semi-solid foods										Number of children
	Infant formula	Other milk*	Other liquids*	Fortified baby foods	Food made from grains**	Fruits and vegetables rich in vitamin A***	Other fruits and vegetables	Food made from roots and tubers	Food made from legumes and nuts	Meat, fish, poultry	Eggs	Cheese, yogurt, other milk product	Any solid or semi-solid food	
BREASTFEEDING CHILDREN														
0-1	4.5	5.7	0.0	0.0	1.5	0.0	0.7	0.0	0.0	0.0	0.0	0.0	1.5	214
2-3	0.4	11.7	3.4	0.2	0.6	0.8	1.6	0.6	0.2	0.0	0.1	0.6	13.2	301
4-5	0.3	20.8	17.1	7.7	20.4	7.7	4.5	7.3	3.4	1.0	0.7	2.3	57.1	275
6-8	4.1	43.6	49.1	24.1	41.4	25.2	17.0	27.0	14.0	7.6	5.0	6.1	79.5	439
9-11	4.4	51.2	42.0	29.4	42.4	26.2	21.4	23.4	17.4	15.4	11.4	13.4	84.2	447
12-17	4.4	51.3	49.7	43.5	70.5	36.9	36.1	38.6	29.6	18.2	13.7	16.4	95.4	794
18-23	4.6	47.8	50.6	47.8	77.3	40.6	45.8	33.2	28.4	22.7	16.7	16.4	96.4	488
0-17	4.3	38.4	45.6	4.2	14.3	40.2	22.0	24.6	14.7	10.4	10.3	8.2	66.7	2465
6-23	4.4	48.9	43.1	41.1	60.9	144.1	32.4	32.7	25.1	20.4	16.8	12.1	92.4	2159
Total	4.1	46.3	40.5	3.9	51.5	48.9	24.8	29.3	18.5	15.5	12.4	9.1	71.6	2948
NON-BREASTFEEDING CHILDREN														
0-17	10.0	54.8	67.5	5.0	67.5	77.9	42.4	56.6	29.1	34.4	26.3	22.0	93.4	133
6-23	6.5	54.5	71.5	6.8	64.1	77.3	40.5	48.7	32.9	33.9	24.5	19.2	96.6	449
Total	6.9	54.7	70.2	6.6	65.8	78.5	39.4	44.1	32.0	31.6	24.3	19.0	96.2	439

Note: Breastfeeding status and food consumed refer to a "24 hour" period (yesterday and last night)
* Other milk includes fresh, tinned, and powdered animal milk
** Does not include plain water, includes sugar or sugar products, clear broth, or other non-milk liquids
*** Includes fortified baby food
**** Includes pumpkin, squash, carrots, yellow or orange sweet potatoes, dark green leafy vegetables, mangoes, papayas, and avocados

The above table highlights the following:

- Among infants up to 6 months, 3% consume breast milk and infant food, whereas 15% consume breast milk and other milk, including fresh, tinned, and powdered animal milk.
- The percentage of infants consuming breast milk and other milk is five times more than those consuming breast milk and infant food, suggesting that mothers turn to other milk consumption before 6 months of age much more than they do to infant food when they do not consider exclusive breastfeeding as possible or sufficient for the child.

The above points are illustrated in the following graphs:



From the above chart, it is noted that there is a significant introduction of solid, semi-solid and soft foods at 6-8 months (80%). However, it has also been noted that the introduction of such foods does not necessarily mean that the diet meets the minimum acceptable dietary requirements, as illustrated below:

Nutritional Importance of Infant food:

Infant food contains all the key ingredients adapted to meet the nutritional needs of the developing infant. In comparison, cow's milk key ingredient is carbohydrates/lactose, while the protein found in cow's milk is not fully adapted for the infant's digestive system (although this changes progressively as the infant develops with time).

The table below summarises the comparisons between breastmilk, infant food, and other substitutes such as cow's milk:

KEY INGREDIENTS	BREASTMILK	INFANT FOOD	COW MILK
Proteins adapted to the baby's nutritional needs & physiology	Ö	Ö	'
Carbohydrate/Lactose	Ö	Ö	Ö
Correct Calcium: Phosphorus ratio to support bone growth and elongation	Ö	Ö	'
Complex carbohydrates e.g. Oligosaccharides for digestion	Ö	Ö	'
LCPUFAs – ARA, DHA, LINOLEIC & LINOLENIC	Ö	Ö	'
Antibodies	Ö	'	'
Enzymes e.g. Amylase, Lipase, Lysozyme	Ö	'	'

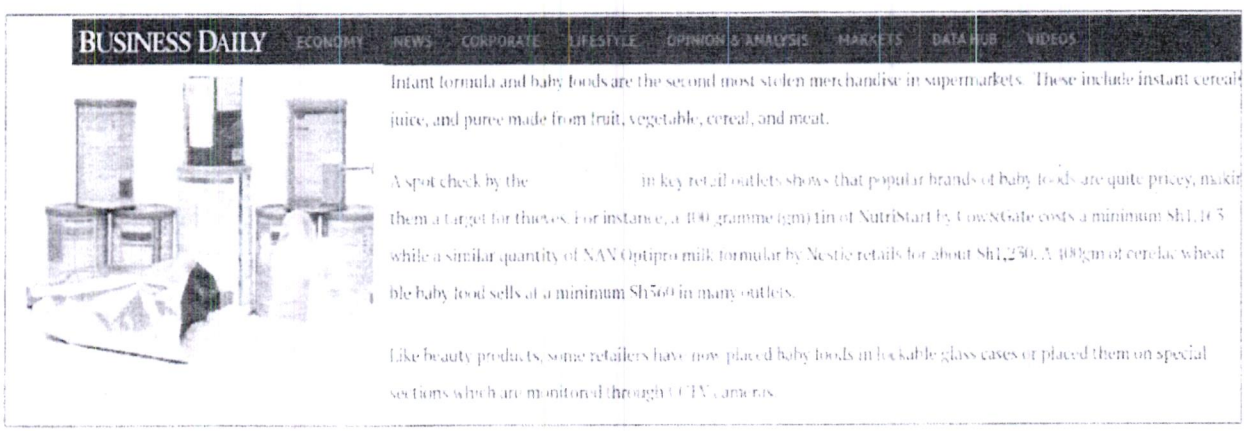
The infant food is therefore a critical source of nutrients for infants and toddlers where breastfeeding is not possible or recommended.

APPENDIX 3

Demand of infant formula has contributed to high pilferage of the product in most supermarkets, where the product is kept under lock & key.

Source: https://www.businessdailyafrica.com/bd/data-hub/strange-things-stolen-by-nairobi-thieves--2459434

Strange things stolen by Nairobi thieves


BUSINESS DAILY ECONOMY NEWS CORPORATE LIFESTYLE OPINION & ANALYSIS MARKETS DATA HUB VIDEOS

Infant formula and baby foods are the second most stolen merchandise in supermarkets. These include instant cereal juice, and puree made from fruit, vegetable, cereal, and meat.

A spot check by the in key retail outlets shows that popular brands of baby foods are quite pricey, makin them a target for thieves. For instance, a 400 gramme (gm) tin of NutriStart by CowSGate costs a minimum Sh1,165 while a similar quantity of NAN Optipro milk formular by Nestle retails for about Sh1,250. A 400gm of cerelac wheat ble baby food sells at a minimum Sh560 in many outlets.

Like beauty products, some retailers have now placed baby foods in lockable glass cases or placed them on special sections which are monitored through CCTV cameras.

APPENDIX 4

PRICING REFERENCE/ONLINE SHOPS AT THE VARIOUS COUNTRIES-

Most countries are way cheaper than Kenya, we sell infant formula at Kes 1300 for a 400g tin, yet other countries the same is affordable, including the UK, South Africa, Cameroon, Mauritius etc.

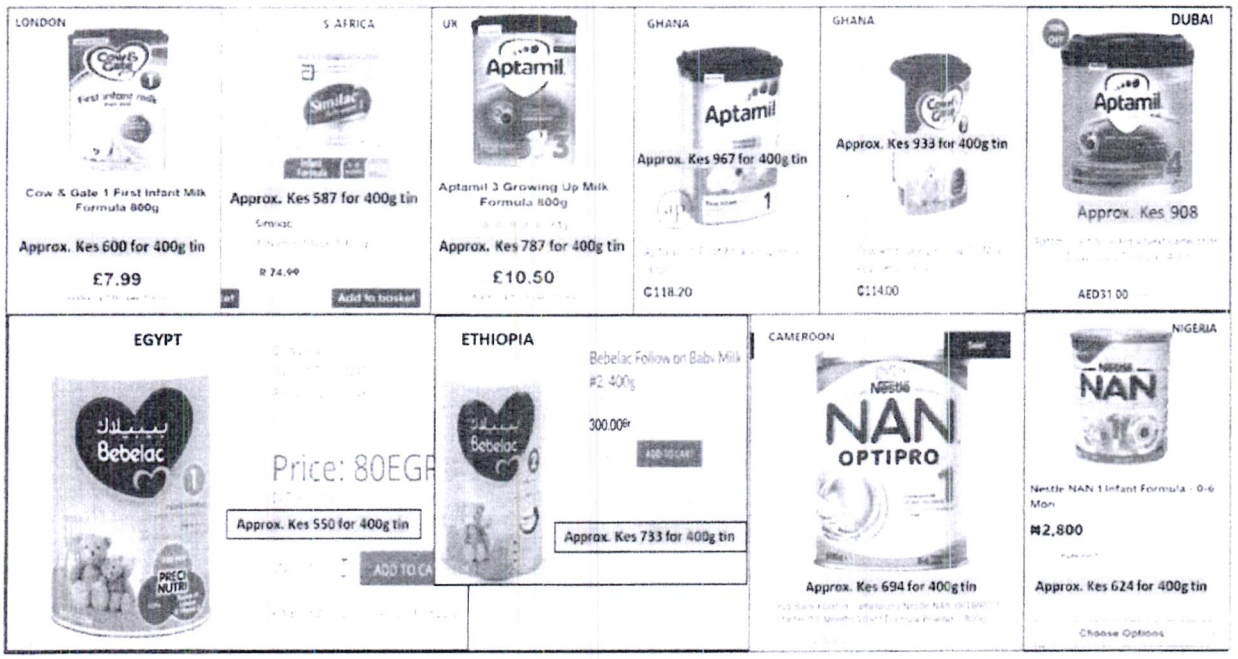
Egypt; Bebelac 1 Infant Formula From 0-6 months 400 gm (egyptiandrugstore.com)

UK; https://www.boots.com/baby-child/babyfeeding/baby-milk-formula#facet:-70000000000001356051021051141151163210910510810 7&productBeginIndex:0&orderBy:&pageView:grid&minPrice:&maxPrice:&pageSize:&

Cameroon; https://marketplaz.com/?c=all&s=baby+formula

Ethiopia https://www.kedamegebeya.com/product/bebelac-follow-on-baby-milk-2-400g/

GHANA; https://addpharma4u.com/product-category/baby/baby-formula/



APPENDIX 5

COST OF INFANT FORMULA NEGATIVELY IMPACTING FAMILY BUDGETS, SAYS PARLIAMENTARY INQUIRY

15 November 2018

Parliamentary Inquiry highlights the need for more research into the impact of austerity and hardship on families who use infant formula.

Today at the Unicef UK Baby Friendly conference the All Party Parliamentary Group on Infant Feeding and Inequalities (APPGIFI) will launch findings from their inquiry into the financial impact of infant formula on family budgets in the UK.

Dr Helen Crawley, Director of First Steps Nutrition Trust and author of the report will today tell delegates at the Unicef UK Baby Friendly Conference that the APPGIFI inquiry has found that the high cost of infant formula is reported to be having a seriously negative impact on a number of families in the UK, and that this may lead to unsafe feeding practices, and parents limiting their own food intake or that of other children, in order to make ends meet. Vulnerable and low income families, those with multiple births, homeless families, those living in temporary accommodation, asylum seeking families and those with no recourse to public funds are most at risk of experiencing 'formula' poverty.

Key findings include:

- The cost of infant formula was reported to have a serious impact on some family budgets and can range from **£6.44 to £13.52** per week for powdered varieties, compared to **£24.47 to £32.20** for ready to feed products.
- Families on tight budgets may resort to unsafe practices in order to feed their babies – like skipping feeds, watering down formula or adding cereal.
- Marketing and advertising were reported to have a significant influence on families' choice of infant formula in spite of the fact that all infant formula must have a composition that conforms to UK regulations.

Both parents and health care professionals reported that they, or families they know, often go without essential items in order to be able to afford infant formula.

"I often go without basic toiletry essentials (particularly feminine care items) due to having to choose between those and formula" – Parent respondent.

"I have cared for families who will have the money for formula but won't have the money to buy essentials such as soap, fruit and veg, won't wash clothes." – Health Worker respondent.

"Formula is incredibly expensive, we struggled at times when we reached the end of my maternity pay. We are both professionals in public sector jobs, I imagine it's almost impossible for low income families to cope with the costs. Families will be buying formula with the food shop and it will inevitably be affecting how much they can pay for food." – Parent respondent.

Dr Helen Crawley, Director of First Steps Nutrition Trust, said: "We wanted to know more about the lived experience of families using formula and the financial impact on the family budget. We also looked at the determinants of formula choice, the advice and support available and how this affects feeding practices in the UK.

Source: https://www.unicef.org.uk/babyfriendly/cost-of-infant-formula-inquiry/

PETITION TO THE NATIONAL ASSEMBLY ON THE GOVERNANCE FRAMEWORK FOR THE PETROLEUM DEVELOPMENT LEVY GOVERNED BY THE PETROLEUM DEVELOPMENT FUND ACT, 1991 & INCREASED THROUGH LEGAL NOTICE NO. 174 OF 2020, INCREMENTS TO THE VATABLE BASE IMPOSED UNDER THE TAX (AMENDMENT) ACT, 2020 , THE INTENDED INCREMENT OF VALUE ADDED TAX (VAT) FROM 8 PER CENT TO 16 PER CENT, AND THE INTENDED INCREMENT OF LIQUIFIED PETROLEUM GAS PRICES STARTING 1ST JULY 2021

① DLPS
Please deal.
19/05/21

Date: 13th May 2021

TO:

The National Assembly
C/O The Clerk
Kenya National Assembly
Parliament Buildings
P.O Box 41842-00100
NAIROBI

RE: PETITION TO THE NATIONAL ASSEMBLY ON THE GOVERNANCE FRAMEWORK FOR THE PETROLEUM DEVELOPMENT LEVY GOVERNED BY THE PETROLEUM DEVELOPMENT FUND ACT, 1991 & INCREASED THROUGH LEGAL NOTICE NO. 124 DATED 10TH JULY 2020, INCREMENTS TO THE VATABLE BASE IMPOSED UNDER THE TAX (AMENDMENT) ACT, 2020, THE INTENDED INCREMENT OF VALUE ADDED TAX (VAT) FROM 8 PER CENT TO 16 PER CENT, AND THE INTENDED INCREMENT OF LIQUIFIED PETROLEUM GAS PRICES STARTING 1ST JULY 2021.

I, the undersigned Petitioner, who is a Citizen of the Republic of Kenya;

DRAW the attention of the National Assembly and specifically the Energy Committee and the Budgets and Appropriations Committee to the following:

1. That in 2010, through the Energy (Petroleum Pricing) Regulations 2010, being Legal Notice No. 196 of 2010, the Government of Kenya, introduced petroleum price control at the pump for imported petroleum products to be implemented by the Energy Regulatory Commission (now the Energy & Petroleum Regulatory Authority (EPRA)) with a view to reducing exploitation of consumers by private oil companies.

2. That however, punitive taxation on the products appears to be impeding its effectiveness. That taxation policy has evolved over the last 2 years bringing the proportionate contribution of taxes and levies to the retail pump price of petroleum fuels to almost 50. In 2018, Value Added Tax was increased to 16 per cent and later cut to stand at 8 per cent in accordance with the Value Added Tax Act, 2013 whose implementation was deferred. The Tax (Amendment) Act, 2020 further increased the contribution of VAT to the retail price

③ Ms Leah - W.C
for attention
of Dept. Committee
on Finance.
No proj
3/5/21

NATIONAL ASSEMBLY
RECEIVED
13 MAY 2021
DEPUTY CLERK
P. O. Box 41842 - 00100, NAIROBI

② Head, Take Note
To register and prepare a report for conveyance by speaker, and to forward to Committee on Finance to consider together with Finance Bill, 2021.
31/5/21.

by increasing the Vatable base to include excise duties and other fees. The petroleum development levy was increased by Kshs. 5.00 through Legal Notice No. 174 of 2020. The increment was claimed to carry with it a petroleum price stabilization objective. All these have jointly resulted in the increase in prices to a nine-year high in February 2021.

3. That while the Government enacted the Petroleum Development Levy Fund Act, 1991 to provide for the establishment of a Petroleum Development Fund and the imposition of a petroleum development levy and for connected purposes, the Act does not clearly elaborate on the purpose of the Fund, the formula for determination of the levy, and its utilization. Further, the Petroleum Act, 2019 does not contain any provision for a petroleum stabilization fund, or any fund in that case, with an objective of petroleum price stabilization. A development fund cannot be claimed to also serve as a stabilization fund, without clear legislation or regulations on the same.

4. That the Energy and Petroleum Regulatory Authority (EPRA) recently validated the Draft Petroleum (Pricing) Regulations, 2020, which failed to encompass proposals for the enforcement of the diesel subsidy.

5. That according to news reports on account of mounting pressure from the International Monetary Fund, the Government is looking to increase the Value Added Tax on petroleum products by an additional 8 per cent bringing it to 16 per cent. This is despite the fact that the Cabinet Secretary for Petroleum and Mining, while appearing before the Senate Energy Committee stated that Kenya charges the highest taxes in the region.

6. That in June 2020, the President assented into law the Finance Act, 2020 which among others, revised the Value Added Tax on the supply of liquified petroleum gas from zero rate to standard rate, effective 1st July 2021. This will see the 13-kg of cooking gas retail price increase from the current approximate Kshs. 2,250 to Kshs. 2,610. Both internationally and nationally, the Government has committed to reducing carbon and other greenhouse gas emissions. In Order to meet these obligations and cushion Kenyans against these extremely difficult economic times, It is crucial that the Government's fiscal measures and policies do not impede, but promote, access to cleaner and affordable sources of energy by all Kenyans. Currently, approximately 80 per cent rural households and urban poor use dirty and carbon intensive energy sources for cooking and heating. The recent uptake of the Liquified Petroleum Gas use by Kenyans shall be impeded by the increase.

PETITION TO THE NATIONAL ASSEMBLY ON THE GOVERNANCE FRAMEWORK FOR THE PETROLEUM DEVELOPMENT LEVY GOVERNED BY THE PETROLEUM DEVELOPMENT FUND ACT, 1991 & INCREASED THROUGH LEGAL NOTICE NO. 174 OF 2020, INCREMENTS TO THE VATABLE BASE IMPOSED UNDER THE TAX (AMENDMENT) ACT, 2020 , THE INTENDED INCREMENT OF VALUE ADDED TAX (VAT) FROM 8 PER CENT TO 16 PER CENT, AND THE INTENDED INCREMENT OF LIQUIFIED PETROLEUM GAS PRICES STARTING 1ST JULY 2021

7. That on or about March 2020, the Country was hit by the Coronavirus Pandemic, which crippled the lives of many Kenyans and the economy at large. On account of increased taxation on fuel, Kenyans were not able to benefit from the global downturn of oil prices until recently.

8. That with international crude oil prices hitting pre-pandemic levels over above 60 US Dollars in February, Kenyans are now feeling the delayed impact of last year's increase of taxation on the price of fuel which is an essential commodity. Though taxes may have been levied on petroleum products the impact is felt on the prices of a much larger number of goods and services because of the flow of inputs and outputs. For instance, the average cost of transportation has increased by 18 per cent since March 2019 this has had a ripple effect on the cost of food as well as other essential household commodities. Electricity consumers also paid an extra Kshs 1.2 more per unit in the Month of March on account of an increase in compensation by Kenya Power and Lighting Company to diesel plants.

9. That with international oil prices on an upward trend, it is expected that if left unchecked, prices will continue to go up further worsening the existing poor socio-economic status of Kenyans.

10. That it is unconscionable, that Kenyans pay taxes almost the equivalent of landing costs of petroleum products at the pump, in taxes. This amounts to over taxation of Kenyans who are already struggling to make ends meet with Covid-19 pandemic and the subsequent lockdowns.

11. That Kenya currently has the highest pump price for petroleum products in East Africa, even for some of its neighbours that are landlocked countries. This carries a potential risk of fuel trafficking across Kenya`s borders.

12. That despite raising this concern with EPRA during public participation on petroleum pricing regulations, the same has not been addressed.

REASONS WHEREFORE your humble Petitioner Prays that the National Assembly:

a) Reviews to reduce the amount of taxes and levies charged on petroleum products to alleviate the burden on the consumer.

PETITION TO THE NATIONAL ASSEMBLY ON THE GOVERNANCE FRAMEWORK FOR THE PETROLEUM DEVELOPMENT LEVY GOVERNED BY THE PETROLEUM DEVELOPMENT FUND ACT, 1991 & INCREASED THROUGH LEGAL NOTICE NO. 174 OF 2020, INCREMENTS TO THE VATABLE BASE IMPOSED UNDER THE TAX (AMENDMENT) ACT, 2020 , THE INTENDED INCREMENT OF VALUE ADDED TAX (VAT) FROM 8 PER CENT TO 16 PER CENT, AND THE INTENDED INCREMENT OF LIQUIFIED PETROLEUM GAS PRICES STARTING 1ST JULY 2021

b) Revokes the intended increment and amends the imposed Value Added Tax on liquified petroleum gas, including propane, from the standard rate to the previous zero rate.
c) Directs the Cabinet Secretary to explain the reasons for the sharp increase in the petroleum development levy, explain the intended purpose of the levy, provide an account of how previous revenue generated from the levy has been utilized, and provide relevant enabling legislation relied upon for compensation of private sector players.
d) Revokes the petroleum development levy increase until the action in (b) above has been executed.
e) Halts or declines any intended increase in Value Added Tax by 6 % on petroleum products.
f) Directs the Cabinet Secretary to formulate regulations on the purpose, objectives, and operationalization of the petroleum development levy fund, together with a transparency and accountability framework as required under the Petroleum Act.
g) Directs the Cabinet Secretary to clarify and make regulations on the intended subsidy function/objective of the petroleum development levy, including how this will be implemented.
h) Makes any other order it may deem fit, in the protection of public interest.

And your PETITIONER will ever Pray.

Names of the Petitioner	Full Address	National ID/Passport No.	Signature/Thumb impression
Charles Wanguhu	6th FLOOR I-HUB SENTLU PLAZA P.O.Box 22944-00505 NBO	22205895	

D/DCs
Please deal.
14/06/21

Leah Muiura
pls facil. late
15/6/21

Coca-Cola Beverages Africa
Proprietary Limited
Company Registration No
2016/050997/07

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Private & Confidential

1st June 2021

Mr. Michael Sialai, CBS
The Clerk of the National Assembly
P.O Box 41842 -00100
Parliament Building
Nairobi
Kenya
Email: clerk@parliament.go.ke

NATIONAL ASSEMBLY
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10 JUN 2021
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P. O. Box 41842-NAIROBI

Dear Sir,

MEMORANDUM OF REPRESENTATION ON THE FINANCE BILL 2021 TO THE NATIONAL ASSEMBLY

We refer to the notice dated 21st May 2021 inviting the public for submission of memoranda for consideration in respect to the Finance Bill 2021. This is pursuant to Article 118 (1) (b) of the Constitution of Kenya and Standing Order 127 (3) of the National Assembly Standing Orders.

Pursuant to the notice, please find below the submission by Coca-Cola Beverages Africa Proprietary Limited ("CCBA"), as a stakeholder in Kenya through its investments in its Kenyan bottling subsidiaries of Nairobi Bottlers Limited, Equator Bottlers Limited, Crown Beverages Limited and Almasi Bottlers Limited (collectively, the four subsidiaries, the "Bottlers"). CCBA made proposals for consideration to the National Treasury in November 2020 and was invited to make oral submissions in March 2021. Please find attached herewith our detailed submissions dated the 14th of November 2020 for your ease of reference.

As an outcome of the process of public participation with the National Treasury, one of the proposals that the system made was the removal of excise tax of 25% on imported glass that had been introduced through the Business Laws Amendment Act of 2020. We would like to commend the Government for the proposal to remove the 25% excise duty as detailed in the Finance Bill and we look forward to this position being maintained in the Finance Act 2021.

Our understanding is that the introduction of excise tax on imported glass was done to protect the local glass manufacturing sector. As glass users, we have demonstrated that we are ready to support the sourcing of glass locally and are prepared to partner with the government in upscaling the industry and enhancing competitiveness. As the local glass industry capacity grows, so will our local sourcing ratio. In demonstration of our commitment, we are jointly working with key players in this sector to address the challenges of the local glass industry and propose solutions for energy cost, cheap glass imports/under valuation into the country, and proposal on incentives to invest in technology and capacity of the local glass manufacturers.

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Coca-Cola Beverages Africa

The introduction of excise duty on glass last year did not aid in achieving growth in the local glass manufacturing sector but instead was a punitive measure that served to increase the cost and burden of doing business in Kenya. We also note that there are ongoing bilateral engagements between the Republic of Tanzania and Kenya to address issues affecting trade. This removal of excise duty will further promote regional economic growth with the largest amount of glass bottles being imported from Tanzania.

As part of the proposals made by CCBA to the National Treasury for the 2021 budget cycle, we would like to reiterate two areas with respect to which we made submissions and which have a significant impact on the Coca- Cola system and the value chain, for your further consideration. We recognize that these two proposals were not addressed in the Finance Bill and due to the macro and micro economic impacts of the proposals, we will be honoured if the National Assembly considered them during this process of public participation.

As an introduction we would like to reference a World Bank report on the link between taxes and econom growth[1]. This report references evidence from 20 countries that shows that those with lower taxes experienced more rapid expansion of investment, productivity, employment, and government services, and had better growth rates, without discriminating against the poor. This paper examines the mechanisms by which fiscal policies may have affected their performance. The evidence suggests that tax policy has affected economic performance via two basic mechanisms: (i) lower taxes have resulted in higher real returns to savings, investment, work, and innovation, and higher returns have stimulated a larger aggregate supply of these factors of production and thus raised total output; and (ii) the focus and types of fiscal incentives provided by low-tax countries appear to have shifted resources from less productive to more productive sectors and activities; thus increasing the overall efficiency of resource utilization.

It is with this economic impact in mind that we would like to further analyze the two proposals below:

1. Electronic Goods Management System – reduction of cost of excise stamps

1.1 Provisions of the law and issue of concern

We recognize the rationale behind the introduction of excise stamps as this was geared towards driving compliance by ensuring traceability of goods and combating illicit trade. However, for compliant taxpayers, these stamps serve effectively as a tax on a tax while non-compliant taxpayers largely escape both taxes. As such the cost of the stamps and underlying excise tax continue to be a major cost for the business resulting in reduced sales as the business in most cases has to absorb this cost. Transferring this cost to the final consumer would result in a further decline in sales due to the price sensitivity of the products. The introduction of the stamps in November 2019 on non-alcoholic beverages and bottled water required a significant capital injection by the Bottlers and they continue to incur an additional excise stamp cost of 60 cents for every bottle sold on non-alcoholic beverages and 50 cents on bottled water. This is over and above the excise tax payable on these products. It is useful to note that, for the beverage industry, illicit sales and tax evasion are not prevalent practices.

[1] https://documents.worldbank.org/en/publication/documents-reports/documentdetail/447031468756620681/links-between-taxes-and-economic-growth-some-empirical-evidence

Efficiency, which is a maxim of taxation provides that a tax should not hinder economic activity nor alter consumption, production and investment decisions made by businesses and households. It further provides that the tax should raise revenue needed at the lowest possible cost to the taxpayer. Based on the analysis done below, we are of the view that the current cost of the excise stamp is not efficient and requires review.

- **Analysis of the cost of the stamp as a percentage to excise duty**

	200ml Soda	300 ml Soda	Bottled water 500 ml
Cost of Excise Stamp	0.60	0.60	0.50
Excise Tax per litre (5.74)	1.15	1.72	2.87
Excise stamp as a % of excise duty	**52%**	**35%**	**17%**

The cost of the stamp, which is aimed at ensuring compliance and protection of the excise tax, is very high compared to the excise tax it purports to collect. The issue is further compounded by the fact that, in CCBA group's business, the popular high volume 300 ml returnable glass beverage has the least risk of counterfeits and illicit trade. This therefore means that the cost of the stamp becomes a cost on business without a direct benefit of increased sales to the business.

- **Comparison with other categories**

	Beer/ ltr	Spirits/ltr	Non-alcoholic beverages/ltr
Excise duty payable per litre	116.08	265.50	5.74
Cost of excise stamp	2.8	2.8	0.5
Excise stamp as a % of excise tax	**2.4%**	**1.05%**	**8.75%**

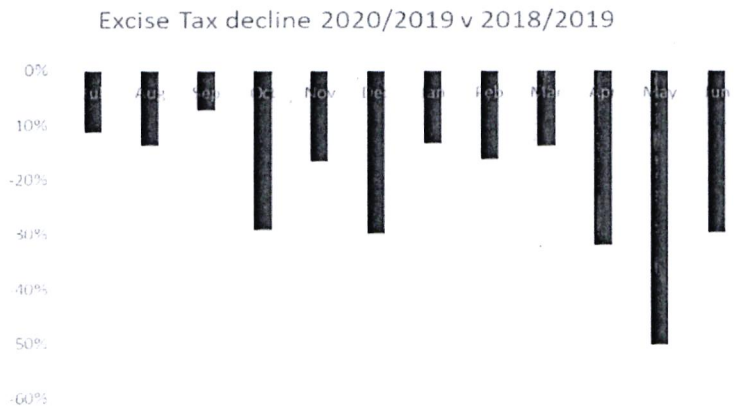
Based on the analysis above, the current cost of the excise stamp is three times higher on non-alcoholic beverages compared to the other excisable products.

- **The Impact of a price increase to factor in the cost of excise stamps**

We strongly emphasise that increasing taxes is anticipated to have a negative impact on economic growth and tax collection. In the event that the business takes price to factor in the excise stamp cost of 60 cents on non-alcoholic beverages and 50 cents on bottled water, it is forecasted that, although government will collect revenues from the purchase of the stamps, the overall other tax collections through VAT, excise, PAYE, corporate tax and import duty will decline by 11.3% in 2021 compared to 2019.

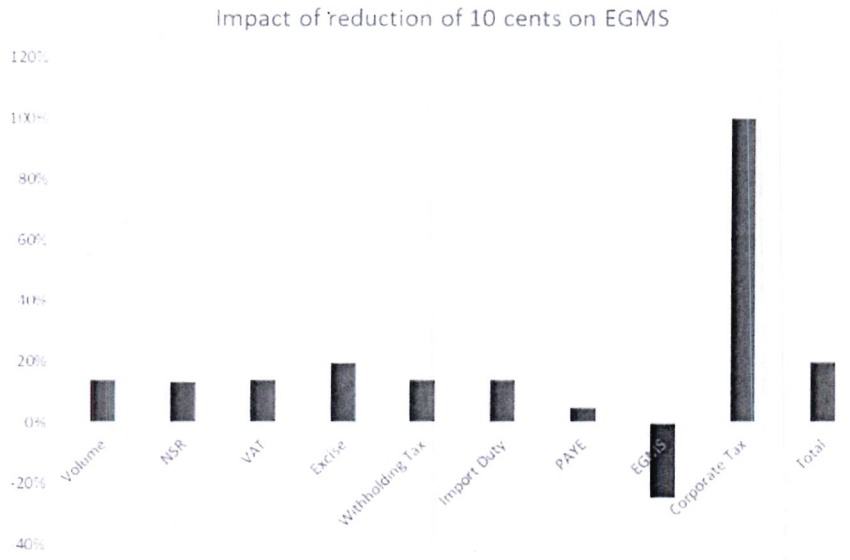


As a group, we have quantified the decline from an excise tax perspective since the introduction of the Electronic Goods Management System ("EGMS"), which clearly indicates that a higher rate does not result in a higher amount of taxes being collected. The graph below represents a comparison in the excise tax collections for the period 2019-2020 when EGMS was introduced to 2018/2019.



- **Forecasted tax collections resulting from reduction of the excise stamp cost by 10 cents**

The Laffer Curve (developed by supply-side economist Arthur Laffer) illustrates that that in certain instances reducing tax rates can increase total tax revenue. Our analysis reflects that a reduction by 10 cents of the cost of excise stamp on the 300 ml returnable glass bottle is expected to result in an increase in volumes sold with the outcome of increasing taxes across all tax heads as represented in the graph below.



1.2 Recommendation

We advocate for the review of the EGMS regulations to reduce the cost of the excise stamps by 10 cents. This means revising the cost for non-alcoholic beverages from 60 cents to 50 cents and for bottled water from of 50 cents to 40 cents.

We further recommend that the capital expenses incurred in the implementation of EGMS be treated as an allowed expense for tax purposes as these are costs borne by the tax payer to assist government in tax compliance, widening the tax base and increasing excise tax collections.

1.3 Justification

- As demonstrated above, the cost of stamps remains too expensive as soft drinks have small margins after deduction of the cost of production, VAT and excise tax. The excise stamp cost also affects the margins of other participants in the value chain who support the backbone of the economy.
- As consumer affordability continues to be a key challenge, a decision to take price to factor in the cost of the excise stamps will result to a further decrease in volumes and this will negatively impact total tax contributions and the ability of the business to reinvest and innovate in this economy.
- Reducing the cost of tax stamps will result in maintaining affordable solutions for the consumers and sustain investment and employment across the value chain. This will result in growth of sales volumes leading to sustainable and consistent revenues for the government.

Acceptance of our proposal to reduce the cost by 10 cents will support long-term investments by legitimate industry participants and will provide a more stable trading environment for MSMEs and businesses at the bottom of the pyramid.

2. Inflation Adjustment – Revise to three years

2.1 Provision of the law and issue of concern

Section 10 of the Excise Tax Act 2015 empowers the Commissioner to adjust the specific rate of excise duty annually to take into account inflation in accordance with the formula specified in Part II of the First Schedule of the Act.

We recognize the importance of an inflation adjustment in respect to specific rates of excise tax as it is aimed at adjusting for inflation erosion of collected taxes. Since the specific tax rate is not tied to the product price, inflation erodes the value of the tax collected. The principle of inflation adjustment also assumes that the price of products increases to factor in inflation. However, this is not always the case since, as a business, it is difficult to take up price every year due to the dynamics of the market, the impact on the value chain and the capacity of the consumer which if not taken into consideration, will result in substantial decline in sales and erode any gains earned from the price increase.

Effective October 2020, the inflation adjustment factor applicable on bottled water and non-alcoholic beverages is 4.9%. The business will unfortunately have to absorb this cost as the business is not able to pass it on to consumers given the price elasticities of the products. This has the impact of eroding the Bottlers' profitability. Furthermore, if this current annual adjustment factor of 4.9% is sustained over the next four years, it will translate to an effective increase of 21% on the baseline rate. This rate of increase will not be sustainable for our business and the industry at large.

We believe that retaining the current adjustment factor for three years will allow the business enough time to both absorb and recover from the impact of this rate increase while ensuring reasonable profitability, against which the company will be able to contribute its fair share of profit taxes and other applicable indirect taxes.

2.2 Recommendation

We recommend that section 10 of the Excise Tax Act be amended to empower the Commissioner to adjust the specific rate of excise duty for inflation every three years.

2.3 Justification

- A further increase in tax in 2021 in the wake of the effects of the pandemic will negatively impact our intended investment opportunities and affect stakeholders who include, consumers, suppliers, contractors, and employees.
- A yearly inflation adjustment impacts on the producer's capacity for production and distribution of excisable products which will have a ripple effect on micro and small enterprises along the value chain.
- Any additional excise tax revenues from a yearly adjustment will be offset by losses in terms of VAT, corporate taxes, PAYE as the beverage industry is expected to contract with the associated loss of sales.

A 3-year reprieve from inflation adjustment will provide the industry the opportunity to develop and implement its post recovery plan and restore confidence in the production process.

3. Conclusion

The proposals discussed above will play a critical role in stalling any negative effects from a business perspective and it will ensure that the government collections attain some level of sustainable growth during these difficult times and in the post recovery phase.

Below is a summary of our key proposals for consideration in the 2021/2022 budget cycle:

- The reduction of the cost of the excise stamp by 10 cents for non-alcoholic beverages and bottled water.
- An amendment to section 10 of the Excise Act to empower the Commissioner to adjust excise duty for inflation every three years.

We are thankful for this opportunity to provide input on these important tax policies and we would be grateful to receiving an invite to make oral submissions before the Parliamentary Committee to expound on the issues discussed above.

Yours sincerely,

Norton M Kingwill
Coca-Cola Beverages Africa Proprietary Limited,
as the parent company of Nairobi Bottlers Limited,
Equator Bottlers Limited, Crown Beverages Limited
and Almasi Bottlers Limited

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Date: 30th May 2020

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Leah Mwaura
pls facilitate
15/6/21

The Clerk of the National Assembly,
P.O Box 41842-00100,
Nairobi- Kenya

Email: clerk@parliament.go.ke

Attention: *Mr. Michael Sialai*

RE: Submission Paper on Finance Bill 2021

We refer to the Finance Bill 2021 which intends to introduce a myriad of proposals for changes in the tax laws with a view of cushioning the country towards economic recovery amidst the COVID-19 pandemic as well as to expand the tax base.

Further to the publication of the bill on 5th May 2021, the amendments aim at amending the following Acts: Income Tax Act, the Value Added Act, the Excise Duty Act, Miscellaneous Fees, and Levies Act, the Tax Procedures Act among others.

Further to the invitation for the submissions concerning ongoing public participation on the Finance Bill, we are glad to share our submissions concerning a few provisions which we believe could adversely affect the tax administration.

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These include;

a. Proposed changes in the Income Tax Act;
b. Proposed changes in the Value Added Tax;
c. Proposed changes in the Excise Duty Act; and
d. Proposed changes in the Tax Procedures Act

Proposed Changes in the Income Tax Act (Cap 470)

1. Deduction of accumulated losses

Section 6 of the Bill proposes to amend section 15(4) of the ITA to remove the 10 year limit for deducting accumulated losses.

We recognize the amendment as a welcome move to encourage investment in the country. We note that investment in capital-intensive projects like the manufacturing sector. Such huge capital-intensive projects

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become a challenge to recover the capital given the unfavourable economic environments like the ongoing COVID-19 pandemic which has adversely affected the business performance and ultimate profitability.

We, therefore, urge the national assembly to approve the proposed amendment.

2. **Interest Restriction**

Section 7 of the Bill proposes to amend section 16(2) (j) of the ITA. The proposal is to restrict the allowable interest expense. With the proposal, interest expense above 30% of EBITDA shall be disallowed for tax purposes.

Grant Thornton position

Grant Thornton proposes that the National Assembly considers amending the proposed clause to clarify whether the EBITDA refers to the book/ accounting EBITDA or tax EBITDA.

We propose that the proposed EBITDA remains the accounting/ book amounts instead of the tax figures on the basis that the tax amount is an adjusted amount that varies from sector to sector.

3. **Insurance relief on NHIF Contribution**

Section 10 of the Bill proposes to amend section 31 of the ITA to provide insurance relief on contributions made to NHIF.

Medical insurance is part of the financial sector that is critical in protecting the public against unforeseen events in individual health. Over the years, the medical cost has become unsustainable where individuals have limited access to quality health.

Further, private health/ medical insurances have been quite expensive for the general public whereby the majority of people cannot afford to pay for the medical cover.

In this regard, the NHIF being a public interest insurance cover has served as an alternative source of insurance that covers a very large target population being a not-for-profit scheme.

The provision of insurance relief on the contributions will serve as a tax incentive for the people contributing to the NHIF. This will encourage people to subscribe to the scheme

This will serve as a major boost to the government's agenda of rolling out universal health coverage across the country.

Grant Thornton position

We urge the parliament to pass the amendment to support the government implement one of the Big Four Agenda on universal health coverage as well as to encourage the uptake of public health insurance covers and cushion the Kenyans against the high cost of health.

4. **Computation of capital allowances under the second schedule of the ITA**

Section 12 of the Finance Bill proposes to convert the computation of the capital allowances from the current reducing balance into a straight line.

Companies are therefore able to claim capital allowances within a short time. This in addition to the removal of the limit for claiming accumulated losses is likely to encourage investments in the country.

Further, a reduction in the time for claiming capital allowances is expected to promote proper cash flow management for the businesses since the capital allowances reduce the tax payable. Therefore, businesses can make use of excess cash to expand their businesses and hence contribute to economic growth through the creation of employment opportunities which promotes the purchasing power of the communities.

Grant Thornton position

We urge the parliament to pass the amendment to provide incentives to the businesses and support the government to implement one of the Big Four Agenda on manufacturing.

A deviation from reducing balance to the proposed straight line is a good proposal because businesses are able to plan and understand with certainty how they shall allocate the allowance for planning purposes.

Nonetheless, we note that there have been 3 amendments on th...e second schedule of the ITA within one year. These changes in the rates of capital allowances within a short time create uncertainties in the business environment since businesses are not able to plan accordingly.

This negates one of the principles of taxation on certainty which provides that businesses should be certain as to what allowance and taxes should be paid in the foreseeable future.

Therefore, we recommend that the national assembly considers protecting some of the tax provisions like the second schedule to ensure that there are no changes aside from additional incentives for instance within 5 years.

Proposed Changes in the Value Added Tax Act 2013

1. **VAT on digital supply**

Section 15 of the Bill proposes to amend section 5 of the VAT act which brings to charge supply made through the digital platforms and supplies made through an online platform that enables the supply of goods and services or other property through digital platforms.

The amendment intends to impose VAT on sales made through social media platforms. However, this is expected to increase compliance burdens for SMEs and sole proprietors who have expanded their operations into e-commerce because it is sustainable for the business.

Further, the proposal doesn't address the uncertainties in the determination of a local supply for purposes of VAT. For instance, KRA has lost on several cases against multinationals concerning reverse Vat on advertisement services done online.

Grant Thornton position

Based on the above, we recommend that the committee considers amending the proposed clause to define and provide clarity as to what constitutes local supply on digital supply for purposes of VAT.

Alternatively, the committee may opt to pass the amendment but provide further guidelines on how to determine a local supply for VAT purposes.

2. **Cabinet Secretary ability to make regulations without parliamentary approval**

Section 20 of the bill proposes to delete section 67(2).

This amendment grants the CS powers to make impose regulations on VAT without parliamentary approval.

Grant Thornton position

We object this amendment on the basis that it withdraws legislative functions from parliament to the CS in charge of finance.

This may result in a situation where the CS introduces punitive regulations without proper public participation.

Our understanding is that parliamentary approval is integral in the passing of any legislation or regulation that has an impact on the tax administration because it gives the public a better platform to share their views on any proposed amendment.

3. **Exemption of specialized solar equipment**

The energy sector in Kenya is heavily reliant on hydroelectric power and petroleum fuels which serve both domestic and commercial purposes.

Kenya has been very committed to the promotion of generation and use of clean energy given its contribution in mitigating the impacts of climate change. This has led to better incentives for the supply of products that are directly utilized in the power generation of clean energy.

Given that the adoption of solar energy applications is still in its latent phase in Kenya there is limited data on the revenue earned by suppliers. The government should put more effort into encouraging the use and penetration of use of this form of energy in the country.

Challenges of the industry

i. Solar equipment is relatively expensive to purchase and install; and
ii. Distributors in the country require a lot of capital to import as no manufacturing is done in Kenya;

Role of solar equipment in the energy sector

i. The deployment of solar equipment has seen the rise in the development of solar firms and solar power stations which contributes to the national grid;

ii. The use of solar energy promotes the use of renewable sources of energy and a clean environment; and

iii. Solar power and sola products are also largely consumed by the common citizens especially in marginalized areas because they are affordable.

Grant Thornton position

We propose that the committee considers passing the amendment to exempt the purchase of specialized solar equipment from VAT.

Alternatively, we advise the committee to consider reclassifying the items from exemption to zero-rating to allow invested to claim input VAT on VAT charged for the installation of solar and wind power. This will promote investment in green energy and a cleaner environment

This is because the amendment will help;

i. Reduce the installation cost of Solar panels and related installation equipment;
ii. Encourage adoption of the use of solar technology given it is at its latent phase of adoption in Kenya;
iii. Reduce the cost of importers as most of the equipment is bought from abroad; and
iv. Increase the electricity coverage and ultimately reduce the cost of power because it will provide other alternative sources of power.

4. **VAT on ordinary bread**

Section 21 of the Bill proposes to impose 16% VAT on ordinary bread.

Grant Thornton wishes to urge the committee to consider dropping the proposal on the basis that it is likely to increase the cost of living for common households.

Imposition of 16% VAT on such a basic commodity shall add a huge burden to the common citizens who are already yet to recover from the adverse economic effects of COVID-19.

5. **VAT on disposable plastic syringes and other syringes**

Section 21 of the Bill proposes to introduce a 16% VAT on the syringes above which have been exempt.

The proposal contradicts government's agenda of providing universal health care across the country. Syringes are critical tools in the healthcare especially during the ongoing pandemic.

Grant Thornton therefore wishes to recommend a rejection of the proposed amendment on this products on the basis that it is likely to increase the cost of healthcare. Alternatively, this may lead to lack of access of the basic commodities especially in the local health centres in the marginalized areas.

6. **VAT on Exported services**

Section 21 and 22 of the Bill proposes to amend the VAT on exported services from zero rated items to exempt items.

We understand that the government intends to minimize the VAT refunds arising from zero-rated sales. However, exempting the export of service means that companies in the export business are not able to claim a credit on input VAT on the purchases.

Therefore, to recover the VAT paid on the cost of production, the businesses may end up charging higher prices for exported services. This may render the export of service from Kenya less competitive.

Lack of competitiveness advantage on exported services negates Kenya's strategy of making Kenya a regional hub for business process outsourcing (BPO).

Grant Thornton position

Based on the above, we recommend that the committee considers rejecting the proposed amendment. Alternatively, to enhance competitiveness in the exported services, the committee may consider exempting from VAT, the purchases and inputs attributable to the generation of exported services.

Proposed Changes in the Excise Duty Act 2015

1. Excise Duty on Betting

Section 25 of the Bill proposes to introduce a 20% excise duty on betting based on the amount wagered or staked.

Grant Thornton position

We object to this tax given that the sector is overburdened by different tax obligations.

Although we understand that the objective of this amendment is to increase revenue collection, persistent imposition of taxes on the betting industry as a way of discouraging investment in the sector is punitive to the players in the sector.

The government should impose administrative regulations to regulate the operations in the sector rather than discourage investments in a single industry.

These sectors provide a source of livelihood to many employees as well as helps in nurturing talents through sponsorship of football clubs and other sporting activities.

2. Excise duty on interest and commission on loans

Section 25 of the Bill proposes to introduce fees or commissions in respect of loans. Therefore, processing fees on borrowing shall be subject to the 20% excise duty.

Grant Thornton position

We object to this amendment on the basis that it is likely to trigger an increase in the cost of credit since financial institutions will consider transferring the cost to the customers (borrowers).

This will be an additional cost to the already high cost of accessing credits for SMEs and individual businesses.

We, therefore, urge the committee to reject the proposed amendment given that it will have an adverse ripple effect on the SMEs and the economy as a whole. This is because access to credit/ capital is an integral factor of production for many businesses.

Proposed Changes in the Tax Procedures Act 2015

1. **Record Keeping and Investigation**

Section 28 of the Bill proposes to amend section 23 and section 31 of the Tax Procedures Act to extend the period the tax payers are required to keep the financial records for investigation by KRA.

Grant Thornton Position

We wish to recommend that the committee rejects the proposal on the basis that this shall add to the administrative cost for the taxpayers. Additional cost to ensure tax compliance in a company is unfavourable for the business environment. This contradicts the government's commitment of reducing the cost of doing business in Kenya.

Further, should KRA intend to conduct investigation on a company for seven years, this shall be an unreasonably long period where the organization risks to have lost some of the information or there is a likelihood of loss of institutional memory arising from changes in the staff in charge of finance. Therefore, 7 year period is likely to be used by the KRA to frustrate businesses during investigations which may lead to additional tax assessments and penalties arising from the unsupported financial records.

Additionally, we are of the view that the current 5 years period is sufficient enough for KRA to identify a tax evasion/ avoidance scheme in a company and thereby initiate the necessary investigative procedures. Hence, extending the period is granting the KRA a leeway for inefficiencies in their responsibility of enforcing tax compliance which is a continuous responsibility.

In that respect, we recommend that in case the authority feels that the 5 year period is not sufficient maybe because of limited resources, the authority should consider requesting for allocation of additional resources from The National Treasury to hire staff or to expand its capacity to do the work.

2. **Concurrent Prosecution**

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Section 40 of the Bill proposes to introduce section 108A which gives right for concurrent processions against an ongoing criminal or civil case against a taxpayer.

Grant Thorn wishes to recommend the committee to consider amending the proposed provision to prevent concurrent prosecution against similar issues/ matters in an ongoing proceeding. This is because it's against fair administration of justice whereby the accused lacks sufficient time and resources to proof their case.

In that regard, the committee should consider amending the proposed clause to make it clear that the only proceeding that maybe initiated is only on matters that are different from the ones in an ongoing legal proceeding.

Conclusion

We note that the parliamentary committees play a critical role in directing the policies and the outcome thereof in the country. The approval, amendment, and/or rejection of finance bill proposals is necessary to promote development in the country. In the exercise of these delicate tasks, we request the committee to put thorough scrutiny and perform a feasibility study on the proposals of the bill before rolling them out to the general public. In light of the above, we believe that enacting the deletion of the above provisions is untimely and negatively affects different various economic and social pillars.

The consequences of enacting the bill into law without consideration of these forecasted results will negatively impact infrastructural development, corporate social responsibility and the cyclical effect would snowball into negative effects on the taxpayer thus low tax revenue.

Should you require further facilitation on the industrial analysis of the aforementioned proposals Grant Thornton would be glad to assist

Yours Faithfully,

Grant Thornton Taxation Services Ltd

Samuel Mwaura

Partner Tax