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REPUBLIC OF KENYA  
THE NATIONAL ASSEMBLY

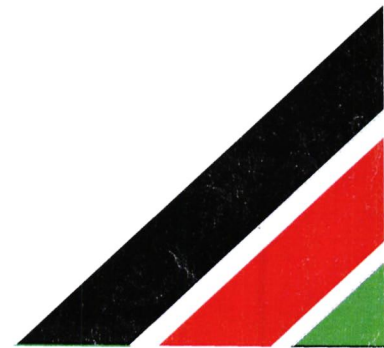
TWELFTH PARLIAMENT – FIFTH SESSION – 2021  
DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

REPORT ON THE CONSIDERATION OF THE ASIAN WIDOWS' AND ORPHANS'  
PENSIONS (REPEAL) BILL (NATIONAL ASSEMBLY BILL NO. 29 OF 2021)

CLERKS CHAMBERS  
DIRECTORATE OF DEPARTMENTAL COMMITTEES  
PARLIAMENT BUILDINGS  
NAIROBI

NOVEMBER 2021

 <b>THE NATIONAL ASSEMBLY PAPERS LAID</b>	
<b>DATE:</b> 23 NOV 2021	<b>DAY:</b> Tuesday
<b>TABLED BY:</b>	Chair, Finance Hon. Gladys Wanga
<b>CLERK-AT THE-TABLE:</b>	G. Chebet



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## CHAIRPERSON'S FOREWORD

This report contains the proceedings of the Departmental Committee on Finance and National Planning on its consideration of the Asian widows' and orphans' pensions (Repeal) Bill (National Assembly Bill No. 29 of 2021) which was published on 18<sup>th</sup> June, 2021.

The Bill went through the First Reading on 10<sup>th</sup> August 2021 and was thereafter committed to the Departmental Committee on Finance and National Planning pursuant to Standing Order 127.

Following placement of adverts in the print media on 19<sup>th</sup> August 2021 requesting for comments on the Bill from members of the public and relevant stakeholders pursuant to Article 118(1)(b) of the Constitution and Standing Order 127(3), the Committee received one written memorandum.

The Bill has four (4) clauses and seeks to repeal the Asian Widows' and Orphans' Pensions Act in light of the enactment of the Public Finance Management Act, 2012.

On behalf of the Departmental Committee on Finance and National Planning and pursuant to provisions of Standing Order 199(6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of the Asian Widows' and orphans' Pensions (Repeal) Bill, 2021. The Committee is grateful to the Offices of the Speaker and Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. I wish to express my appreciation to the Honorable Members of the Committee and the Committee Secretariat who made useful contributions towards the preparation and production of this report.

It is my pleasure to report that the Committee has considered the Asian Widows' and Orphans' Pensions (Repeal) Bill (National Assembly Bill No. 29 of 2021) and have the honour to report back to the National Assembly with the recommendation that the Bill be **approved with amendments** as contained in the report.

**Hon. Gladys Wanga, CBS, MP**

**Chairperson, Departmental Committee on Finance and National Planning**

## 1 PREFACE

### 1.1 ESTABLISHMENT OF THE COMMITTEE

1. The Departmental Committee on Finance & National Planning is one of the fifteen Departmental Committees of the National Assembly established under ***Standing Order 216*** whose mandates pursuant to the ***Standing Order 216 (5)*** are as follows:
  - i. *To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;*
  - ii. *To study the programme and policy objectives of Ministries and departments and the effectiveness of their implementation;*
  - iii. ***To study and review all the legislation referred to it;***
  - iv. *To study, access and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;*
  - v. *To investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;*
  - vi. *To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order No. 204 (Committee on appointments);*
  - vii. *To examine treaties, agreements and conventions;*
  - viii. *To make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;*
  - ix. *To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and*
  - x. *To examine any questions raised by Members on a matter within its mandate.*

### 1.2 MANDATE OF THE COMMITTEE

2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider, public finance, monetary policies, public debt, financial institutions (excluding those in securities exchange), investment and divestiture policies, pricing policies, banking, insurance, population revenue policies including taxation and national planning and development.
3. In executing its mandate, the Committee oversees the following government Ministries and departments:
  - i. National Treasury and Planning
  - ii. State Department for Devolution
  - iii. Commission on Revenue Allocation
  - iv. Office of the Controller of Budget
  - v. Salaries and Remuneration Commission

### 1.3 COMMITTEE MEMBERSHIP

4. The Departmental Committee on Finance and National Planning was constituted by the House in July, 2020 and comprises of the following Members:

#### **Chairperson**

Hon. Gladys Wanga, CBS, MP  
Homabay County  
**ODM Party**

#### **Vice-Chairperson**

Hon. Isaac W. Ndirangu, MP  
Roysambu Constituency  
**Jubilee Party**

#### **Members**

Hon. Jimmy O. Angwenyi, MP  
Kitutu Chache North Constituency  
**Jubilee Party**

Hon. Christopher Omulele, MP  
Luanda Constituency  
**ODM Party**

Hon. Shakeel Shabbir Ahmed, MP  
Kisumu East Constituency  
**Independent Member**

Hon. Daniel Nanok, MP  
Turkana West Constituency  
**Jubilee Party**

Hon. (Dr.) Christine Ombaka, MP  
Siaya County  
**ODM Party**

Hon. Andrew Okuome, MP  
Karachuonyo Constituency  
**ODM Party**

Hon. David Mboni, MP  
Kitui Rural Constituency  
**CCU Party**

Hon. Francis K. Kimani, MP  
Molo Constituency  
**Jubilee Party**

Hon. Joseph Oyula, MP  
Butula Constituency

#### **ODM Party**

Hon. Joshua Kandie, MP  
Baringo Central Constituency  
**MCC Party**

Hon. Stanley Muthama, MP  
Lamu West Constituency  
**MCC Party**

Hon. Edith Nyenze, MP  
Kitui West Constituency  
**WDM-K**

Hon. Catherine Waruguru, MP  
Laikipia County  
**Jubilee Party**

Hon. James Mwangi, MP  
Tetu Constituency  
**Jubilee Party**

Hon. (Prof.) Mohamud Muhamed, MP  
South Constituency  
**Jubilee Party**

Hon. Peter Lochakapong, MP  
Sigor Constituency  
**Jubilee Party**

Hon. Qalicha Gufu Wario, MP  
Moyale Constituency  
**Jubilee Party**

#### 1.4 COMMITTEE SECRETARIAT

5. The Committee is facilitated by the following Secretariat:

Ms. Leah W. Mwaura  
**Senior Clerk Assistant/Head of Secretariat**

Ms. Jennifer Ndeto  
**Principal Legal Counsel 1**

Ms. Lauren Wesonga  
**Clerk Assistant II**

Mr. Josephat Motonu  
**Senior Fiscal Analyst**

Mr. Chelang'a Maiyo  
**Research Officer II**

Mr. Luka Mutua  
**Serjeant-At-Arms**

Mr. John Njoro  
**Serjeant-At-Arms**

Ms. Christine Maeri  
**Audio Officer**

Ms. Hannah Mwangi  
**Intern**

## **2 OVERVIEW OF THE ASIANS' AND ORPHANS' PENSIONS (REPEAL) BILL (NATIONAL ASSEMBLY BILL NO. 29 OF 2021)**

### **2.1 INTRODUCTION**

6. The principal objective of the Bill is to repeal the Asian Widows' and Orphans' Pensions Act in light of the enactment of the Public Finance Management Act, 2012.

### **2.2 ANALYSIS OF THE BILL**

The Bill repeals the Public Finance Management Act, 2012 and has 4 clauses. It proposes the following amendments:

7. **Clause 1** of the Bill provides for the short title
8. **Clause 2** of the Bill provides for the definition of terms
9. **Clause 3** of the Bill provides for the repeal of Asian Widows' and Orphans' Pensions Act (CAP 193.)
10. **Clause 4** of the Bill provides for the transitional provisions.
11. The Bill does not delegate legislative power or limit any fundamental rights or freedoms.
12. The enactment of this Bill shall not occasion additional expenditure of public funds.

### **3 PUBLIC PARTICIPATION/STAKEHOLDERS CONSULTATION**

13. Following the call for memoranda from the public through the placement of adverts in the print media on 19<sup>th</sup> August 2021, the Committee received one memorandum from Hon. Sonia Birdi. Hon. Birdi submitted that:

#### **3.1 HON. SUNJEEV KAUR BIRDI**

14. In a memorandum, dated 2<sup>nd</sup> September 2021, Hon. Birdi proposed that an actuarial valuation should be done to determine the actual liability and advice on the amount to hold in respect of data contingency. Additionally, member option forms need to be done and signed by members to avoid any legal issues in future regarding closure of the funds.
15. She also proposed that a register of Asian widows and orphans residing in the country should be consolidated so as to ensure that the Act is not repealed yet there are people who are supposed to benefit from the Fund

#### 4 COMMITTEE OBSERVATIONS

In considering the Bill, the Committee observed that:

16. The Asian Widows' And Orphans' Pensions Act was enacted to make provision for granting pensions to widows and children of deceased Asian public officers and given that the fund has been dormant since the Government of Kenya no longer pays the pensions of Asian widows and orphans as it was transferred to the Crown Agents.

## 5 COMMITTEE RECOMMENDATION

17. The Committee having considered the Asian Widows' and Orphans' Pensions (Repeal) Bill (National Assembly Bill No. 29 of 2021) recommends that the House **approves the Bill with amendments** as proposed in the schedule in chapter 6.

**6 SCHEDULE OF PROPOSED AMENDMENTS**

18. The Committee proposed the following amendments to be considered by the House in the Committee Stage:

**CLAUSE 4**

19. **THAT**, the Bill be amended in clause 4 by inserting the following new paragraph immediately after paragraph (e)-

(f) the Auditor General shall, within one year of the coming into operation of this Act, submit to the National Assembly a terminating audit report of the Fund.

**Justification**

To provide that the Auditor General must submit a status report on the fund within one year.

SIGNED..... DATE 23/11/2021.....

  
**HON. GLADYS WANGA, CBS, MP**  
**CHAIRPERSON**

**DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING**

**ADOPTION OF THE REPORT ON THE CONSIDERATION OF THE ASIAN WIDOWS' AND ORPHANS' PENSIONS (REPEAL) BILL (NATIONAL ASSEMBLY BILL NO. 29 OF 2021)**

The report on the consideration of the Asian Widows' and Orphans' Pensions (Repeal) Bill (National Assembly Bill No. 29 of 2021) was adopted by the Committee on Monday, 22<sup>nd</sup> November 2021 having been proposed and seconded by Hon. Shakeel Shabbir, CBS, M.P. and Hon. Joseph Oyula, M.P. respectively. The following Members acceded to the recommendations proposed in the report to be considered during the Committee Stage having been present in the meeting:

1. Hon. Gladys Wanga, CBS, M.P. - **Chairperson**
2. Hon. Isaac Waihenya Ndirangu, M.P. - **Vice-Chairperson**
3. Hon. Jimmy Angwenyi, MGH, M.P.
4. Hon. Christopher Omulele, CBS, M.P.
5. Hon. Shakeel Shabbir Ahmed, CBS, M.P.
6. Hon. Daniel Nanok, M.P.
7. Hon. (Dr.) Christine Ombaka, M.P.
8. Hon. Andrew Okuome, M.P.
9. Hon. Francis Kimani, M.P.
10. Hon. Joseph Oyula, M.P.
11. Hon. Joshua Kandie, M.P.
12. Hon. Catherine Waruguru, M.P.
13. Hon. James Gichuhi Mwangi, M.P.
14. Hon. (Prof.) Mohamud Sheikh Mohamed, M.P.

**MINUTES OF THE 85<sup>TH</sup> SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING HELD IN VIRTUALLY ON MONDAY, 22<sup>ND</sup> NOVEMBER 2021 AT 10:00 A.M.**

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**PRESENT**

- |   |   |                         |
|---|---|-------------------------|
| 1. Hon. Gladys Wanga, CBS, MP               | - | <b>Chairperson</b>      |
| 2. Hon. Isaac W. Ndirangu, MP               | - | <b>Vice Chairperson</b> |
| 3. Hon. Jimmy O. Angwenyi, MGH, MP          |   |                         |
| 4. Hon. Christopher Omulele, CBS, MP        |   |                         |
| 5. Hon. Shakeel Shabbir Ahmed, CBS, MP      |   |                         |
| 6. Hon. Daniel E. Nanok, MP                 |   |                         |
| 7. Hon. (Dr.) Christine Ombaka, MP          |   |                         |
| 8. Hon. Andrew A. Okuome, MP                |   |                         |
| 9. Hon. Francis K. Kimani, MP               |   |                         |
| 10. Hon. Joseph M. Oyula, MP                |   |                         |
| 11. Hon. Catherine Waruguru, MP             |   |                         |
| 12. Hon. James Gichuhi Mwangi, MP           |   |                         |
| 13. Hon. (Prof.) Mohamud Sheikh Mohamed, MP |   |                         |
| 14. Hon. Joshua C. Kandie, MP               |   |                         |

**ABSENT WITH APOLOGY**

1. Hon. David M. Mboni, MP
2. Hon. Stanley M. Muthama, MP
3. Hon. Edith Nyenze, MP
4. Hon. Peter Lochakapong, MP
5. Hon. Qalicha Gufu Wario, MP

**IN ATTENDANCE**

**SECRETARIAT**

- |                        |   |  |
|------------------------|---|--|
| 1. Ms. Leah Mwaura     | - | Senior Clerk Assistant/Head of Secretariat |
| 2. Ms. Jennifer Ndeto  | - | Principal Legal Counsel I                  |
| 3. Ms. Laureen Wesonga | - | Clerk Assistant II                         |
| 4. Mr. Josephat Motonu | - | Senior Fiscal Analyst                      |
| 5. Mr. Mark Mbuthia    | - | Audio Officer                              |
| 6. Ms. Hannah Mwangi   | - | Intern                                     |

**AGENDA**

1. Prayers
2. Communication from the Chairperson
3. Confirmation of Minutes from the previous sitting(s) and Matters Arising
4. **Clause by clause consideration and adoption of reports of the following Bills:**
  - i. **Senate Amendments to the Public Private Partnerships Bill, 2021;**
  - ii. **The Asian Widows' and Orphans' Pensions (Repeal) Bill, 2021;**
  - iii. **The Provident Fund (Repeal) Bill, 2021;**
  - iv. **The Public Procurement and Asset Disposal (Amendment) Bill, 2021; and**
  - v. **The Public Procurement and Asset Disposal (Amendment) (No. 2) Bill, 2021**
5. Any Other Business
6. Adjournment/Date of Next Meeting

**MIN.NO.NA/F&NP/2021/398: COMMUNICATION FROM THE CHAIRPERSON**

The meeting was called to order at 10:27 a.m. and a prayer was said. The Chairperson welcomed the meeting to deliberate on the day's agenda.

**MIN.NO.NA/F&NP/2021/399: CONFIRMATION OF MINUTES**  
Agenda deferred

**MIN.NO.NA/F&NP/2021/400: CLAUSE BY CLAUSE CONSIDERATION AND ADOPTION OF THE REPORT OF THE SENATE AMENDMENTS TO THE PUBLIC PRIVATE PARTNERSHIPS BILL, 2021**

Members observed that Senate amendments to the Public Private Partnerships Bill, 2021 added value to the amendments passed by the National Assembly. The Committee therefore resolved as follows on the Senate amendments:

1. **Clause 6:** Agreed to
2. **Clause 33:** Agreed to
3. **Clause 75:** Agreed to
4. **New Clauses:** Agreed to

The Committee adopted the report on the consideration of the Public Private Partnerships Bill, 2021 having been proposed by Hon. Joseph Oyula, MP and seconded by Hon. (Dr.) Christine Ombaka, MP.

**MIN.NO.NA/F&NP/2021/401: CLAUSE BY CLAUSE CONSIDERATION AND ADOPTION OF THE REPORT OF THE ASIAN WIDOWS' AND ORPHANS PENSIONS (REPEAL) BILL, 2021**

The Committee deliberated on the amendments proposed in the Bill and resolved as follows:

1. **Clause 1:** Agreed to
2. **Clause 2:** Agreed to
3. **Clause 3:** Agreed to
4. **Clause 4**

Amend by inserting a new paragraph (f) providing for the final auditing of the accounts.

The Committee adopted the report on the consideration of the Asian Widows' and Orphans' Pensions (Repeal) Bill, 2021 having been proposed by Hon. Shakeel Shabbir, CBS, MP and seconded by Hon. Joseph Oyula, MP.

**MIN.NO.NA/F&NP/2021/402: CLAUSE BY CLAUSE CONSIDERATION AND ADOPTION OF THE REPORT OF THE PROVIDENT FUND (REPEAL) BILL, 2021**

The Committee deliberated on the amendments proposed in the Bill and resolved as follows:

1. **Clause 1:** Agreed to
2. **Clause 2:** Agreed to
3. **Clause 3:** Agreed to
4. **Clause 4**

Amend by inserting a new paragraph (f) providing for the final auditing of the accounts.

The Committee adopted the report on the consideration of the Provident Fund (Repeal) Bill, 2021 having been proposed by Hon. (Dr.) Christine Ombaka, MP and seconded by Hon. Joshua Kandie, MP.

CLAUSE BY CLAUSE CONSIDERATION  
AND ADOPTION OF THE REPORT OF THE  
PUBLIC PROCUREMENT AND ASSET  
DISPOSAL (AMENDMENT) BILL (N.A. BILL  
NO. 32 OF 2021)

The Committee deliberated on the amendments proposed in the Bill and resolved as follows:

1. **Clause 1:** Agreed to
2. **Clause 2:** Delete paragraph (a)
3. **Clause 3:** Delete
4. **Clause 4:** Delete
5. **Clause 5:** Agreed to
6. **Clause 6:** Agreed to
7. **Clause 7:** Agreed to
8. **Clause 8:** Agreed to
9. **Clause 9:** Agreed to
10. **Clause 10:** Agreed to
11. **Clause 11:** Agreed to
12. **Clause 12:** Agreed to
13. **Clause 13:** Agreed to
14. **Clause 14:** Agreed to
15. **Clause 15:** Agreed to
16. **Clause 16:** Agreed to
17. **Clause 17:** Agreed to
18. **Clause 18:** Agreed to
19. **Clause 19:** Delete paragraphs (b) and (c)
20. **Clause 20:** Agreed to
21. **Clause 21:** Agreed to
22. **Clause 22:** Agreed to
23. **Clause 23:** Agreed to
24. **Clause 24:** Delete
25. **Clause 25:** Agreed to
26. **Clause 26:** Agreed to
27. **Clause 27:** Agreed to
28. **Clause 28:** Agreed to
29. **Clause 29:** Agreed to
30. **Clause 30:** Agreed to
31. **Clause 31:** Agreed to
32. **Clause 32:** Delete
33. **Clause 33:** Delete
34. **Clause 34:** Agreed to
35. **Clause 35:** Delete and substitute with the following paragraph; *“Section 139 of the principal Act is amended in subsection (4) by deleting the words “any variation of a contract shall only be considered after twelve month from the date of signing the contract” and substituting therefor the words “a variation of a contract shall be considered at any time, in the case of a quantity variation or shall only be considered after twelve months from the date of signing of the contract, in the case of a price variation”.*
36. **Clause 36:** Agreed to
37. **Clause 37:** Delete paragraph (a)
38. **Clause 38:** Agreed to

- 39. **Clause 39:** Agreed to
- 40. **Clause 40:** Delete
- 41. **Clause 41:** Agreed to
- 42. **Clause 42:** Agreed to
- 43. **Clause 43:** Agreed to
- 44. **Clause 44:** Agreed to

The Committee adopted the report on the consideration of the Public Procurement and Asset Disposal (Amendment) Bill (N.A. Bill No. 32 of 2021) having been proposed by Hon. Catherine Waruguru, MP and seconded by Hon. Daniel Nanok, MP.

**MIN.NO.NA/F&NP/2021/404:**

**CLAUSE BY CLAUSE CONSIDERATION AND ADOPTION OF THE REPORT OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL (AMENDMENT) (NO. 2) BILL (N.A. BILL NO. 36 OF 2021)**

The Committee deliberated on the amendments proposed in the Bill and resolved as follows:

- 1. **Clause 1:** Agreed to
- 2. **Clause 2:** Delete
- 3. **Clause 3:** Agreed to
- 4. **Clause 4:** Delete
- 5. **Clause 5:** Agreed to
- 6. **Clause 6:** Agreed to
- 7. **Clause 7:** Agreed to
- 8. **Clause 8**
  - a. Amend paragraph (1) by deleting the word "*business*".
  - b. Amend paragraph 2(a) by deleting the words "*twenty-four*" and substituting with the words "*forty-eight*".
- 9. **Clause 9:** Delete

The Committee adopted the report on the consideration of the Public Procurement and Asset Disposal (Amendment) (No. 2) Bill (N.A. Bill No. 36 of 2021) having been proposed by Hon. Joseph Oyula MP and seconded Hon. (Dr.) Christine Ombaka, MP.

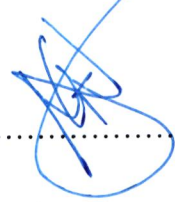
**MIN.NO.NA/F&NP/2021/405:**

**ADJOURNMENT/DATE OF NEXT MEETING**

There being no other business to deliberate on, the meeting adjourned at 1.06 p.m. The next meeting will be on Tuesday, 23<sup>rd</sup> November 2021 at 10.00a.m.

**HON. GLADYS WANGA, CBS, MP  
(CHAIRPERSON)**

Signed.....DATE.....

 23/11/2021



**REPUBLIC OF KENYA  
THE NATIONAL ASSEMBLY  
TWELFTH PARLIAMENT (FIFTH SESSION)  
DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING**

In the matter of Article 118 (1)(b) of the Constitution and National Assembly Standing Order 127(3) and  
In the matter of consideration by the National Assembly of the:

1. The Asian Widows' and Orphans' Pensions (Repeal) Bill (National Assembly Bill No. 29 of 2021); and
2. The Provident Fund (Repeal) Bill (National Assembly Bill No. 30 of 2021)

**INVITATION FOR PUBLIC PARTICIPATION (SUBMISSION OF MEMORANDA)**

Article 118(1)(b) of the Constitution provides that, "Parliament shall facilitate public participation and involvement in the legislative and other businesses of Parliament and its Committees". Standing Order (S.O.) 127(3) provides that "the Departmental Committee to which a Bill is committed shall facilitate public participation and take into account the views and recommendations of the public when the Committee makes its report to the House".

The **Asian Widows' and Orphans' Pensions (Repeal) Bill (National Assembly Bill No. 29 of 2021)** introduced by Hon. (Dr.) Amos Kimunya, E.G.H, M.P, **Leader of the Majority** seeks to repeal the Asian Widows' and Orphans' Pensions Act following the enactment of the Public Finance Management Act, 2012.

The **Provident Fund (Repeal) Bill (National Assembly Bill No. 30 of 2021)** introduced by Hon. (Dr.) Amos Kimunya, E.G.H, M.P, **Leader of the Majority** seeks to repeal the Provident Fund Act following the enactment of the Public Finance Management Act, 2012.

The Bills were read a First Time on Tuesday, 10<sup>th</sup> August 2021 and committed to the **Departmental Committee on Finance and National Planning** for consideration in accordance with the provisions of Standing Order 27(3).

Pursuant to Article 118(1)(b) of the Constitution and Standing Order 127(3) of the National Assembly, the Clerk of the National Assembly hereby invites members of the public and stakeholders to submit memoranda on the Bill.

The memoranda may be addressed to the **Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi**; hand-delivered to the **Office of the Clerk, Main Parliament Buildings, Nairobi**; or emailed to [clerk@parliament.go.ke](mailto:clerk@parliament.go.ke); to be received on or before **Thursday, 2<sup>nd</sup> September 2021 at 5.00 p.m.**

Copy of the Bill is available at the National Assembly Table Office, or on [www.parliament.go.ke/the-national-assembly/house-business/bills](http://www.parliament.go.ke/the-national-assembly/house-business/bills).

**MICHAEL R. SIALAI, CBS  
CLERK OF THE NATIONAL ASSEMBLY  
19<sup>th</sup> August 2021**



**REPUBLIC OF KENYA  
COUNTY GOVERNMENT  
THE COUNTY ASSEMBLY OF THARAKA NITHI  
OFFICE OF THE CLERK/SECRETARY  
COUNTY ASSEMBLY SERVICE BOARD**

Clerk's Chamber  
Former Meru South County Council Offices  
P.O. Box 694  
Email: [tharakanithicountyassembly@gmail.com](mailto:tharakanithicountyassembly@gmail.com),  
[clerk@tharakanithica.go.ke](mailto:clerk@tharakanithica.go.ke)

Telegraphic address  
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Telephone: 0202399828  
Cell 0710272056

**RE-ADVERTISEMENT**

**INVITATION FOR APPLICATION FOR THE COUNTY ASSEMBLY AUDIT COMMITTEE**

Pursuant to section 155(5) of the Public Finance Management Act, 2012, Public Finance Management (County Government) regulations, 2015 section 167 and Audit committee guidelines for the County Government. The County Assembly of Tharaka Nithi invites application for the position of Chairperson and two (2) Members of the Assembly Audit Committee.

**of the Committee**

- Support the Accounting officer with regard to their responsibilities for issues of risk, control and governance and associated assurance.
- Follow up on the implementation of the recommendations of Internal and external auditors
- Any other responsibility as laid out in the Kenya gazette Vol. CXVIII No.40 of 15/4/2016 and guidelines issued by the public sector Accounting standards Board.

**Requirements for appointment as Chairperson of the Audit Committee-**

1. Hold a degree from a recognized university in Kenya.
2. Hold CPA(K) in good standing
3. Possess knowledge and experience of not less than 7 years in Audit and or Financial Management/Accounting.
4. Possess knowledge and experience in public service/devolved system of Government and knowledge in risk management.
5. Meet requirement of chapter six of the constitution.
6. Masters shall be an added advantage.

**Requirements for appointment as Member (2) of the Audit Committee-**

1. Hold a degree from university recognized in Kenya
2. Have progressive working experience of not less than 5 years
3. Member of Institute of Internal audit of Kenya or ICPAK
4. Have knowledge in public service/devolved system of government
5. Meet requirement of chapter six of the constitution.

**Terms of appointment**

- Members of Audit committee shall be appointed for a term of 3 years on part time basis and shall be eligible for re-appointment for a further one term only
- Despite paragraph (i) above, after expiry of every term at least one third of the committee shall retire and not be eligible for re-appointment.
- The term should only be extended after performance of the member has been reviewed.
- Applicants should not be past/present employee/agent of Tharaka Nithi County Government/Assembly or political office holder.

**HOW TO APPLY**

Interested and qualified candidates are requested to submit their applications accompanied by:-

1. Curriculum vitae,
  2. Certified copies of relevant Academic and Professional Certificates,
  3. National Identity Card,
  4. Clearance from Directorate of Criminal Investigation,
  5. Kenya Revenue Authority,
  6. Ethics and Anti-corruption Commission and other relevant supporting documents.
- Soft copies shall be preferable in compliance to the Covid-19 protocols.

Applications may be done through email nos. [tharakanithicountyassembly@gmail.com](mailto:tharakanithicountyassembly@gmail.com) and [clerk@tharakanithica.go.ke](mailto:clerk@tharakanithica.go.ke) to be received on or before **Wednesday 1<sup>st</sup> September, 2021.**

**AMOS K. SIKWEYA  
CLERK OF THE COUNTY ASSEMBLY**



Vision | To be the seat of good governance

Mission | To steer the County of Tharaka Nithi to prosperity through effective legislation, consultative representation and robust oversight

**REPUBLIC OF KENYA**

Clerk's Chamber  
Former Meru South County Council Offices  
P.O. Box 694  
Email: [tharakanithicountyassembly@gmail.com](mailto:tharakanithicountyassembly@gmail.com),  
[clerk@tharakanithica.go.ke](mailto:clerk@tharakanithica.go.ke)



Telegraphic address  
"Assembly" Chuka  
Telephone: 0202399828  
Cell 0710272056

**COUNTY GOVERNMENT  
THE COUNTY ASSEMBLY OF THARAKA NITHI  
OFFICE OF THE CLERK/SECRETARY  
COUNTY ASSEMBLY SERVICE BOARD**

**TENDER/REGISTRATION OF SUPPLIERS FOR THE  
FINANCIAL YEAR 2021/2023.**

Pursuant to section 71 and 74 of the Public Procurement and Asset Disposal Act 2015, Tharaka Nithi County Assembly Service Board is in the process of registering suppliers for various categories and advertising for tenders for the financial years 2021/2023 under the listed categories.

CATEGORY A: GENERAL GOODS AND WORKS			
NO	TENDER REF NO	TENDER ITEM DESCRIPTION	CATEGORY
1.	TNCA/P/01/21-23	supply of general office stationery	Special Group
2.	TNCA/P/02/21-23	Supply of furniture and fittings	Special Group
3.	TNCA/P/03/21-23	Supply of telephone and telecommunication equipment	Special Group
4.	TNCA/P/04/21-23	General Supply, kitchen items, milk and dry goods.	Special Group (Local)
5.	TNCA/P/05/21-23	Supply of Hardware materials	Special group(local)
6.	TNCA/P/06/21-23	Supply of Diaries, calendars and printed materials	Special group
7.	TNCA/P/07/21-23	Supply of bottled water	Special group(local)
8.	TNCA/P/08/21-23	Supply and delivery of photocopiers, computers, printers, projectors, laptops, ups and other ICT related machines and their consumables	Special group
9.	TNCA/P/09/21-23	Supply and delivery of fuel, oil, lubricants and motor vehicle parts	Open
10.	TNCA/P/10/21-23	Supply and delivery of uniform and Linen	Open
CATEGORY B: SERVICES			
11.	TNCA/P/11/21-23	Provision of training and capacity building	Open
12.	TNCA/P/12/21-23	Provision of air ticket and travel agency	Open
13.	TNCA/P/13/21-23	Provision of wire and wireless internet services	Special Group
14.	TNCA/P/14/21-23	Provision of repair of motor vehicles and other equipment	Open
15.	TNCA/P/15/21-23	Provision for repair and maintenance of office buildings	Special group
16.	TNCA/P/16/21-23	Provision of repair and Maintenance Services of Audiovisual Equipment	Special group
17.	TNCA/P/17/21-23	Provision of repair and maintenance of computers printers and laptops	Special group
18.	TNCA/P/18/21-23	Provision for repair of office furniture	Special group
19.	TNCA/P/19/21-23	Provision for motor vehicle hire services	Open
20.	TNCA/P/20/21-23	Provision of Consultancy services in legislation services	Open
21.	TNCA/P/21/21-23	Provision of Legal Services and Litigation	Open
22.	TNCA/P/22/21-23	Provision of conveyance services	Open
CATEGORY C: OPEN TENDER			
1.	TNCA/CONF/01/21-23	Provision of conference facilities and catering services.	Framework Contract
2.	TNCA/INS/01/21-22	Provision of Medical cover for Members of County Assembly and Staff.	Open (Underwriters) IFMIS NEGOTIATION NO 889983/2021/2022
3.	TNCA/INS/02/21-22	Provision of Group Personal Cover, Work Injury Cover, Group Life Cover both for Members of County Assembly and Staff and General Insurance	Open Brokers and Underwriters IFMIS NEGOTIATION NO 889992/2021/2022

**KEY**

- 1 Open - Open to all bidders
- 2 Special group - Youth, Women, Persons Living with disabilities
- 3 Special group (local) - special group local firms.

Interested eligible candidates may download detailed tender documents free of charge from Tharaka Nithi County Assembly website [www.tharakanithica.go.ke](http://www.tharakanithica.go.ke) or Government Portal [supplier.treasury.co.ke](http://supplier.treasury.co.ke)

Tender for Insurance covers should be submitted via IFMIS.

Completed tender documents in plain sealed envelope indicating the tender number and name without identifying the sender should be addressed to:

The Clerk/ Secretary County Assembly Service Board  
County Assembly of Tharaka Nithi,  
P.O. Box 694,  
Chuka,  
Tel: 0710272056

Thereafter placed in the tender box at Tharaka Nithi County Assembly Chuka Offices before **2<sup>nd</sup> September 2021 at 11:00am.**

Opening of bids will take place immediately in the presence of bidders or their representative who may choose to attend in strict adherence to Covid-19 protocols.

Bidders are advised to ensure serialization of all the pages of the tender document.

**AMOS K. SIKWEYA  
CLERK OF THE COUNTY ASSEMBLY**



Vision | To be the seat of good governance

Mission | To steer the County of Tharaka Nithi to prosperity through effective legislation, consultative representation and robust oversight



Approved for tabling



REPUBLIC OF KENYA  
THE NATIONAL ASSEMBLY

Shut  
SNA  
22/6/2021

TWELFTH PARLIAMENT (FIFTH SESSION)

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 22 JUN 2021	DAY: TUESDAY
TABLED BY:	CHAIR, DC-FINANCE & NATIONAL PLANNING
CLERK AT THE TABLE:	

REPORT ON THE CONSIDERATION OF THE FINANCE BILL, 2021  
(VOLUME I)

CLERKS CHAMBERS  
DIRECTORATE OF DEPARTMENTAL COMMITTEES  
PARLIAMENT BUILDINGS  
NAIROBI

JUNE, 2021

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## CHAIRPERSON'S FOREWORD

This report contains the Committee's proceedings on the consideration of the Finance Bill (National Assembly Bill No. 18 of 2021) which was published on 5<sup>th</sup> May 2021 and read a First Time on Tuesday, 11<sup>th</sup> May 2021 and committed to the Departmental Committee on Finance and National Planning pursuant to Standing Order 127.

The Bill seeks to amend the following laws; the Income Tax Act (Cap. 470), the Value Added Tax Act (No. 35 of 2013); the Excise Duty Act, 2015; the Tax Procedures Act, 2015; the Miscellaneous Fees and Levies Act, 2016; the Capital Markets Act (Cap. 485A); the Insurance Act (Cap. 497); the Kenya Revenue Authority Act (No. 2 of 1995); the Retirement Benefits Act (No. 2 of 1997); and the Central Depositories Act (No. 2 of 2000).

Amendments proposed to the above laws are aimed at supporting economic recovery from effects of the COVID-19 Pandemic and strengthening revenues in the fiscal framework especially in support of the "*Big Four Agenda*", currently under implementation by the Government. In addition, the amendments include measures on regulatory reforms, revenue administration reforms and measures to strengthen macroeconomic stability. The policy framework resonates with the Government's post COVID-19 Economic Recovery Strategy, prudent economic management policies and strengthening of governance systems to create an enabling environment for accelerated economic recovery and long-term growth.

Following placement of adverts in the print media on 20<sup>th</sup> May 2021 requesting for comments on the Bill from members of the public and relevant stakeholders pursuant to Article 118(1)(b) of the Constitution and Standing Order 127(3), the Committee received memoranda from fifty-six (56) stakeholders.

The Committee also invited stakeholders vide letter REF: NA/DDC/F&NP/2021/19 dated 26<sup>th</sup> May 2021 for a stakeholders' engagement retreat on the Bill which was held at the Trademark Hotel, Village Market from 2<sup>nd</sup> to 4<sup>th</sup> June 2021 with thirty-four (34) stakeholders making oral presentations before the Committee. The Committee also held a meeting with the National Treasury and the Kenya Revenue Authority in line with the requirements of Article 114 of the Constitution.

Majority of the stakeholders were opposed to the introduction of 16% VAT on bread and infant food noting that it will increase prices of the commodities and make them unaffordable to most Kenyans especially at this time when most livelihoods have been affected by the COVID-19 Pandemic. Additionally, the proposal to delete requirement for the National Assembly to approve VAT regulations before gazetting was opposed by most stakeholders because it will take away powers of the National Assembly to scrutinise Regulations in line with the requirements of the Statutory Instruments Act. The Committee agreed with the concerns raised by the Stakeholders and as such, proposed deletion of Clause 20. The deletion will ensure that the interest of the public is safeguarded.

Several amendments were submitted proposing redefinition of the term "*control*" and on the amendments touching on the digital service tax (details of the stakeholders' comments on the Bill are contained in Part III of the report). All the stakeholders' comments were put into consideration while preparing the proposed Committee's amendments and some of the proposals were adopted forming part of the proposed Committee's amendments.

In considering the Bill, the Committee observed that the amendments relating to Income Tax Act are intended to cure the weaknesses in the current provisions that create opportunities for Base Erosion

and Profit Shifting (BEPS). Tax expenditure has been a key concern of the Committee and therefore some of the proposals are intended to maintain it at internationally acceptable levels. The current tax expenditure stands at six percent of the GDP which is the highest in the region. The proposal to define "*permanent establishment*" as proposed in the Bill is intended to ensure that profits are taxed where economic activities take place and value is created.

On behalf of the Departmental Committee on Finance and National Planning and pursuant to provisions of Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of the Finance Bill (N.A. Bill No. 18 of 2021). The Committee is grateful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee further wishes to thank all stakeholders who submitted their comments on the Bill. Finally, I wish to express my appreciation to the Honorable Members of the Committee and the Committee Secretariat who made useful contributions towards the preparation and production of this report.

It is my pleasure to report that the Committee has considered the Finance Bill (N.A. Bill No. 18 of 2021) and have the honour to report back to the National Assembly with the recommendation that the Bill should be **approved with amendments**.

**Hon. Gladys Wanga, CBS, M.P.**  
**Chairperson, Departmental Committee on Finance and National Planning**

## **PART I**

### **1 PREFACE**

#### **1.1 ESTABLISHMENT OF THE COMMITTEE**

1. The Departmental Committee on Finance & National Planning is one of the fifteen Departmental Committees of the National Assembly established under **Standing Order 216** whose mandates pursuant to the **Standing Order 216 (5)** are as follows:
  - a. To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
  - b. To study the programme and policy objectives of Ministries and departments and the effectiveness of their implementation;
  - c. **To study and review all the legislation referred to it;**
  - d. To study, access and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
  - e. To investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
  - f. To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order No.204 (Committee on appointments);
  - g. To examine treaties, agreements and conventions;
  - h. To make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
  - i. To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
  - j. To examine any questions raised by Members on a matter within its mandate.

#### **1.2 MANDATE OF THE COMMITTEE**

2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider, public finance, monetary policies, public debt, financial institutions (excluding those in securities exchange), investment and divestiture policies, pricing policies, banking, insurance, population revenue policies including taxation and national planning and development.
3. In executing its mandate, the Committee oversees the following Government Ministries and Departments:
  - a. The National Treasury and Planning
  - b. State Department for Devolution
  - c. The Commission on Revenue Allocation (CRA)
  - d. Office of the Controller of Budget
  - e. Salaries and Remuneration Commission (SRC)

### 1.3 COMMITTEE MEMBERSHIP

4. The Departmental Committee on Finance and National Planning was re-constituted by the House in July, 2020 and comprises of the following Members:

#### **Chairperson**

Hon. Gladys Wanga, CBS, MP  
MP for Homabay County  
**ODM Party**

#### **Vice-Chairperson**

Hon. Isaac W. Ndirangu, MP  
MP for Roysambu Constituency  
**Jubilee Party**

#### **Members**

Hon. Jimmy O. Angwenyi, MGH, MP  
MP for Kitutu Chache North Constituency  
**Jubilee Party**

Hon. Christopher Omulele, CBS, MP  
MP for Luanda Constituency  
**ODM Party**

Hon. Shakeel Shabbir Ahmed, CBS, MP  
MP for Kisumu Town Constituency  
**Independent Member**

Hon. Daniel Epuyo Nanok, MP  
MP for Turkana West Constituency  
**Jubilee Party**

Hon. (Dr.) Christine O. Ombaka, MP  
MP for Siaya County  
**ODM Party**

Hon. Andrew Adipo Okuome, MP  
MP for Karachuonyo Constituency  
**ODM Party**

Hon. David Mwalika Mboni, MP  
MP for Kitui Rural Constituency  
**CCU Party**

Hon. Francis Kuria Kimani, MP  
MP for Molo Constituency  
**Jubilee Party**

Hon. Joseph Maero Oyula, MP  
MP for Butula Constituency

#### **ODM Party**

Hon. Joshua Chepyegon Kandie, MP  
MP for Baringo Central Constituency  
**Jubilee Party**

Hon. Stanley M. Muthama, MP  
MP for Lamu West Constituency  
**Jubilee Party**

Hon. Edith Vethi Nyenze, MP  
MP for Kitui West Constituency  
**WDM-K**

Hon. Catherine Waruguru, MP  
MP for Laikipia County  
**Jubilee Party**

Hon. James Gichuhi Mwangi, MP  
MP for Tetu Constituency  
**Jubilee Party**

Hon. (Prof.) Mohamud Mohamed, MP  
MP for Wajir South Constituency  
**Jubilee Party**

Hon. Peter Lochakapong, MP  
MP for Sigor Constituency  
**Jubilee Party**

Hon. Qalicha Gufu Wario, MP  
MP for Moyale Constituency  
**Jubilee Party**

**1.4 COMMITTEE SECRETARIAT**

5. The Committee is facilitated by the following Members of the Secretariat:

**Head of the Secretariat**

Ms. Leah W. Mwaura

**Senior Clerk Assistant**

Ms. Jennifer Ndeto  
**Principal Legal Counsel I**

Ms. Laureen Wesonga  
**Clerk Assistant II**

Ms. Christine Ndiritu  
**Clerk Assistant II**

Mr. Josephat Motonu  
**Fiscal Analyst I**

Mr. Chelang'a Maiyo  
**Research Officer II**

Mr. John Njoro  
**Serjeant-At-Arms**

Ms. Christine Maeri  
**Audio Officer**

## PART II

### 2 OVERVIEW OF THE FINANCE BILL, 2021

#### 2.1 ANALYSIS OF THE BILL

6. The Finance Bill, 2021 sets out revenue raising measures for the national government and amends specific tax laws and other statutes for the effective collection of revenue as relates to the budget of Fiscal Year 2021/2022.
7. Aware of the government's "*Big Four Agenda*" and mitigation of the socio-economic effects of COVID-19, the Finance Bill, 2021 seeks to provide a fertile ground for implementation of amendment of statutes that will fast track realization of these medium-term agenda, which is fundamental to improving livelihoods of the public.
8. The Bill comes at a time when the country needs broader and stronger measures to help businesses stay afloat, support households and preserve employment amid the raging COVID-19 Pandemic.
9. The Bill proposes amendments to the following legislations with an aim of facilitating realisation of the budget proposals:
  - i. The Income Tax Act (Cap.470);
  - ii. The Value Added Tax Act, 2013;
  - iii. The Excise Duty Act, 2015;
  - iv. Tax Procedures Act, 2015;
  - v. The Miscellaneous Fees and Levies Act, 2016;
  - vi. The Capital Markets Act (Cap. 485A);
  - vii. The Insurance Act (Cap. 497);
  - viii. The Kenya Revenue Authority Act (No. 2 of 1995);
  - ix. The Retirement Benefits Act (No. 2 of 1997); and
  - x. The Central Depositories Act (No. 2 of 2000).

#### 2.2 REVIEW OF THE FINANCE BILL, 2021

10. The Finance Bill, 2021 contains (66) clauses that seek to amend various tax laws and other related statutes to better operations of the financial sector as well as enhance revenue raising measures. The Bill proposes amendments to statutes as follows:

##### **The Income Tax Act (Cap. 470)**

The Bill proposes the following amendments to the Act:

11. Amends Section 2 of the ITA to re-introduce definition of the term "*control*". The new definition is more comprehensive. and in line with the proposals in the ITA. The prior definition of control focused on direct control of 25% of the capital, unless control was differently defined in the entity's constitution.
12. Reintroduces definition of the term "*infrastructure bond*" which is a bond issued by the Government for the financing of a strategic public infrastructure facility including a road, hospital, port, sporting facility, water and sewerage system, or a communication network.
13. Introduces a Country-by-Country reporting (CbCR) requirement on a Kenyan headquartered Multinational Enterprise Group (MNEG), referred to in the Bill as an "*Ultimate Parent Entity*" (UPE). The specific definition given to a UPE is "*an entity that is resident in Kenya for tax purposes, is not controlled by another entity, and owns or controls a*

*Multinational Enterprise Group.* AUPE will be required to file returns 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 MNEG's financial reporting period.

14. Deletes Section 3(2) (ca) of the ITA, which brings to charge "*Income accruing through a digital marketplace*". In its place, the Bill proposes to introduce the following provision: "*income accruing from a business carried out over the internet or an electronic network including through a digital marketplace.*"
15. Replaces definition of the term "*digital marketplace*" appearing in Section 3(3) (ba) with the following definition: "*digital marketplace*" means an online platform which enables users to sell or provide services, goods or other property to other users.
16. Amends Section 12E (1) of the ITA and explicitly provides that Digital Service Tax (DST) shall only be payable by a non-resident person whose income from provision of services derived from or accrued in Kenya through a digital marketplace. The Bill also proposes to delete the proviso under Section 12E (1). The proviso entitles a resident person or a non-resident person with a permanent establishment in Kenya to an offset of the DST paid against their income tax liability for the year.
17. Amends Section 41(5) which provides that benefits of a tax treaty shall not be available to a resident of the treaty partner state if 50% or more of the underlying ownership of a non-resident is held by an individual or individuals who are not residents of the treaty partner state. The amendment replaces the words an individual or individuals with a person or persons. The amendment will have an effect on non-resident entities based in countries that have double taxation agreements with Kenya.
18. Amends the Second Schedule to the ITA in order to change the basis of calculating investment allowance from reducing balance to straight-line. This amendment simplifies the computation of capital allowances and reduces the period of recovery of capital costs.
19. Amends definition of the word "*manufacture*" in the Second Schedule to the ITA to include generation, transformation and distribution of electricity (whether to the national grid or not). Currently this is limited to generation, transformation and distribution of electricity to/through the national grid. The amendment is expected to encourage more investment in off-grid electricity generation, transformation and distribution.
20. Introduces definition of the words "*civil works*" in the Second Schedule to the ITA. Civil works will include: roads and parking areas; railway lines and related structures; water, industrial effluent and sewerage works; communications and electrical posts; pylons and other electrical supply works; and security walls and fencing. The definition of civil works will guide taxpayers on the allowances to be granted when they incur expenditure on civil works as part of buildings or other investment qualifying for investment allowance.
21. Amends Paragraph 4(3) & 9(3) of the Ninth Schedule to align capital allowance rates on machinery used to undertake mining prospecting and petroleum exploration operations to the rates provided in the Second Schedule. The proposed rate is 50% in the year of first use and the remainder at 25% p.a. Previously, the allowance was claimable at 100% in the year of first use. The amendment aligns rates in the Ninth Schedule to those provided to other sectors in the Second Schedule and appears to be aimed at enhancing equity following overhaul of the Second Schedule via the Tax Laws Amendment Act, 2020.

22. Increases the rate of withholding tax upon payment of service fees to non-resident subcontractors operating in the extractive industries from 5.625% to 10%. This applies to non-resident subcontractors who do not have a Kenyan permanent establishment (PE). Those with a PE are required to pay tax under the self-assessment regime applicable to resident companies. This move is aimed at increasing tax collection from the extractive sector since a large portion of technical services is normally subcontracted to specialist service companies.
23. Reduces the rate of withholding tax upon payment for management, training and professional fees to non-resident sub-contractors operating in the extractive sectors from 12.5% to 10%. The proposed amendment aligns the rates applicable to such fees and removes the differentiation.
24. Introduces a tax relief on individuals who make contributions to the National Hospital Insurance Relief (NHIF). The amount of insurance relief to be claimed is equivalent to 15% of the premiums paid with a cap of KES 5,000 per month. Currently, only policyholders of education, life and health insurance enjoy an insurance relief on the premiums paid.
25. Expand applicability of tax rebate to employers who engage apprentices to cover graduates of technical and vocational training institutions. Currently, only employers who engage university graduates as apprentices enjoy this tax rebate.

**The Value Added Tax (VAT) Act No. 35 of 2013**

The Bill proposes the following amendments to the Act:

26. Deletes the word "*registered*" under sub-section 1; the expression "*a registered person*" under sub-section 2 and replacing it with "*the person referred to in sub-section 1 is a registered person and*"; and definition of the words "*by any person*" under sub-section 3. The amendments align the treatment of imported services as provided under Section 10 with the proposed amendment of the definition under Section 2.
27. Amends Section 5 (7) of the Act to clarify that supplies made over the internet or an electronic network or through a digital marketplace are chargeable to VAT. The provision as currently worded only refers to supplies made through a digital marketplace. The Bill also amends definition of the term "*digital marketplace*" to mean "*an online platform which enables users to sell or provide services, goods or other property to other users.*" There has been an increased focus on taxation of supplies made through a digital marketplace and it is expected that this will continue to be an area that KRA will leverage on to boost revenue collection.
28. Amends Section 17(1) by replacing the word "*section*" with "*Act*". In addition, the Bill amends Section 17(4), which currently prohibits a registered person from claiming input tax on the acquisition of passenger cars or minibuses and the repair and maintenance thereof including spare parts. The amendments to sub-section 4 will now include leasing or hiring of passenger cars or minibuses.
29. The Bill changes the VAT status of the exportation of taxable services from zero-rated to exempt. It also proposes changes in VAT status by removing the following items from the exemption schedule: Airlid paper without super absorbent polymer 180gsm/67 of tariff number 4803.00.00(Par 73); Airlid paper without super absorbent polymer 80gsm/67 of

tariff number 4803.00.00(Par 74); and Plain polythene film/PE of tariff number 3920.10.10 (85) PE white 25-40gsm/release paper of tariff number 4810.99.00. The government has over the years aimed at reducing the list of exempt goods and services with the aim of increasing tax revenue from industries and other consumers.

30. Amends the provision relating to the due date for VAT payment to allow anyone who is liable to VAT to defer payment of the VAT to the 20<sup>th</sup> day of the month following the period in which the tax became due. The proposed amendment is aimed at aligning the section on the payment due date with the other proposed changes relating to the definition and treatment of imported services.
31. Deletes the requirement for regulations made under the VAT Act, 2013 to be tabled before the National Assembly before such regulations can take effect. The proposed deletion of the requirement to have regulations made under the VAT Act to be first tabled before the National Assembly is possibly aimed at giving the Cabinet Secretary for National Treasury power to introduce and gazette regulations without going through the approval process by Parliament. This will in effect fall under the purview of the Statutory Instruments Act, 2013.

#### **The Excise Duty Act No. 23 of 2015**

The Bill proposes the following amendments to the Excise Duty Act:

32. Defines the term "*compound*" in the Excise Duty Act (EDA) to have the meaning assigned to it in Section 2 of the Compounding of Potable Spirits Act. The Compounding of Potable Spirits Act defines "*compound*" to mean, "*communicate any flavour to, or to mix any ingredient or material with, spirits, but not so as to denature the spirits*". The definition provides further clarity on spirits which fall within the ambit of excise duty.
33. Introduces definition of the term "*possession*" to mean, "*having, owning or controlling any excisable goods including: Having in one's possession any excisable goods; Knowingly having any excisable goods in the actual possession or custody of any other person; Having any excisable goods in any place, whether belonging to or occupied by oneself or not, for the use or benefit of oneself; or Having any excisable goods for the use or benefit of another person*". Section 39(5) of the EDA imposes a penalty of KES 5 million on any person who has in their possession, any excisable goods that have been manufactured contrary to provisions of the EDA or which have been removed from the place where they ought to have been charged with excise duty before such duty has been charged and either paid or secured.
34. Amends Section 14 of the EDA to allow for offset of excise duty paid by licensed persons on purchase of bulk internet data against excise duty payable on resale of the internet data to final consumers. This will avoid double payment of excise duty on internet data and ultimately reduce the cost of providing internet data services.
35. Re-introduces excise duty on locally manufactured sugar confectionery of tariff heading 1704 at KES 20.99 per Kg and white chocolate, chocolate in blocs, slabs or bars of tariff codes 1806.31.00, 1806.32.00 and 1806.90.00 at KES 209.88 per Kg. This is mainly because these confectionery and chocolate products are not essential commodities and the consumers only do so as a luxury. Inclusion of these products in the excise regime will create additional revenue streams.

36. Introduces excise duty, at the rate of KES 5,000 per Kg, on 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 health matters and other manufactured tobacco and tobacco substitutes that have been homogenized and reconstituted, tobacco, tobacco extracts and essences.
37. Amends definition of "other fees" in Part III of the First Schedule of the 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 there under". Currently, commissions in respect of a loan have been excluded from excise duty. The proposed amendment is to remove this exclusion. This is in order to enhance the revenue base from this sector. The import of the amendment is to bring clarity on the scope of interest that is exempt from Excise duty.
38. Amends the rate of excise duty on motorcycles from KES 11,608.23 per unit to 15% of the excisable value. This amendment is moved from a specific rate to an ad valorem rate of 15%.

**The Tax Procedures Act No. 29 of 2015 (TPA)**

The Bill proposes to amend the Bill as follows:

39. Introduces the Common Reporting Standards (CRS) regime in Kenya to effect automatic exchange of financial accounting information on tax matters. The reporting is to be done by all financial institutions resident in Kenya, including Kenyan branches of non-resident financial institutions but excluding foreign branches of Kenyan financial institutions. The reporting will be done by way of filing returns, including "nil", where applicable, with the Commissioner on reportable accounts. The Bill requires the Cabinet Secretary to publish Regulations prescribing the common reporting standards. This will increase compliance on tax matters regarding income and assets held abroad in line with the current global drive to increase transparency for purposes of combating tax evasion among other crimes.
40. Extends the period taxpayers are required to maintain tax records from five years to seven years; extends the period the Commissioner is allowed to amend a tax return where there is no evasion, fraud or wilful neglect, from five years to seven years; and extends the period within which a taxpayer can lodge an application for amendment of a self-assessment to seven years.
41. Proposes to include the Miscellaneous Fees and Levies Act, 2016 and any Regulations or other subsidiary legislation made under it within the definition of tax law under the TPA.
42. Clarifies that implementation of the multilateral agreements and treaties entered into by or on behalf of the Government of Kenya should be effected as stipulated in such agreements or treaties. The Bill further proposes that any information obtained pursuant to such agreement shall only be disclosed in accordance with the conditions specified in such agreements.
43. Provides clarity that provisions of international tax agreement should supersede provisions of any other tax law (including the TPA) in relation to implementation of such agreements and maintaining confidentiality.

44. Imposes a requirement for digital service providers to have a Personal Identification Number (PIN). This implies that all digital service providers who have income accrued in Kenya, including non-residents will have to be registered for tax in Kenya. This will streamline taxation of digital service providers.

**The Miscellaneous Fees and Levies Act No. 29 of 2016**

The Bill proposes the following amendments to the Act:

45. Introduces Section 9B in the Miscellaneous Fees and Levies Act that provides for application of the provisions of Section 47 of the TPA for purposes of: application for refunds, ascertainment and repayment of fees and levies overpaid or paid in error under the MFLA; and the determination by the Commissioner of penalties and interests on fees that remains unpaid. Section 47 of the TPA provides for application for refund of overpaid tax to the Commissioner of Domestic Taxes within 5 years from the date the tax was paid. Further, Section 47 of the TPA requires the Commissioner to refund the amounts due within a period of 2 years from the date of application failure to which the amount due shall attract an interest of 1% per month.
46. Reinstates the goods, which the Cabinet Secretary may determine is in the public interest, or to promote investment of a value not exceeding KES 5 billion, in the Import Declaration Fee (IDF) and Railway Development Levy (RDL) exemption schedule. This will help attract high value investment to Kenya.

**The Capital Markets Act (Cap. 485A): Clause 45**

47. The Bill sets a 90-day period commencing on the date of filing of an appeal for the Capital Markets Tribunal to hear and determine that appeal. Currently, the law does not provide for a specific period that a matter should be heard and determined. This is expected to improve efficiency in resolving disputes by the Tribunal.

**The Insurance Act (Cap. 497): Clauses 46 to 49**

The Bill proposes to amend the Act as follows:

48. Repeals the current definition of the term "broker" and replaces it with a new definition that includes foreign reinsurance brokers who do not undertake insurance business or have no place of business in Kenya. In effect, foreign reinsurance brokers will now be regulated by the Insurance Regulatory Authority.
49. Repeals the transitional provision that exempted, in the case of treaty insurance, an insurer, broker, agent or other person seeking to place any reinsurance of Kenya business with an insurer not registered under the Insurance Act from the requirement to seek approval from the Commissioner to the treaty.
50. Introduces a new section (21A), which will govern the administration of closed fund business. The Section provides the meaning of a closed fund business and provides for the penalties applicable should a person contravene provisions governing closed fund business.
51. Introduces a prescribed annual fee to be paid by a registered insurer. This will be effective on 1<sup>st</sup> January 2022.

**The Kenya Revenue Authority (KRA) Act, 1995: Clause 50**

52. The Bill proposes the following amendments to the KRA Act in order to increase the maximum reward to any person who provides information leading to the: Identification of unassessed tax from KES 100,000 to KES 500,000; and recovery of unassessed taxes from KES 2,000,000 to KES 5,000,000. This move is expected to enhance tax compliance and increase revenue collection by encouraging the public/informers to provide intelligence information to the Commissioner.

**The Retirement Benefits Act (No. 2 of 1997): Clauses 51 to 63**

The Bill proposes the following amendments to the Act:

53. Expands definition of retirement benefit schemes to include any arrangement under which persons are entitled to benefits in the form of post-retirement medical cover, effective 1<sup>st</sup> January 2022. This is in recognition of the modernization of the structure of retirement benefits products.
54. Provides definition of post-retirement medical fund as follows, *“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”*.
55. Empowers the Retirement Benefits Authority (*“the Authority”*) to extend the timeline for submission of audited accounts during extraordinary times. Currently, trustees are expected to submit audited accounts within six months after the end of each financial year.
56. Introduces registration and regulation of corporate trustees that provide services to pension schemes. The definition of corporate trustee has been provided. Corporate trustees will be required to apply for registration to the Authority.

**The Central Depositories Act, 2000: Clauses 64 to 66**

The Bill proposes the following amendments to the Act:

57. Introduces the concept of beneficial and legal owner in the capital markets. This is aimed at enhancing regulation of investors in the capital markets.
58. Allows opening of an omnibus account by a person investing on behalf of others in the securities market. An omnibus account is defined as *“an account held by an authorized nominee on behalf of two or more beneficial owners or legal owners”*. The amendment may have been motivated by enactment of the Statute Law (Miscellaneous Amendments) Act No. 12 of 2019, which provided that every company incorporated or registered in Kenya is required to keep two separate registers: A register of members; and A register of beneficial owners; and coming into effect of the Companies (Beneficial Ownership Information) Regulations, 2020.

## PART III

### 3 PUBLIC PARTICIPATION/STAKEHOLDER CONSULTATION

59. Following the call for memoranda from the public through the placement of adverts in the print media on Thursday, 20<sup>th</sup> May 2021 requesting for comments from the public on the Bill and invitation of stakeholders vide letter REF: NA/DDC/F&NP/2021/19 dated 26<sup>th</sup> May 2021 for a stakeholder engagement retreat on the Bill which was held at the Trademark Hotel, Village Market from 2<sup>nd</sup> to 4<sup>th</sup> June 2021, the Committee received memoranda from the following stakeholders:

- i. PKF Taxation Services Limited
- ii. Ernest & Martin Associates
- iii. Institute of Certified Public Accountants of Kenya (ICPAK)
- iv. Kenya Bankers Association (KBA)
- v. Kenya Private Sector Alliance (KEPSA)
- vi. KPMG Advisory Services Limited
- vii. Federation of Women Lawyers-Kenya
- viii. Retirement Benefits Authority (RBA)
- ix. Insurance Regulatory Authority (IRA)
- x. Anjarwalla and Khanna LLP
- xi. Kenya Association of Manufacturers (KAM)
- xii. Kenya Breweries Limited (KBL)/UDV (Kenya) Limited
- xiii. Capital Markets Authority and Nairobi Securities Exchange
- xiv. Federation of Kenya Pharmaceutical Manufacturers (FKPM)
- xv. Association of Battery Manufacturers
- xvi. Kenya Renewable Energy Association (KERE), Sistema Bio and Clean Cooking Association
- xvii. Petroleum Institute of East Africa (PIEA)
- xviii. Kenya Wine Agencies Limited (KWAL)
- xix. Milestone & Gaming Ltd (Sportsesa)
- xx. Kimakia Magara and Partners LLP
- xxi. Kisoo Mutua & Associates Advocates
- xxii. The East African Tax and Governance Network (EATGN), National Taxpayers Association (NTA), The Institute for Social Accountability (TISA) And Tax Justice Network Africa (TJNA)
- xxiii. Sugar Campaign for Change (SUCAM)
- xxiv. Kenya Transporters Association
- xxv. Westminister Consulting
- xxvi. Uber BV
- xxvii. Sanaabil Consulting Limited
- xxviii. Tespok
- xxix. National Taxpayers Association
- xxx. The American Chamber of Commerce in Kenya (AMCHAM)
- xxxi. Ashford Consultants Limited/Abdulbasid & Associates
- xxxii. DM Associates
- xxxiii. Ernst & Young LLP Certified Public Accountants
- xxxiv. Royal Flora Holland (RFH) Kenya Limited
- xxxv. Tatu City
- xxxvi. Nzamba Kitonga Advocates LLP
- xxxvii. British American Tobacco (BAT) Kenya
- xxxviii. Fund Managers Association
- xxxix. United States Commercial Service
- xl. Kenya Flower Council

- xli. Kenya Electricity Generating Company (KENGEN)
- xlii. Danone Nutricia
- xliii. Leonardo Technologies and Services Limited
- xliv. Victory Farms
- xlv. Escart Services Limited
- xlvi. PricewaterhouseCoopers (PWC)
- xlvii. RSM (Eastern Africa) Consulting Limited
- xlviii. Deloitte & Touche
- xlix. Mr. Charles Wanguhu
  - i. CocaCola
  - ii. Grant Thornton Taxation Services Limited

The stakeholders submitted as follows:

### 3.1 PKF TAXATION SERVICES LIMITED

PKF submitted their memorandum Ref: PKFTAX/NA-1/2021/mkm/jm dated 26<sup>th</sup> May 2021, The proposed the following THAT—

#### Income Tax Act

60. Opposed to the insertion of the new definition of the term control in section 2 of the Act because the proposal will have a significant impact on Transfer Pricing Arrangements and as such the Bill should be amended to exclude instances that involve transactions between unrelated or third parties. Further, if the proposal is maintained, there will be major distortions in business arrangements that in the past have been considered to be conducted at market price.

#### Committee's Observation

The Committee supported some aspects of the definition to the term "*control*" since lack of this definition contributes to base erosion and profit shifting as some Multi-National Companies through transfer pricing evade taxation.

This is an anti-avoidance provision and is meant to safeguard revenue leakage. Deleting the provision will negate the objective of safeguarding revenue leakage upon which it was proposed. In addition, there is no definition of the term control. The previous one was deleted during repeal of the Second Schedule by the Tax Laws (Amendments) Act, 2020 which poses risk of revenue leakage and especially by Multi-National Companies through transfer pricing.

The Committee however, proposed an amendment to ensure that the Commissioner General undertakes an assessment before making the determination that there is price influence between supplier and purchaser under paragraphs f and g.

61. The proposal for a fixed place of business should be amended because it lacks a timeline on how long the fixed place should have existed in Kenya. The current provision in the Income Tax Act, CAP 470 provides that a fixed place of business should have existed for a period of 6 months for it to create a 'Permanent Establishment' (PE). The absence of a specific timeline is ambiguous and will be subject to numerous disputes.

### **Committee's Observation**

There is no need of having a timeline for which a fixed place of business ought to have existed unless it is in respect to project related activities which have timelines for completion such as mining, exploration, and construction among others which are specifically provided for in the definition.

62. Clause 7 proposing amendments to Section 16(2)(j) of the Bill 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.

### **Committee's Observation**

The proposed amendment seeks to adopt Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA). EBITDA as a measure of profitability of a business which is the determinant of how much tax an entity should pay. The proposal by PKF to only include companies that capitalised through foreign loans was not supported as it makes the assumption that its only local companies who are thinly capitalised and cannot be subject to tax avoidance. The Committee has given few exceptions to this rule based on the nature of the business.

63. They supported the amendment to Section 18B and further proposed an amendment to include the threshold of gross turnover that the Multinational Enterprises (MNEs) should meet to comply with the regulation so as to create certainty on compliance with the regulation.
64. They supported amendments to the 2<sup>nd</sup> and 9<sup>th</sup> Schedules to the Act but noted that the proposed increase in withholding tax rates should be dropped as it will discourage investments in the extractive industry. Further, they proposed that the provision to align deductibility of interest expense in the extractive sector to the proposed change to Section 16(2)(j) should be dropped.

### **Committee's Observation**

The Committee supported the proposed amendment as contained in the Bill.

### **Value Added Tax (VAT)**

65. The proposed to section 67(2) of the Act on the approval of the VAT regulations by the National Assembly before gazetting should be deleted. This is because this would negate the principle of separation of powers, giving the executive a free hand in making the Regulations.

### **Committee's Observation**

The Committee agreed on the proposal to delete the proposed amendment as contained in the Bill as it was seeking to remove the role of Parliament in the scrutiny of regulations relating to VAT.

66. Opposed Part 1 (Exempt Supplies) of the First Schedule to the Act which include imposition of VAT on disposable syringes and other syringes. This, in their view will increase costs of vaccination. Additionally, they were opposed to the introduction of VAT on milk specifically prepared for infants since this will make it costly for a vast majority of the public.

#### **Committee's Observation**

The Committee supported the proposal to retain the disposable syringes and other syringes under the exempt schedule based on the reasons espoused above.

67. They opposed the amendment to Part A (Zero rated Supplies) of the Second Schedule to the Act noting that the proposal to exempt exported taxable services from VAT would limit VAT refund claims by taxpayers providing services to non-resident persons, thus going against international best practices.

#### **Committee's Observation**

The above proposal seeks to delete the proposed amendment on paragraph 1 of the Second Schedule in the Bill. The proposed amendment in the Bill is intended to remove challenges in determination of services done in Kenya by a resident Company but purported to be enjoyed outside Kenya thus leading to loss of revenue through claiming of refunds on such transactions. However, the proposed amendment affected transportation of goods originating from Kenya to the neighbouring countries. In order to retain the competitiveness of the transportation sector, an amendment to the Second Schedule is proposed in order to provide zero rating on transportation of goods originating from Kenya to a place outside Kenya.

68. They opposed the amendment Part C (Zero rated supplies) of the Second Schedule to the Act because the proposal would result in increase of the price of bread, which is consumed by a majority of Kenyans who are already struggling with the negative current economic climate as a result of the COVID-19 Pandemic.

#### **Committee's Observation**

The proposed amendment seeks to remove bread under the zero-rated supplies. This essentially means that ordinary bread will be a taxable commodity and there will be a resultant price increase to match the VAT component. The Committee supported to retain ordinary bread under the zero-rated supplies to ensure that its price does not go up.

69. The proposal 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 is welcome because it will make it cheaper for persons to establish Real Estate Investment Trusts (REITs) hence spurring growth in the sector.

#### **Committee's Observation**

The Committee supported the proposal.

#### **Excise Duty Act**

70. The proposed amendment to the First Schedule to the Act seeking to re-introduce excise duty on locally manufactured sugar confectionery and white chocolate in blocs, slabs or bars should be deleted because it 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.

#### **Committee's Observation**

The Committee observed that the proposal in the Bill seeks to introduce excise duty on the locally manufactured sugar confectionery of tariff HS Code: 1704 and Chocolates (HS

Code: 1806). The Committee further observed that introduction of excise duty on locally manufactured items will affect the local manufacturers and this will go against government agenda to promote local manufacturing. In order to cover the revenue expected to be realised from the proposal in the Bill, the Committee agreed to revise excise duty on imported Sugar confectionary and White chocolate of the aforementioned HS codes to Shs. 35 per kg.

71. The proposed amendment to re-introduce excise duty on betting at a rate of 20% on the amount wagered or staked should be deleted as it will deal a huge blow to the players in the industry and may lead to additional companies exiting the market.

#### **Committee's Observation**

The Committee observed that the proposed rate of excise on betting is high and may end up not achieving the intended revenue as most players will opt for international platforms for the betting activities. The Committee further observed that there are other forms of activities under the Betting, Lotteries and Gaming Act that have not been subjected to excise duty. In view of the above the Committee proposed to apportion the twenty percent excise across all betting and lottery transactions, that is betting, gaming, prize competitions and lottery, at seven-point five percent. As such, the new amendment will raise up to 30% on excise duty on all the betting and lottery transactions against the 20% that was initially proposed in the Bill.

#### **Tax Procedures Act**

72. The proposed to sections 23 and 31 of the Act (Clause 28 paragraph (a) and Clause 29) be deleted noting that taxpayers would be required to maintain records for a longer period.

#### **Committee's Observation**

Committee supported the proposal by PKF as increasing from five years to seven years would amount to encouraging inefficiency.

73. The proposed amendment under section 42(A) of the Act should be deleted noting that the exemptions should be retained since the VAT refund backlogs will make it difficult for businesses that would have benefitted from the exemption in the first instance.

#### **Committee's Observation**

The Committee agreed with the proposal as it is in the Bill. The Committee noted that the proposal by Ernst and Young is to delete from the Bill the proposal to delete Section 42A (4A) of the TPA. The proposal in the Bill seeks to remove the Commissioner's powers to exempt any supplier from application of withholding VAT (WHVAT). The provision is no longer relevant going forward considering that the rate of WHVAT was reduced from 6% to 2% and the fact that excess input tax resulting from WHVAT is refundable.

### **3.2 ERNEST & MARTIN ASSOCIATES**

Ernest and Martin Associates submitted their memorandum dated 16<sup>th</sup> May 2021 and made an oral presentation on 2<sup>nd</sup> June, 2021, they submitted THAT—

#### **Income Tax**

74. Clause 2 be amended in definition the term "control" by deleting the words "twenty per cent" and replacing with the words "twenty-five percent" and adding the following proviso;

*"The definition of control shall not apply in the definition of the term "contract of service in section 2".*

75. The proposed paragraph (h) be deleted and for purposes of the new definition of "control" in section 15(2)(r) (iv) be amended by deleting 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"*; and for purposes of synchronizing the proposed definition of "control" under paragraph (b), amend the 4<sup>th</sup> Schedule to expand the definition of financial institution to include, a person licensed under the Central Bank of Kenya Act; A savings and credit co-operative society licensed under the Sacco Societies Act No. 14 of 2008; A person licensed under the Microfinance Act, No. 19 of 2006; A person licensed under the Capital Markets Act; A person licensed under the Retirement Benefits Act; and A Venture Capital Enterprise.

#### **Committee's Observation**

The Committee proposed amendment to paragraph h in order to ensure that its upon assessment that one can establish a case that constitutes control. The Bill as it is may be subject to abuse and lack in objectivity in the determination of what constitutes control. The reduction of the controlling percentage from twenty percent to twenty five percent was not supported as the provision is meant to safeguard revenue by ensuring that those companies with the level of control of 20% are subjected to these rules in order to ensure they comply with the arm's length principle.

76. Amend paragraph (b) under definition of *"Permanent Establishment"* by inserting the words *"one hundred and eighty-three days"* immediately after the words *"in that year of income or within the preceding 12-month period"*. This is to provide a definite period within which a permanent establishment is set in paragraph (b).

#### **Committee's Observation**

The proposed amendment is already addressed by the proviso to paragraph (b) which provides for aggregating of periods where a person splits their contracts in different periods to avoid meeting the threshold. The proposed amendment therefore is not necessary.

#### **Clause 3**

77. The proposed definition of *"digital market place"* be deleted and replaced 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"*. This is because no definition is provided in the Finance Bill as to what constitutes an *'online platform'* and this introduces significant ambiguity to the digital service tax regime.

#### **Committee's Observation**

The proposal to include the word *'or electronic'* immediately after the words *'online'* in the definition of *'digital market place'* is supported as it will ensure all digital transactions are captured for purposes of taxation.

#### Clause 6

78. Clause 6 be amended by inserting the following words at the end of the clause; "*and, in so far as that deficit has not already been deducted*". This is to give an extent to which a deficit may be utilized.

#### Committee's Observation

The proposal is not necessary since the deduction can only happen if it has not been exhausted.

#### Clause 7

79. Clause 7 be amended under the proposed amendment to section 16(2)(j) by replacing the word "*thirty*" with the word "*fifty*". This is because the value of 30% is too low and may discourage growth of business, yet debt is a legitimate source of finance, thus hampering employment.

#### Committee's Observation

The above proposal seeks to increase the allowable interest restriction from 30% to 50% of the EBITDA. This will dilute the effectiveness of the proposed interest restriction as it will allow the deduction of a higher value of interest thus eroding the tax base. The 30% as currently proposed in the Bill is in line with best practise and should be maintained.

In view of the above, the Committee rejected the proposal to increase interest restriction to 50 % of the EBIDTA. The proposed will lead to base erosion.

80. The proposed section 16(2)(j) be amended by inserting the following paragraph; "*(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*". The proposed provision would be rendered inoperable if the term "*all loans*" is undefined.

#### Committee's Observation

The proposal to define the term '*all loans*' is redundant since it is already defined under Section 16 (3) of the Act. The Committee therefore rejected the proposal.

81. The proposed section 16(2)(ja) be amended by deleting the words "*alone or together with not more than four other persons*" This is to ensure that financial institutions are not disadvantaged by the clause.

#### Committee's Observation

The above proposal seeks to delete the words '*alone or together with not more than four other persons*'. However, these words are necessary as they provide clarity on the non-resident person referred to under the definition of deemed interest in Section 2. In view of the above, the Committee rejected the proposal to delete the words alone or together with not more than four other persons'.

#### Clause 8

82. The definition of the word "*ultimate parent entity*" in item (a) be amended by deleting the words "*is resident*" and replacing with the words "*is not resident*". This is because Section 18 relates to multinational companies, thus the ultimate company should be non-resident, as any resident ultimate company is well within KRA's ambit.

83. The proposed section 18B(2) be amended by deleting the words "*financial activities*" and replacing with the words "*business or financial activities*".
84. The proposed section 18B(3) be amended by adding the words "*in addition to its transfer pricing documentation*" after the words "*jurisdiction in which the group operates*".
85. The proviso to Paragraph 3(q) of the Third Schedule Head B be amended by replacing the word "*citizens*" with the words "*citizens or residents*". This is to broaden the scope of the proposed provisions.

**Committee's Observation**

The proposed amendments to the definition of ultimate parent entity is not appropriate since the requirement for reporting is on a resident parent company which has operations in other jurisdictions. In view of the above the proposal was rejected.

Further, the proposed amendment (paragraph 85) to include transfer pricing documentation is not necessary as the information required will be provided in the Regulations that will guide the operation of this provision.

**Value Added Tax (VAT)**

**Clause 14**

86. The definition of the term "*supply of imported services*" in paragraph (a) be amended by adding the words "*or by a person whom section 5(7) does not apply*" after the words "*not a registered person*". This is because digital service providers are required to charge VAT the same as registered persons.

**Committee's Observation**

The Committee observed that the proposal to define the term 'supply of imported services in paragraph (a) is not necessary since the paragraph refers to supply of services made in Kenya by a person outside Kenya hence the person is not required to register as per the VAT Act.

**Clause 20**

87. Clause be deleted because the proposal may be superfluous as the Statutory Instruments Act makes provision for all statutory instruments to be tabled before the relevant House of Parliament within seven (7) sitting days after publication.

**Committee's Observation**

The Committee agreed with the proposal to delete Clause 20 as it was removing the role of Parliament in the scrutiny of subsidiary legislation contrary to Statutory Instruments Act.

**Clause 21**

88. Clause 21 be amended by inserting the words "*supply or leasing of biogas and bio-slurry products, equipment and appliances including digesters*". This is to encourage use of clean energy in rural areas in Kenya.

**Committee's Observation**

The Committee agreed with the above proposal in support of clean energy cooking solutions.

### **Clause 22**

89. Clause 22 be deleted because 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 unfavourable to investors looking to be a regional hub and expose the country to the risk of investors leaving to more favourable jurisdictions.

### **Committee's Observation**

The Committee did not support the amendment to delete Clause 22 as it will lead to revenue. However, the Committee agreed to only make exemption of transportation sector where it will remain zero rated supply for it to remain competitive.

### **Excise Duty**

#### **Clause 24**

90. Clause 24 be amended by inserting the following new sub-section; "*A licensed person under this Act, may, in computing of the 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 proposed provision should be extended to the provision of goods i.e. operate an input output system, instead of a refund system.

### **Committee's Observation**

The proposal above seeks to extend the provision relating to relief on raw materials to goods and also offset the excise duty paid on raw materials instead of treating it as a refund. This is already provided for under the current Section 14 which provides for an offset and not a refund as stated. In view of the above the Committee rejected the proposal.

#### **Clause 25**

91. Clause 25 be amended by deleting the proposed item (c) i.e. in Part III, in the definition of "*other fees*", and further delete the words "*fees or commissions earned in respect of a loan*". This is because 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 do not include interest on loan or return on loan. It's 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.

### **Committee's Observation**

The amendment as proposed in the Bill is meant to create more revenue streams and therefore the deletion would lead to projected revenue loss of approximately KShs. 680 million. Furthermore, these are revenues for banks and hence should be excisable.

### **Tax Procedures Act**

92. Clause 26 of the Bill be amended by inclusion of the Betting, Lotteries and Gaming Act under the Tax Procedures Act, for uniform procedures.

#### **Committee's Observation**

The Betting, Lotteries and Gaming Act is meant for the regulation of the industry. The Committee therefore rejected the proposal.

#### **Clause 27**

93. Amend the proposed section 6A by inserting the following new sub-section 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"*.

#### **Committee's Observation**

The above proposal is seeking to insert a new subsection 6A (1A) to require the Cabinet Secretary to cause a copy of an agreement under Section 6A to be laid without delay before the National Assembly as per the Statutory Instruments Act, 2013. This is already applicable since the agreement is gazetted through a legal notice that is tabled before the Committee of Delegated Legislation within the stipulated timelines. The proposal was therefore rejected.

94. The proposed sub-clauses 28(a) and 28(c) Amendment of section 23 be deleted. This is because increasing the audit period to 7 years will make it very cumbersome for businesses to effectively respond to queries from KRA.
95. The amendment proposed in clause 29 be deleted because KRA should be encouraged to carry out more timely and frequent audits, which are more helpful to the tax authority and the tax payer.

#### **Committee's Observation**

The Committee agreed to the proposal to delete proposed sub-clauses 28(a) and 28(c) and Clause 29 based on the reasons elucidated above. In view of the above the Committee proposed an amendment to delete.

96. Delete clause 32 as it will hurt companies that will be in a 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.

#### **Committee's Observation**

The Committee observed that the above proposals by Ernest and Martin Associates is to delete from the Finance Bill the proposal to delete Section 42A (4A) of the TPA. The proposal in the Bill seeks to remove the Commissioner's powers to exempt any supplier from application of WHVAT. The provision is no longer relevant going forward considering that the rate of WHVAT was reduced from 6% to 2% and the fact that excess input tax resulting from WHVAT is refundable.

97. Clause 40 be deleted because it raises concerns relating to the violation of a taxpayer's rights especially in light of Section 80 of the Act 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.

#### **Committee's Observation**

The Committee agreed to the deletion of the proposed Clause 40 as it will also amount to directing the Courts on its judicial processes.

98. Clause 42 be amended by deleting and replacing it as follows; "*Carrying out business over the internet or an electronic network including through a digital marketplace*". Because this is more consistent with the proposed clause 3 amending the Income Tax Act.

#### **Committee's Observation**

The Committee agreed with the new wording for consistency since it will align the provisions made to the First Schedule of the Tax Procedures Act relating to digital service tax with the proposed amendments on the taxation of digital services under the income tax and the VAT.

### **3.3 INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA (ICPAK)**

ICPAK submitted their memorandum and made oral presentations on 2<sup>nd</sup> June, 2021. They proposed THAT—

#### **Income Tax Act**

99. Sub-clause 2(a) be amended by deleting paragraphs (b), (c), (f), (g) and (h). This is because the Bill proposes to provide a very broad definition of the term control. Whereas they agreed 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.

#### **Committee's Observations**

This is an anti-avoidance provision and is meant to safeguard revenue leakage. Deleting the deleting paragraphs (b), (c), (f), (g) and (h) will negate the objective of safeguarding revenue leakage upon which it was proposed. The Committee proposed an amendment to Paragraph h to give the Commissioner General power to make an assessment to any dealing or practice in establishing what constitutes Control.

100. Sub-clause 7(a) be amended to read as follows in line with the international best practice; "*gross interest paid or payable to non-resident related persons in excess of thirty per cent of earnings before interest, taxes, depreciation and amortization of the borrower in any financial year*". Introduce 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*".

#### **Committee's Observations**

The Committee agreed with proposal to exempt banks or financial institutions licensed under the Banking Act and to also include the micro and small enterprises registered under the Micro and Small Enterprises Act, 2012 from the 30% restriction to interest deductibility.

101. Sub-clause 8(2) be amended to read as follows; "*All multinational enterprises 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.*"

### **Committee's Observations**

The above proposal seeks to provide for a threshold of gross turnover. The threshold will be prescribed through a regulation as it varies from one jurisdiction to another. In view of the above, the Committee rejected the proposal to prescribe a threshold.

### **Value Added Tax Act**

102. The Bill be amended by deleting paragraph 32 under sub-clause 21(b) and sub-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.

### **Committee's Observations**

The Committee observed that the above proposal seeks to delete the proposed amendment on paragraph 1 of the Second Schedule in the Bill. The proposed amendment in the Bill is intended to remove challenges in determination of services done in Kenya by a resident Company but purported to be enjoyed outside Kenya thus leading to loss of revenue through claiming of refunds on such transactions. However, the proposed amendment affected transportation of goods originating from Kenya to the neighbouring countries. In order to retain the competitiveness of the transportation sector, an amendment to the Second Schedule is proposed in order to provide zero rating on transportation of goods originating from Kenya to a place outside Kenya.

103. Sub-clause 22(b) be deleted because subjecting ordinary bread to 16% VAT will make the product expensive and inaccessible to many Kenyans. This also runs counter to the government's Big 4 Agenda pillar on Food Security.

### **Committee's Observations**

The Committee agreed to the deletion of the proposed sub-clause 22(b) so as to maintain the price of ordinary bread since it's an essential commodity and imposition of VAT at 16% would lead to a corresponding price increase.

### **Excise Duty Act**

104. The proposed new paragraph 4A in sub-clause 25(b) be amended because 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.

### **Committee's Observations**

The Committee observed that the proposed rate of excise on betting is high and may end up not achieving the intended revenue as most players will opt for international platforms for the betting activities. The Committee further observed that there are other forms of activities under the Betting, Lotteries and Gaming Act that have not been subjected to excise duty. In view of the above the Committee proposed to apportion the twenty percent excise across all betting and lottery transaction, that is betting, gaming, prize competitions and lottery, at seven-point five percent. As such, the new amendment will raise up to 30% on excise duty on all the betting and lottery transactions as against the 20% that was initially proposed in the Bill.

105. The proposed amendment in sub-clause 25(c) be deleted because 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.

#### **Committee's Observations**

The amendment as proposed in the Bill is meant to create more revenue streams and therefore the deletion would lead to projected revenue loss of approximately KShs. 680 million. Furthermore, these is revenue for the banks and hence should be excisable.

#### **Tax Procedures Act**

106. The amendments proposed in clauses 28 and 29 be deleted because the proposal will subject taxpayers 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. As such, the increased time period may erode the administrative efficiency of KRA by reducing the incentive to audit taxpayers in a timely manner.

#### **Committee's Observations**

The Committee agreed to the proposal to delete proposed sub-clauses 28(a) and 28(c) and Clause 29 based on the reasons elucidated above. In view of the above the Committee proposed an amendment to delete sub-clauses 28(a) and 28(c) and Clause 29.

107. Amend clause 33 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 the overpayment arose*". This is because 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.

#### **Committee's Observations**

The Committee proposed an amendment to provide that once the Commissioner notifies that he is satisfied that there is an overpayment of tax, the it is deemed to be offset against future tax liabilities.

### **3.4 KENYA BANKERS ASSOCIATION (KBA)**

Kenya Bankers Association submitted a memorandum dated 31<sup>st</sup> May 2021 and made oral presentation before the Committee on 2<sup>nd</sup> June, 2021. The Association submitted THAT—

#### **Income Tax Act**

108. Section 16(2)(j) of the Act should be amended by including the following sub-paragraph (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.

### **Committee's Observations**

The Committee agreed to exempt banks from the provision of 30% of EBIDTA interest restriction based on the business nature of banking sector.

109. Section 2 of the Act should be amended on the definition of management or professional fees and royalties to include; *"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."*
110. 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.

### **Committee's Observations**

The proposed amendment in paragraph 109, 110 and 111 of the report will lead to revenue loss. The Committee therefore rejected the proposal to the new definition of the term management or professional fees and royalties.

111. Paragraph 3(d) of the Third Schedule to the Act should be amended by substituting *"fifteen"* with the word *"ten"*. 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 favorable income tax regime but have access to markets across Africa.

### **Committee's Observations**

The reduction in the rate from fifteen to ten percent will have a serious implication in revenue.

112. A new sub-section 3(2)(cb) under the Act be inserted 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 a financial service provider authorized or approved by the Central Bank of Kenya; and (b) online services provided by Government institutions"*. The Act should specifically set out the exemption of the financial institutions from Digital Service Tax as set out in the Income Tax (DST) Regulations 2020 in order to avoid any misunderstanding as to the taxability of the services provided by the banks.

### **Committee's Observations**

The proposed amendment by KBA seeks to exclude certain digital services from DST. However, the proposed exemptions are for institutions that are resident in Kenya. The

Bill has proposed exclusion of resident persons from DST which means these institutions will not be subject to DST. The proposed exemption is redundant.

#### **Value Added Tax Act**

113. The proposed introduction of paragraph 32 under Section 21(b) be deleted because this section introduces export of services under the exempt supplies category. Delete Section 22(a) because it 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.

#### **Committee's Observations**

The Committee did not support the amendment to delete Clause 22 as it will lead to revenue. However, the Committee agreed to only make exemption of transportation sector where it will remain zero rated supply for it to remain competitive.

114. Part I of the First Schedule to the Act be amended to read as follows; "*insurance agency, brokerage and reinsurance business*". Insurance cover is becoming a necessity in the country. Charging of VAT on the insurance business will increase the cost of insurance. Further, 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 losses due to the low uptake from the populace.

#### **Committee's Observations**

The Committee rejected the proposal as it will negate the intended objective of reducing the tax expenditure. This will also erode the tax base.

#### **Excise Duty Act**

115. The Excise Duty Act be amended by deleting the proposed amendment to part III of the Interpretation Schedule to the Act. Imposition of excise duty on fees and commissions earned on loans will lead to an increase in the cost of borrowing, which is likely to affect access to credit.

#### **Committee's Observations**

The Committee rejected the proposal as it will negate the intended objective of reducing the tax expenditure. This will also erode the tax base.

#### **Tax Procedures Act (TPA)**

116. The proposal to amend Section 23 of the TPA be deleted because it proposes to increasing the period for record keeping from 5 years to 7 years has an implication of cost to the taxpayers. The effect of deleting the proposal will reduce uncertainty for taxpayers and encourage the KRA to better utilize the investments that it has made in technology and data analytics.

#### **Committee's Observations**

The Committee agreed with the proposal to delete Sub -clauses 28 (a) and (c) as the revenue authority has invested in systems which improves the process of auditing easier. As such the proposal to increase the timelines for KRA to carry out tax audit from five to seven years will contribute to inefficiency.

117. Transfer of business should be listed under Part I of the First Schedule to the Act as an exempt supply. This is to help businesses which will likely suffer the consequences of COVID-19 and require restructuring their businesses in the post-COVID period.

#### Committee's Observations

The Committee rejected the proposal since it will lead to enormous revenue loss.

### 3.5 KENYA PRIVATE SECTOR ALLIANCE (KEPSA)

In their memorandum and oral presentation made before the Committee on 2<sup>nd</sup> June, 2021, KEPSA proposed THAT—

#### Income Tax Act

118. Sub-clause 2(a) be amended to 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 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*". 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.

#### Committee's Observations

The provision as contained is comprehensive enough to cover all aspects that would constitute control. The provision is meant to address tax avoidance based on arm's length rule. The Committee has proposed an amendment to paragraph of sub-clause 2 (a) that is intended to ensure that it is upon assessment that the Commissioner General can deem a certain dealing or practice as amounting to control.

119. Clause 2(b) be amended to read as follows; "*Permanent Establishment now includes; i) A fixed place of business through which business is wholly or partly carried on and includes: (a) A place of management, a branch, an office, a factory, a workshop and a sales outlet; (b) 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; (c) A warehouse in relation to a person whose business is providing storage facilities to others; or (d) 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: (a) 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 (b) 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; and 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: (a). 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 (b) 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: (i) The use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise; (ii) 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 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”.*

120. The 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.

#### **Committee’s Observations**

The Committee observed that the proposal will lead to loss of revenue. There is no need of having a timeline for which a fixed place of business ought to have existed unless it is in respect to project related activities which have timeline for completion such as mining, exploration, and construction among others which are specifically provided for in the definition. Some of the proposal seeks to increase the number of days for services to qualify as a permanent establishment from 91 days to 183 days. The effect of this will prohibit the government from taxing such services until 183 days.

121. Clause 5(b)(2) of the Bill be amended in order provide a format for the proposed return be provided by KRA and that it 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. This is for purposes of clarity on the nature of information which should be provided to the KRA to avoid ad hoc information requests.

#### **Committee’s Observations**

The Committee observed that the proposal by KEPISA is to provide format for submitting returns. Section 71 of the Tax Procedures Act already empowers the Commissioner to prescribe forms for submitting tax returns or other information required for tax purposes. The Commissioner has already prescribed the return for DST which is currently submitted through the KRA’s iTax platform. The Committee therefore did not support the proposal by KEPISA.

122. Sub-clause 7(a) be amended by deleting paragraph (j) and substituting it as follows; *“(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 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’.* 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.

#### **Committee's Observations**

The Committee observed that the proposal as contained in the Bill seeks to maintain the existing debt to equity ratio for restriction of interest's deductibility which is susceptible to manipulation and has not been effective. The use of earnings before interest, taxes, depreciation and amortization (EBITDA) is more effective as it is based on the profitability of a business which is the determinant of how much tax an entity should pay. The debt-to-equity ratio measures efficiency of business and its profitability. Further, EBITDA is recognized as best practice in dealing with tax avoidance arising from capital structure of a company. The Committee however agreed to exempt banks or financial institutions licensed under the Banking Act and micro and small enterprises registered under the Micro and Small Enterprises Act, 2012 from this interest restriction provision.

123. They proposed a provision of a prescribed turnover threshold under Clause 8 of the Bill. This is because multinational groups whose ultimate parent entities are located in Kenya need this information for certainty on compliance with the provision.

#### **Committee's Observations**

The above proposal seeks to provide for a threshold of gross turnover. The threshold will be prescribed through a regulation as it varies from one jurisdiction to another. In view of the above, the Committee rejected the proposal to prescribe a threshold.

#### **Value Added Tax Act**

124. Under sub-clause 17(b) of the Bill, they recommended 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. This is because the amendment will erode the tax benefits under lease, meaning that Leasing Finance option will become more expensive.

#### **Committee's Observations**

The Committee observed that the proposed amendment as contained in the Bill seeks to extend the prohibition of claim of input tax to cover cases where the vehicles are leased or hired. Currently, the prohibition under only covers instances where the motor vehicle is acquired. This amendment if enacted will address tax leakages through prohibition of deduction of input taxes relating to hire or lease of motor vehicles. As such the claiming of input tax on leasing or hiring of vehicles is not allowable. The Committee rejected the proposal by KEPSA.

125. They were opposed to the provisions under clause 20 noting that the proposed deletion of sub-section 67(2) of the Act contravenes Section 11(1) of the Statutory Instruments Act which requires all statutory instruments to be tabled in the National Assembly for approval.

#### **Committee's Observations**

The Committee agreed with the proposal to delete Clause 20 as it was removing the role of Parliament in the scrutiny of subsidiary legislation contrary to Statutory Instruments Act.

126. They proposed that sub-clause 21(a)(xxiv)(114) of the Bill be rephrased to consider Power Purchase Agreements (PPA) because the language as drafted only preserves the VAT exemption if the exemption was "provided for" by the PPA itself.

#### **Committee's Observations**

The Committee observed that Power Purchase Agreements are a form of agreement hence the preservation equally extends to them.

127. Sub-clause 21(b)(32) on 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 follows; *"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"*.

#### **Committee's Observations**

The Committee observed that the proposal seeks to delete the proposed amendment on paragraph 1 of the Second Schedule in the Bill. The proposed amendment in the Bill is intended to remove challenges in determination of services done in Kenya by a resident Company but purported to be enjoyed outside Kenya thus leading to loss of revenue through claiming of refunds on such transactions. The Committee however supported the zero rating of, transportation of goods originating from Kenya to the neighbouring countries in order to retain the competitiveness of the transportation sector. As such the Committee proposed an amendment to the Second Schedule to provide zero rating on transportation of goods originating from Kenya to a place outside Kenya.

#### **Excise Duty Act**

128. Under sub-clause 24(2), they proposed the exemption from excise duty on bulk purchases of internet data services from a licensed operator so as to enhance efficiency and reduce administration of excise.

#### **Committee's Observations**

The Committee did not support the proposal to exempt from excise from excise duty on bulk purchases of internet data services from a licensed operator as this will erode the tax base leading to loss of revenue. In addition, the Bill has already proposed to allow offset of excise duty on bulk purchases of internet data services.

### **3.6 KPMG ADVISORY SERVICES LIMITED**

In their memorandum dated 1<sup>st</sup> June 2021, they proposed THAT —

#### **Income Tax Act**

129. The ITA should be amended in the definition of *control* by deleting the words *"twenty percent"* and replacing with the words *"fifty percent"* in paragraph (a); deleting the words *"total indebtedness"* and replacing with the words *"book value of the total assets"* and also deleting paragraphs (e) (f) (g) and (h). The proposed changes align the shareholding and voting power threshold for purposes of determining control under the Act to the provisions in the Companies Act.

#### **Committee's Observations**

The Committee observed that the proposal by KPMG seeks to amend the definition of the term 'control' by increasing the threshold for shareholding and voting to 50% and

change the base for determination of level of indebtedness. Further the proposal aims to delete paragraphs (e) (f), (g) and (h). The Committee rejected the proposals by KPMG as they will dilute the objective of the definition of 'control and provide opportunities for tax planning.

130. Proposed amendment to Section 2(b) be amended by deleting the words "ninety-one days" and replacing with the words "one hundred and eighty-three days". This alignment to the clause on the number of days is in conformity with international best practice.

#### **Committee's Observations**

The Committee agreed to retain the amendment as it is in the Bill in order to limit consultancy to ninety-one days.

131. Amend sub-clause 7(a) by deleting the proposal to amend Section 16(2) (j) of the Act. Under the current COVID-19 Pandemic, many businesses are struggling to stay afloat. Such a proposal, which will further strain cash flows for struggling businesses, may be ill timed. The proposal ought to be shelved until such a time as when the economy will start showing signs of recovery.

#### **Committee's Observations**

The Committee observed that the proposal by KPMG seeks to provide a blanket maintenance of the existing debt to equity ratio for restriction of interest's deductibility which is susceptible to manipulation and has not been effective. The use of earnings before interest, taxes, depreciation and amortization (EBITDA) is more effective as it is based on the profitability of a business which is the determinant of how much tax an entity should pay. The debt-to-equity ratio measures efficiency of business and its profitability. Further, EBITDA is recognized as best practice in dealing with tax avoidance arising from capital structure of a company. The Committee therefore rejected the proposal by KPMG. However, the Committee supported the exemption of MSMEs registered under the Micro and Small Enterprises Act from this requirement in order to support the growth of the sector. The Committee further exempted banks or financial institutions licensed under the Banking Act.

#### **Excise Duty Act**

132. Under sub-clause 25(b), they proposed the deletion of the proposed change to part III of the Interpretation Schedule to the Act. The proposed amendment will lead to ambiguity on the scope of interest that is exempt from excise duty.

#### **Committee's Observations**

The Committee observed that the proposal by KPMG seeks to delete the proposed amendment on the definition of 'other fees'. This will negate the intended objective of reducing the tax expenditure. This will also erode the tax base

#### **Value Added Tax Act**

133. Delete clause 21 because subjecting bread to VAT will erode the gains made by the Government in ensuring the average Kenyan is able to put food on their table.

#### **Committee's Observations**

The Committee agreed to maintain ordinary bread under the zero rate so that the manufacturers are in a position to claim input tax and the price of ordinary bread will not therefore be increased. Bread is an essential commodity and therefore should remain zero rated good.

134. Delete the proposed introduction of paragraph 32 under clause 21(b) and sub-clause 22(a). This is aimed at retaining the export of services as a zero-rated supply thus ensuring the country is able to compete with other African countries for services exports and retain its position as a regional hub.

#### **Committee's Observations**

The Committee noted that the proposal by KPMG seeks to delete the proposed amendment on paragraph 1 of the Second Schedule in the Bill. The proposed amendment in the Bill intended to remove challenges in determination of services done in Kenya by a resident Company but purported to be enjoyed outside Kenya thus leading to loss of revenue through claiming of refunds on such transactions. However, the proposed amendment will negatively affect transportation of goods originating from Kenya to the neighbouring countries. In order to retain the competitiveness of the transportation sector, the Committee proposed the amendment to the Second Schedule to provide zero rating on transportation of goods originating from Kenya to a place outside Kenya. In view of the above, the proposals to delete the proposed amendment contained in the Bill was rejected.

135. Section 5 of the VAT Act be amended by inserting the following new paragraph 5(2)(aa)(i); "*the taxable value in respect of fuel products shall exclude excise duty, fees and other charges.*" The 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-needed income apportionment and affordability of other essential commodities.

#### **Committee's Observations**

The Committee observed that the removal of the excise duty, fees and other charges in the taxable value of in respect of fuel products would lead to significant revenue loss. The Committee therefore rejected the proposal. In addition, fuel products are vatable at 8 % which is a lower rate compared to 16 % of most goods.

136. The transfer of business as a going concern be listed under Part 1 of the First Schedule to the 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-19 period in order to remain afloat.

#### **Committee's Observations**

The Committee observed that the exemption from VAT on the transfer of business as a going concern will have a significant impact on revenue. The Committee therefore rejected the proposal.

137. Proposal to add to Part 1 of the First Schedule to the Act be inserted as follows; "*insurance agency, brokerage and reinsurance business*" Charging of VAT on the insurance business will have a negative effect on access to basic insurance cover by Kenyans.

#### **Committee's Observations**

The Committee observed that the exemption from VAT on insurance agency, brokerage and reinsurance business" will have a significant impact on revenue. The Committee therefore rejected the proposal.

### **Tax Procedures Act**

138. They proposed that extensions given post COVID-19 period be exempted from the interest charge through the addition of a proviso to section 33(5) of the Act as follows; *“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.”* This means 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.

### **Committee’s Observations**

The Committee observed that the above proposal seeks to waiver of interest on tax due following granting of extension of time or permission to pay tax by instalments. The Committee rejected this proposal due to the fact that it would have a huge implication on revenue projection.

139. Delete clause 28(a) of the Bill because it will reduce uncertainty for taxpayers and encourage KRA to better utilize investments made in technology and data analytics.

### **Committee’s Observations**

The Committee agreed to the deletion.

### **3.7 FEDERATION OF WOMEN LAWYERS-KENYA**

140. In their memorandum dated May 2021, FIDA-Kenya were opposed to the amendments proposed in clause 21 of the Bill noting that it will increase the cost of living for mothers from the stage of birth of children, notwithstanding the other maternal costs they have to bear.

### **Committee’s Observations**

The Committee agreed to exempt from VAT on all products relating to infants including milk, specifically prepared for infants and other not containing added sugar or other sweetening matters specifically prepared for infants.

### **3.8 RETIREMENT BENEFITS AUTHORITY**

141. In their memorandum, the Authority submitted that clause 51 be deleted and replaced with the following new provision: *“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; (b) by inserting the following new definitions in proper alphabetical sequence- “post-retirement medical funds” 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”.* The 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-retirement medical funds which are established within pension schemes and those that are unregulated.

### **Committee Observations**

The Committee observed that the proposed amendment in the Bill is erroneous as it provides that schemes will provide a medical cover-which is an insurance product and not the core objective of a pension scheme. The proposal therefore does not reflect the intention of the proposed amendment which was to allow for formulation of Regulations

for the registration and regulation of stand-alone and Umbrella post-retirement medical funds established within pension schemes and those that are currently unregulated; In any event, the two definitions contradict each other if they are both sustained; The manner of accessing the funds or the specific medical benefits can be determined in the Regulations; a medical cover is one of them. The proposal by RBA was therefore supported.

### **3.9 INSURANCE REGULATORY AUTHORITY**

142. In their submissions, the Authority supported the proposed definition of "broker" under clause 46 as it will bring operations of foreign brokers within the scope of the Authority's regulatory mandate hence enhance of the interests of insurers and policy holders.
143. Supported replacement of "*Health Management Organization*" with medical insurance providers because it will enhance internal coherence of the Insurance Act.
144. They supported the amendment proposed in clause 48 because it provides the Authority with legal basis to allow insurers to operate closed fund business. It also enhances protection for policy holders as it regulates closed funds. They also supported the amendment proposed under clause 49 as it will clarify that insurers must pay annual fees.

### **3.10 ANJARWALLA & KHANNA LLP**

In their memorandum, Ref: DNG/KKN/GEN and oral presentation, they proposed as follows:

#### **Income Tax Act**

145. Amend Clause 2(a) as follows; "*control, in relation to a person, means where: (a) 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 executive member of the governing board of that person*". The definition will 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.

#### **Committee's Observations**

The Committee observed that the proposed definition by Anjarwalla & Khanna LLP of the term 'control', has removed paragraphs (b), (c), (e), (f), (g) and (h). The paragraphs omitted in the proposed definition are major indicators of the presence of control of one person over another. If the proposal is accepted, it will dilute the objective of the definition of control and provide opportunities for tax planning. The proposal by Anjarwalla & Khanna LLP was rejected.

146. Under Clause 2(b) of the Bill, they proposed that a period of six months set out in the current definition of permanent establishment in the Income Tax Act be adopted so as 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.

#### **Committee's Observations**

The amendment as proposed by Anjarwalla & Khanna LLP seeks to increase the number of days for services to qualify as a permanent establishment from 91 days to 183 days. The effect of this will prohibit the government from taxing such services until 183 days. It should be noted that the time period for providing services hardly reach 183 days and

therefore the government is likely to lose revenue on income derived in Kenya from the provision of those services.

147. They supported the proposal under clause 5 on accounting and payment of Digital Service Tax (DST). They however proposed that a format for the return be provided by KRA, so as to provide clarity on the nature of information which should be provided to KRA to avoid ad hoc information requests.

#### **Committee's Observations**

The Committee observed that the format for filing the returns is to be prescribed under Regulations by the Commissioner General.

148. Amend clause 7 by inserting the following new paragraph (iii); "*(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*". Thin capitalisation is intended to avoid flight of capital from Kenyan companies by non-residents by way of interest payments.

#### **Committee's Observations**

The Committee noted that the above proposal seeks to limit the application of the interest restriction to *non-resident related parties* and also exclude financial institutions. This will dilute the effectiveness of the provision since excess interest deductions that erode the tax base can also occur between unrelated parties. The proposal was therefore rejected. On the financial institutions, the Committee supported the exemption of banking and financial institution as well as Micro Small and Medium Enterprises registered under the Micro, Small and Medium Enterprises Act due to the nature of capitalisation.

149. They proposed 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 Independent Power Producers (IPPs) supplying electricity to the national grid under a power purchase agreement. They noted that 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.

#### **Committee's Observations**

The exemption will lead to revenue loss. The proposed amendment by Anjarwalla and Khanna was rejected. Minimum Tax is targeted on companies that perpetually declare losses.

#### **Value Added Tax**

They proposed the following amendment to clause 16:

150. Regulation 4 of the Digital Marketplace Supply (DMS) regulations is amended by deleting sub-sections (2), (3), (4) and (5) and substituting therefor the following new paragraph below sub-section (1); "*(2) Where the supply under Regulation 3 is made in a business-to-business transaction, the provisions of section 10(3) shall apply*".
151. Regulation 5 of the DMS Regulations is amended: in sub-section 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*"; and in sub-section 2 by deleting the words "*business-to*

*customer*" appearing immediately before the words "a person from an export country who makes a".

152. Regulation 6 of the DMS Regulations is amended by deleting the words "*business-to-customer*" appearing immediately before the words "a person from an export country who makes a".

**Committee's Observations**

The Committee observed that the issues raised above are to be covered under the Digital Marketplace Supply regulations.

153. The amendment proposed in clause 20 should be deleted as it will be inconsistent with the provisions of the Statutory Instruments Act, 2013 which requires all statutory instruments, which are made pursuant to powers granted to a Cabinet Secretary under a written law, to be tabled in Parliament within seven days after the publication of the relevant statutory instrument.

**Committee's Observations**

The Committee agreed with the views raised above.

154. The amendments proposed in sub-clause 21(b) should be deleted because 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, thus discourage exportation of services from Kenya.

**Committee's Observations**

The Committee observed that the proposal seeks to delete the proposed amendment on paragraph 1 of the Second Schedule in the Bill. The proposed amendment in the Bill is intended to remove challenges in determination of services done in Kenya by a resident Company but purported to be enjoyed outside Kenya thus leading to loss of revenue through claiming of refunds on such transactions. The Committee however supported the zero rating of, transportation of goods originating from Kenya to the neighbouring countries in order to retain the competitiveness of the transportation sector. As such the Committee proposed an amendment to the Second Schedule to provide zero rating on transportation of goods originating from Kenya to a place outside Kenya.

**Excise Duty Act**

155. The amendment proposed to sub-clause 25(a) should be deleted because the additional cost will negatively impact the consumption and manufacture of sugar confectionery and white chocolate, a move that may also discourage the local manufacturing of these goods as this proposal will not cushion the local companies from the competition of cheaper imports.

**Committee's Observations**

The Committee observed that the proposal in the Bill seeks to introduce excise duty on the locally manufactured sugar confectionery of tariff HS Code: 1704 and Chocolates (HS Code: 1806). The Committee further observed that the introduction of excise duty on locally manufactured the items will affect the local manufacturers and this will go against government agenda to promote local manufacturers. In order to cover the revenue expected to be realised from the proposal in the Bill, the Committee agreed to revise excise duty on imported Sugar confectionery and White chocolate of the aforementioned HS codes to Shs. 35 per kg.

156. They proposed re-introduction of excise duty on betting at a rate of 20% of the amount wagered or staked by punters as captured under sub-clause 25(b) should be deleted because the move will discourage punters from placing bets which may ultimately lead to investors exiting the Kenyan betting industry.

#### **Committee's Observations**

The Committee observed that the proposed rate of excise on betting is high and may end up not achieving the intended revenue as most players will opt for international platforms for the betting activities. The Committee further observed that there are other forms of activities under the Betting, Lotteries and Gaming Act that have not been subjected to excise duty. In view of the above the Committee proposed to apportion the twenty percent excise across all betting and lottery transaction, that is betting, gaming, prize competitions and lottery, at seven-point five percent. As such, the new amendment will raise up to 30% on excise duty on all the betting and lottery transactions as against the 20% that was initially proposed in the Bill.

#### **Tax Procedures Act**

157. The proposal to increase the period within which the Commissioner may amend a tax assessment from five years to 7 years as proposed in sub-clause 28(a) should be deleted because the proposed extension will make it onerous for taxpayers to maintain records and effectively respond to any questions relating to periods past five years.

#### **Committee's Observation**

The Committee agreed with the views to delete the proposed subclause 28 (a) and (c) and Clause 29 based on the reasons explained above.

#### **Central Depositories Act**

158. A new Section 30C to the Central Depositories Act should be inserted which is aimed at including mechanisms to safeguard the confidentiality of beneficial ownership information; *"(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 sub-section (1), information relating to a beneficial owner may be disclosed with the written consent of the beneficial owner; and (3) Beneficial ownership information shall not be made available to the public"*.

#### **Committee's Observation**

The Committee observed that the proposal by Anjarwalla & Khanna LLP seeks to provide for non-disclosure of beneficial ownership. This proposal is not necessary as the prior sections have provided for instances when that information may be disclosed. Further the Authority is guided by the Access to information Act and Data Protection Act that provide on disclosure of private information.

### 3.11 KENYA ASSOCIATION OF MANUFACTURERS (KAM)

In their memorandum and oral presentation made on 3<sup>rd</sup> June, 2021, the Kenya Association of Manufacturers submitted THAT—

#### Income Tax Act (ITA)

159. Clause 7 under the ITA should be deleted to retain the current position of Debt-Equity ratio of 3:1 as opposed to limiting the interest of Earnings Before Interest Tax, Depreciation and Amortization (EBITDA). The proposed rate is extremely high and will affect capital-intensive businesses such as the manufacturing sector.

#### Committee's Observation

The Committee observed that the proposal by KAM seeks to maintain the existing debt to equity ratio for restriction of interest's deductibility which is susceptible to manipulation and has not been effective. The use of earnings before interest, taxes, depreciation and amortization (EBITDA) is more effective as it is based on the profitability of a business which is the determinant of how much tax an entity should pay. The debt-to-equity ratio measures efficiency of business and its profitability. Further, EBITDA is recognized as best practice in dealing with tax avoidance arising from capital structure of a company.

160. Clause 12 be amended by inserting the following new definition of "farm works"; "*Farm works means farmhouse, labour quarters, any other immovable buildings necessary for the proper operation of the farm, fences, daps, drains, water and electricity supply works other than machinery, windbreaks, and other works necessary for the proper operation of the farm*". The effect of not having a definition creates ambiguity on which investments should qualify for this capital deduction.

#### Committee's Observation

The Committee observed that the proposal by KAM seeks to define the term farm works. The Committee agreed to the proposal as it will guide the implementation of investment allowance on farm work as provided in the Second Schedule.

161. KAM proposes that sub-clause 2(e) be amended by deleting the words "*manufacture or processing of goods*"; and deleting paragraphs (b), (c), (g)(i), (g)(ii) and (h). This is because the definition is too broad and will affect businesses operating as contract manufacturing and further, that 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.

#### Committee's Observation

The deletion will weaken the intended objective if the term control. In order to address any concern relating to how the Commissioner can deem control, the Committee has proposed an amendment to paragraph f, g and h. This is so as to separate ordinary market activities from what can actually be deemed as control.

#### Value Added Tax Act

162. The proposed amendment clause 22 should be deleted because a further increase of a 400g loaf of bread by approximately KSh. 8 will make the commodity unaffordable to most Kenyans.

#### Committee's Observation

The Committee agreed with the views by KAM to continue retaining ordinary bread under the second schedule for it to be a zero-rated commodity.

163. The amendments proposed in clause 20 should be deleted because the proposal will go against the provisions of the Statutory Instruments Act, 2013 which guarantees citizens an avenue for public consultation.

**Committee's Observation**

The Committee agreed with the above view proposed by KAM based on the reasons elucidated.

164. The amendments proposed in Sub-clause 17 (b) should be deleted because the proposed deletion seeks 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.

**Committee's Observation**

The proposal by KAM seeks to provide for deductions of input tax on all types of vehicles leased excess of one year. It is noted that Section 17 is very clear that input VAT on purchase of non-commercial vehicles is not allowable for deductions unless the use of such vehicles relates to making of taxable supplies. It then implies that VAT paid on leasing/hiring of non-commercial vehicles is not allowable for deductions. In view of the above, the Committee rejected the above proposal by KAM as it will lead to high tax expenditure.

165. Clause 21 should be deleted because the proposal will adversely affect the local pharmaceutical manufacturing sector in the country since 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.

**Committee's Observation**

The Committee observed that the proposal in the Bill is not removing them from exemption but aligning them in the proper order as contained in the EAC CET, 2017. The tariff as contained in the current VAT Act are erroneous while other ceased to exist hence complicating the application of the same.

166. Clause 21 should be amended to include the following HS Codes 3003.20.00; 3003.90.00; and 3004.31.00 under the Schedule of the Act on zero rate status which have been omitted subjecting them to 16% VAT. This is because 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.
167. Part I, Section A of the First Schedule should be amended in order to introduce plant and machinery as a paragraph under the Second schedule of the Act as zero-rated items. This is because plant and machinery are critical assets that drive business production operations. The cost for such plant and machinery for manufacturers requires being 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.

### **Committee's Observations**

The Committee agreed to introduce under the zero-rate plant and machinery.

168. Amend Part I, Section A of the First Schedule to introduce agricultural tractors as a new paragraph under the Second schedule of the Act as exempt items of VAT. 90% of Kenyan 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. By adding a VAT on the machinery, farmers will go back to Oxen and Cart and factually manual labour cannot compete with mechanization.

### **Committee's Observations**

The Committee rejected the proposal to zero rate agricultural tractors due to the complexities in determining which tractors are specifically for agricultural purposes only and therefore the proposed amendment can be subject to abuse. Further, it will lead to erosion of tax base and increase tax expenditure. The revenue implication of tractors is about Kshs. 670.4 million which have been factored in the fiscal framework for the FY 2021/22 Budget.

169. They proposed to introduce "*infant food of tariff code 1901.10.00*" under the First Schedule to the Act. This because the Ministry of Health (MOH), UNICEF and WHO recommend exclusive breastfeeding of infants for the first 6 months of their life. However, various situations where exclusive breastfeeding of infants is not possible or is severely restricted due to several factors or circumstances, including the mother's inability to exclusively breastfeed due to her inability to produce sufficient milk.

### **Committee's Observations**

The Committee observed that the proposal to exempt infant food of tariff code 1901.10.00 will enhance its affordability especially where children are unable to access breast milk or it's insufficient.

170. Delete clause 22 (a) because the proposed amendment to remove exported services from zero rate status to exempt will negatively impact manufacturers as it will increase the cost of doing business for companies exporting due to increase in costs from support services costs increasing from Kenya.

### **Committee's Observation**

The Committee observed that the above proposal seeks to delete the proposed amendment on paragraph 1 of the Second Schedule in the Bill. The proposed amendment in the Bill is intended to remove challenges in determination of services done in Kenya by a resident Company but purported to be enjoyed outside Kenya thus leading to loss of revenue through claiming of refunds on such transactions. However, the proposed amendment affected transportation of goods originating from Kenya to the neighbouring countries. In order to retain the competitiveness of the transportation sector, an amendment to the Second Schedule is proposed in order to provide zero rating on transportation of goods originating from Kenya to a place outside Kenya.

### **Excise Duty Tax Act**

171. Delete clause 25 and introduce the following new provisions as follows:
- (i) In Part 1 - Imported Sugar confectionary excluding East African Community partner states of tariff heading 17.04 @ KSh. 20 per Kg;

- (ii) 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.; and
  - (iii) Exclude East African Community partner states.
172. This is to delete the proposal to 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 will be similar to the tax incentive offered to local automotive assembly sector where they have been exempted while imported automotive attract excise tax.

#### **Committee's Observation**

The Committee observed that the proposal in the Bill seeks to introduce excise duty on the locally manufactured sugar confectionery of tariff HS Code: 1704 and Chocolates (HS Code: 1806). The Committee further observed that the introduction of excise duty on locally manufactured the items will affect the local manufacturers and this will go against government agenda to promote local manufacturers. In order to cover the revenue expected to be realised from the proposal in the Bill, the Committee agreed to revise excise duty on imported Sugar confectionary and White chocolate of the aforementioned HS codes to Shs. 35 per kg.

173. Clause 25 be amended as follows; delete "*KSh. 5,000 per kg*" and replace with "*KSh. 757 per kg*". 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. The tobacco-free nicotine containing oral pouches are a new product category that is only available in a limited number of countries. With a KSh. 2.5 billion investment in the new state of the art factory to manufacture tobacco-free nicotine-containing oral pouches, BAT hopes to deliver KSh. 7.5 billion in export revenue from Africa and beyond over the next five years; realise KSh. 1.5 billion in import duty from raw materials and support close to 50,000 Kenyan business within the value chain and over 80 additional direct jobs for Kenyans.
174. The existing rate of excise on electronic cigarettes be deleted due to the high cost affecting local production. Delete the current rate of "*KSh. 2,649.74 per unit for cartridge for use in electronic cigarettes*" and replace with "*KSh. 5 per milliliter of nicotine refilling cartridges*". The proposal is on the basis that the units are not uniform since some may contain more liquids than others.

#### **Committee's Observation**

The Committee observed that the rate as proposed in the Bill is too high and may end up hurting the manufacturers of this product. In view of the above the Committee, reviewed the rate from KSh. 5000 per kg to KSh. 1200 per kg. This is so as to allow the growth of the industry being that it's a new investment and that BAT has already invested in a new factory that is projected to deliver KSh. 7.5 billion in export revenue from Africa and beyond over the next five years; realise KSh. 1.5 billion in import duty from raw materials and support close to 50,000 Kenyan business within the value chain and over 80 additional direct jobs for Kenyans.

### **Tax Procedures Act**

175. Clause 28 be amended by deleting the words "*seven years*" and replacing with the words "*five years*" from the current financial year under the proposed amendments in line with the global standards for the same.

#### **Committee's Observation**

The Committee observed that the proposal in the Bill intends to increase the timelines for tax audit from five years to seven years. The Committee further the increase in timeline will contribute to inefficiencies thereby disadvantage taxpayers. The Committee therefore deleted the proposed amendment in the Bill.

176. Clause 32 be deleted because 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.

#### **Committee's Observation**

The Committee observed that the amendment seeks to delete section 42A which empowers the Commissioner to exempt a supplier from the requirement for withholding VAT where the person has demonstrated that they are going to be in a continuous credit position for a period of not less than 24 months. This provision was necessary when the rate of withholding VAT was at 6%. The withholding VAT rate was reduced to 2% through the Finance Act 2019. Further, the law also clarified that zero-rated supplies were not subject to withholding VAT. In view of the above observations the proposal to delete was rejected.

177. Clause 33 be amended by deleting the words; "*from the date of the notification*". The provisions are aimed at supporting businesses including manufacturers to receive refunds for overpaid tax. However, inclusion of the words "*from the date of the notification*" negates the intended effect of ensuring refund of overpaid tax.

#### **Committee's Observations**

The Committee observed that the proposal in the Bill will complicate the refund process for overpaid tax. The Committee therefore proposed to amend the proposal in the Bill to provide that once the Commissioner notifies that he is satisfied that there is an overpayment of tax, it is deemed to be offset against future tax liabilities.

### **3.12 KENYA BREWERIES LIMITED/UDV (KENYA) LIMITED**

Kenya Breweries Limited/UDV Kenya Ltd submitted a memorandum dated 2<sup>nd</sup> June, 2021. They also made an oral presentation before the Committee on 3<sup>rd</sup> June, 2021. They submitted THAT—

#### **Income Tax Act**

178. Clause 2 be amended by deleting paragraphs (f), (g) and (h), noting that the broad definition of "*control*" will expose businesses deemed to have control of certain value chains while in practice they either have none or the transaction are with completely independent parties.

#### **Committee's Observation**

The Committee observed that the deletion of paragraphs (f), (g) and (h) will negate the intention of dealing with tax avoidance by companies engaging in transfer pricing. The Committee however observed that before the Commissioner General renders his or her

opinion that a certain dealing in either supply or sale constitutes control, he or she will have to do so having done a thorough assessment.

179. Clause 7 be amended 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. Moreover, exclude interest on existing debt from the scope of debt whose interest would be subject to the EBITDA-based interest limitation rule. This is because the proposed change will result in capital flight, since investors may consider diverting their investments to other countries, thereby stifling development as well as switch to equity financing, as debt financing could prove costly negatively impacting financial institutions

#### **Committee's Observations**

The Committee agreed to exempt banks or financial institutions licensed under the Banking Act and micro and small enterprises registered under the Micro and Small Enterprises Act, 2012 and enterprises that supplies solar power equipment to low-income households from the application of the proposed thin capitalization provision.

180. They proposed an amendment to paragraph 11 of the Third Schedule to the Act to read as follows; "*the rate of tax in respect of minimum tax under section 12D shall be zero-point three percent of the gross turnover*". Insert the following new paragraph 12D(1)(f), "*a company declares losses for more than 3 years excluding the impact of high capital investments*". At 0.3% Minimum Tax (MT), the government will be able to distribute that tax burden without negatively impacting established and compliant business

#### **Committee's Observation**

The proposed amendment to section 12D is meant to exempt the companies making losses for a number of years from payment of Minimum tax. This will negate the purpose of the minimum tax which is to require all the companies/entities operating in Kenya contribute to the exchequer for the provision of services by the Government and especially infrastructure which are used by all companies/entities whether making losses or profit.

#### **Excise Duty Act**

181. They supported the provisions under sub-clause 25(a)(iii) because 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.

#### **Committee's Observation**

The Committee noted the comments but proposed an amendment to protect glass bottles originating outside of the EAC member countries. The Committee therefore proposed an amendment to the proposed amendment in the Bill by ensuring that glass bottles imported from countries outside the EAC member countries are excisable. The move will protect local manufacturers from unfair competition by importers from countries that already enjoy subsidies.

182. Section 10(1) of the Excise Duty Act be amended to read as follows; "*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 once every two years to take into account inflation in accordance with the formula specified in Part 1 of the First Schedule*". Alcohol share of wallet has declined from 9% 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.

#### **Committee's Observation**

The Committee observed that Section 10 of the Excise Duty Act provide powers to the Commissioner General to adjust the rates of excise duty on excisable goods that have a specific rate of tax to account for inflation. The adjustment is meant to ensure that Government revenue from excisable goods subject to specific rate of excise duty is not eroded. However, the Finance Act, 2020 amended Section 10 of the Excise Duty Act to provide flexibility to the Commissioner General in consultation with the Cabinet Secretary, National Treasury and planning to adjust the specific excise duty rate on excisable goods depending on prevailing economic circumstances. This therefore, does not require further amendments to the law. In view of the above, the Committee rejected the proposal by KBL & UDV.

183. They were opposed to the provisions under Clause 39 of the Bill seeking to amend Section 99 of the Act noting that the provision failed to expound on the circumstances under which a taxpayer may be required to appear before the Commissioner.

#### **Committee's Observation**

The proposed amendment seeks to amend Section 99 (1) (b) to provide as an offence for failure to honour a notice to appear before the Commissioner, as required under Section 61 and other sections in the Act. Currently, the section is limiting as it only covers instances of failure to appear as is provided under section 59(1)(c) of the Act. The Committee rejected the proposal by KBL & UDV to expound on the circumstances under which a taxpayer may be required to appear before the Commissioner.

### **3.13 CAPITAL MARKETS AUTHORITY (CMA) AND NAIROBI SECURITIES EXCHANGE (NSE)**

The Capital Markets Authority and the Nairobi Securities Exchange through their joint memorandum dated 3<sup>rd</sup> June 2021 and oral presentation made to the Committee on 3<sup>rd</sup> June 2021 submitted THAT—

184. They supported the amendment in sub-clause 21(33), noting that the proposal will open up the vast opportunity in the Real Estate Investment Trust (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.

#### **Committee's Observation**

The Committee noted the positive comments made by CMA and NSE will encourage raising of capital through REITs and Asset Backed Securities. The Committee agreed to the proposal as it is in the Bill.

185. They supported the amendment proposed in sub-clause 45(17) because it is aimed at introducing 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.

#### **Committee's Observation**

The Committee observed that the introduction of timelines within which the Tribunal will hear appeals on the decision made by Capital Markets Authority is a positive move as it will lead to expeditious conclusion of appeals and this will go along in inspiring confidence in the stock market. The Committee agreed to the proposal as it is in the Bill.

186. They supported the amendments proposed in clauses 63, 64, 65 and 66 noting that 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.

#### **Committee's Observation**

The Committee observed that the proposed amendment in the Bill will enhance regulation of the investors in the capital markets as well as opening of omnibus account by a person investing on behalf of others in the securities market. The amendments will further address concerns raised by international reviewers of accessibility of Kenyan capital markets by international investors. It will also align with the Companies Act that requires the underlying beneficial ownership to be disclosed and provide for appointment of an authorised nominee and the manner of operation of the omnibus account. The Committee further observed that the proposed amendment in Clauses 63, 64, 65 and 66 will increase penetration in the securities market. The Committee agreed to the proposal as it is in the Bill.

#### **3.14 FEDERATION OF KENYA PHARMACEUTICAL MANUFACTURERS (FKPM)**

FKPM submitted their memorandum and made oral presentation on 3<sup>rd</sup> June 2021. They submitted THAT—

187. they proposed an amendment to Clause 21(a)(iv & xxiv) aimed at moving to zero rate VAT status or a concessional rate of not more than 4% on medicaments. This is to ensure that Kenya pharmaceutical manufacturers are able to recover input VAT incurred in business expenses in the manufacture of medicaments resulting in a lower cost of medicaments. The local manufacturers will be in a level playing field with medicaments that are directly imported by interested parties.
188. the following HS Codes should be included as they have been omitted hence still under 16% VAT: 3003.20.00, 3003.90.00 and 3004.31.00. This is because 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.
189. they proposed an amendment to move the following HS Codes to zero rated VAT status or a concessional 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. This is because 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.

### **Committee's Observation**

The Committee noted the comments by FKPM that the proposal contained in the Bill makes the product Vatable was not correct since the tariff as contained in the current VAT Act are erroneous while other ceased to exist hence complicating the application of the same. The current proposal is not removing them from exemption but aligning them in the proper order as contained in the EAC CET, 2017. The Committee agreed to the proposal as it is in the Bill.

### **3.15 ASSOCIATION OF BATTERY MANUFACTURERS**

The Association of Battery Manufacturers submitted their memorandum before the Committee on 3<sup>rd</sup> June, 2021. They submitted THAT—

190. they were opposed to the provision under sub-clause 21(xxiv)(113) of the Bill and thus proposed deletion of the same. This is because exemption increases the cost of locally manufactured solar products while making imported products cheaper, thus leading to loss of jobs and revenue to the Government.

### **Committee's Observation**

The Committee observed that the proposal by the Association of Battery Manufacturers would lead to loss of revenue and consequently increase tax expenditure.

### **3.16 KENYA RENEWABLE ENERGY ASSOCIATION (KERA), SISTEMA BIO AND CLEAN COOKING ASSOCIATION**

191. In their joint memorandum, KERA, SISTEMA and Cleaning Cooking Association proposed inclusion of the following new clause immediately after paragraph 133;

- (i) "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 cook stoves;
- (ii) 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.;
- (iii) 136. Pre-fabricated biogas digesters;
- (iv) 137. Biogas;
- (v) 138. Leasing of biogas producing equipment; and
- (vi) 139 Sustainable fuel briquettes for household and commercial use".

191. This 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 Sustainable Development Goal (SDG) 7 which focuses on a concerted global effort to ensure access to affordable, reliable, sustainable and modern energy for all.

### **Committee's Observation**

The Committee observed that items listed in (i), (iii), (iv) and (vi) are essential source of clean cooking solutions mainly by the low-income earners. Introduction of VAT on the items has reduced access to clean cooking solutions especially among low income earners. This coupled with the ban on logging has made it worse for them. In view of the above the Committee agreed to put the specified items (i), (iii), (iv) and (vi) under the First Schedule of the VAT Act, 2013. This will make them affordable. With regards to items

listed in (ii), the Committee observed that the items are used by the upper and middle class segment of the society and therefore they should be vatable so as to protect the low-income earners and in the long run reduce the tax expenditure.

192. They proposed inclusion of the following new paragraphs immediately after paragraph 20 in proper sequence; "21. the supply of denatured ethanol of tariff number 2207.20.00 (for household cooking and heating); and 22. denatured bioethanol of tariff number 2207.20.00". The Government of Kenya's stated policy (via Ministry of Energy) is to ensure universal access to clean cooking solutions by 2028. Rolling out affordable clean cooking solution like bioethanol is also a key measure in achieving at least 8 of the UN SDGs.

#### **Committee's Observation**

The Committee observed that denatured ethanol and denatured bioethanol are essential source of clean cooking solutions mainly by the low income earners. Introduction of VAT on the items has reduced access to clean cooking solutions especially among low income earners. The Committee agreed to put the supply of denatured ethanol of tariff number 2207.20.00 (for household cooking and heating); and 22. denatured bioethanol of tariff number 2207.20.00". First Schedule of the VAT Act, 2013. This will make it affordable.

#### **3.17 PETROLEUM INSTITUTE OF EAST AFRICA (PIEA)**

The Petroleum Institute of East Africa submitted their memorandum Ref: PIEA/ADMIN 27B. They also made oral presentation before the Committee on 3<sup>rd</sup> June, 2021. They submitted THAT—

#### **Income Tax Act**

193. They proposed a provision under Section II Part V of the Act that the investment deductions for petroleum and gas storage facilities be amended to include: (a) petroleum distribution facilities; and (b) 100% capital allowance in the first year of use. This is 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.

#### **Committee's Observation**

The Committee observed that the 100% capital allowance will lead to significant reduction of revenue hence distorting the fiscal framework for the 2021/22 financial year.

#### **Value Added Tax**

194. They proposed the deletion of the proviso on the reinstatement of 16% VAT on Liquefied Petroleum Gas (LPG) because imposing VAT on 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.

#### **Committee's Observation**

The Committee observed that the removal of VAT on LPG will lead to significant reduction of revenue hence distorting the fiscal framework for the 2021/22 financial year.

#### **Excise Duty Act**

195. They proposed a reduction of excise duty on imported LPG appliances/cylinders from 35% to 5%, with gradual annual increases as the local, technical and production capacity grows so that local manufacturing is promoted and protected even as the cost of conversion to LPG is managed as appropriate. This is because of the Government's

commitment made during the Global Clean Cooking Forum (CCF) where the Government pledged to achieve universal access to clean cooking by 2028. In addition, in order to expand usage of LPG especially in the peri-urban and rural areas then 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. The local manufacturing technical and production capacity was work in progress and indeed in 2020 the KEBS raised a red flag on the below standard quality of certain batches of cylinders. In order to ensure that brand owners have a fall back and flexibility plan in meeting consumer demand of LPG in safe cylinders PIEA 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 grows so that local manufacturing is promoted and protected even as the cost of conversion to LPG is managed as appropriate

#### **Committee's Observation**

The Committee observed the 35 % excise duty on imported LPG appliances/cylinders is meant to encourage local manufacturing. In view of that, the Committee rejected the proposal to reduce excise duty to 30% as this will create competition against local manufacturers. In addition, the Committee recommended that in order to support local manufacturing of LPG appliances/cylinders, there was need to introduce appropriate incentives related to production.

196. They proposed that import duty for 3811.21.00 additives for lubricating oils: containing petroleum oils or oils obtained from bituminous minerals should be reviewed from 10% to 0% and the import duty for 3811.29.00 Other (Proposal to change current description from "other" to additives for lubricating oils: containing synthetic oils) should be reduced to 0%. This will have a favorable impact on lubricant prices for consuming sectors.
197. They proposed Common External Tariff (CET) split to provide for coolants at 25%. 2710.19.56 non-lubricating oils (cutting oils, coolants, anti-rust, brake fluids and similar oils) in order to support and build local manufacturing and export all over Africa in favor of imports which is creating a loss of foreign exchange.

#### **Committee's Observation**

The Committee observed that the proposal to exempt additives for lubricating oils from import duty will lead to significant reduction in revenue.

#### **3.18 KENYA WINE AGENCIES LIMITED (KWAL)**

198. In their memorandum dated 27<sup>th</sup> May 2021, they proposed an amendment to sub-clause 25(a)(iv) by deleting the expression "*shs. 198.34 per litre*" appearing against the description wines including fortified wines and other alcoholic beverages obtained by fermentation of fruits and substituting thereof with the rate of "*shs. 189 per litre*". This is because reduction of excise tax will help to nurture the wine industry thus leading to more investors investing in local grape farming initiatives.

#### **Committee's Observation**

The Committee observed that the proposal to reduce excise duty on wines including fortified wines and other alcoholic beverages by KSh. 9.34 per litre. The Committee noted that the proposed reduction will lead to revenue loss and thereby distort the 2021/22 fiscal year revenue targets.

199. They proposed retention of sub-clause 25(a)(iii). This is because the amendment will promote the spirit of East African Community by removing barriers to trade for other glass manufacturers situated within the EAC.

#### **Committee's Observation**

The Committee observed that the proposed amendment as it is in the Bill seeks remove excise on imported glass bottles (other than for packaging pharmaceutical products). This is in line with the ruling at the East African Court of Justice that cited that introduction of excise on imported bottle was non-tariff trade barrier. In order to safeguard revenue arising from the importation of glass bottle, the Committee agreed to protect glass coming from within the EAC but to continue imposing excise coming from other countries that are not in the EAC. The move is meant to promote local manufacturers of glass bottles. In view of the above, the Committee proposed an amendment as contained in the schedule of Committee's proposed amendment.

#### **3.19 MILESTONE AND GAMING LIMITED (SPORTPESA)**

200. In their memorandum, they were opposed to the provision under sub-clause 25(b) which proposed introduction of excise duty on betting, computed as 20% of the amount staked. This they noted was contrary to section 9 of the Excise Duty Act which provides that the excisable value of excisable services shall be "...the fee, commission, or charge payable for the services, or open market value of the services".

#### **Committee's Observation**

The Committee observed that the proposed rate of excise on betting is high and may end up not achieving the intended revenue as most players will opt for international platforms for the betting activities. The Committee further observed, that there are other forms of activities under the Betting, Lotteries and Gaming Act that have not been subjected to excise duty. In view of the above the Committee proposed to apportion the twenty percent excise across all betting and lottery transaction, that is betting, gaming, prize competitions and lottery, at seven-point five percent. As such, the new amendment will raise up to 30% on excise duty on all the betting and lottery transactions as against the 20% that was initially proposed in the Bill.

#### **3.20 KIMAKIA MAGARA AND PARTNERS LLP**

201. In their memorandum, Ref: KMP/LEG/BD-1/2021 they proposed amendment of section 52(2)(b) of the Stamp Duty Act (Cap 480) by inserting the words "*or a registered family trust*" after the word "*established*".
202. Amend Section 117(1)(h) of the Stamp Duty Act (Cap. 480) by inserting the words "*registered family trust*" in between the words "*codicil*" and "*or*". This is to prevent double taxation 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.

#### **Committee's Observation**

The Committee observed that the new proposed amendment is as a consequence to the proposed changes Trustees (Perpetual Succession) Act and the Perpetuities and Accumulations Act in order to allow for family trusts. The proposed amendment is to provide the family trust income be deemed as income under the Income Tax Act. The proposal seeks to also exempt certain family transactions from stamp duty in order to

avoid double taxation. The Committee agreed to the proposed amendment as proposed by Kimakia Magara and Partners LLP.

### 3.21 KISOO MUTUA & ASSOCIATE ADVOCATES

Kisoo Mutua & Associates Advocates submitted a memorandum Ref: KM/05/2021. They also made an oral presentation before the Committee on 3<sup>rd</sup> June 2021. They submitted THAT—

#### Income Tax Act

203. Section 11(3)(c) of ITA be amended by inserting the following sub-section (c); *“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 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”*. This is 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.
204. Section 25(7)(b)-(Income settled on children) be amended in the definition of *“Settlement”*, by inserting the words *“through a registered family trust or”* in between the words *“assets”* and *“resulting”*. The section will allow a family trust, as a separate legal entity to make its own accounts on taxes.
205. Section 26(5) – (Income from certain settlements deemed to be income of Settlor) be amended in the definition of *“Settlement”*, by inserting the words *“other than a registered family trust”* in between the words *“trust”* and *“covenant”*. This will allow a family trust, as a separate legal entity to make its own accounts on taxes.
206. A new paragraph 36(g) in the First Schedule, Part I be inserted to avoid double taxation of investments, being transferred into a family trust, from capital gains tax; *“Property (including investment shares) which is transferred or sold for the purpose for transferring the title or proceeds into a registered family trust”*.
207. A new paragraph 57 in the First Schedule, Part I be incorporated as follows - *“(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”*. This is aimed at avoiding double taxation by exempting the transfer or immovable property from capital gains.
208. A new paragraph 5(jb) of the Third Schedule be inserted as follows- *“in respect to disbursement of deemed income to beneficiaries under Section 11(3)(c), standard corporate tax rate of the gross amount paid”*. This will help to generate government revenue through taxation of deemed income distributed to beneficiaries, by taxing at the standard corporate tax rate.

#### Committee’s Observation

The Committee observed that the new proposed amendment is as a consequence of the proposed changes to the Trustees (Perpetual Succession) Act and the Perpetuities and Accumulations Act in order to allow for family trusts. The proposed amendment is to provide the family trust income be deemed as income under the Income Tax Act. The

proposal seeks to also exempt certain family transactions from stamp duty in order to avoid double taxation. The Committee agreed to the above proposals.

**3.22 THE EAST AFRICAN TAX AND GOVERNANCE NETWORK (EATGN), NATIONAL TAXPAYERS ASSOCIATION (NTA), THE INSTITUTE FOR SOCIAL ACCOUNTABILITY (TISA) AND TAX JUSTICE NETWORK AFRICA (TJNA)**

The above stakeholders under the *Okoa Uchumi Coalition* submitted a joint memorandum. They also made oral presentation to the Committee on 3<sup>rd</sup> June 2021. They submitted THAT—

209. Clause 2 be amended by deleting paragraphs (f)(i)(ii) and (g)(ii) because the provisions grant the Commissioner unrestrained powers to determine control will increase uncertainty amongst taxpayers.

**Committee's Observation**

The Committee observed that the deletion of paragraphs (f), (g) and (h) will negate the intention of dealing with tax avoidance by companies engaging in transfer pricing. The Committee however observed that before the Commissioner General renders his or her opinion that a certain dealing in either supply or sale constitutes control, he or she will have to do so having done a thorough assessment.

210. Clause 7 be amended by including the following new provision; "*This paragraph shall not apply to micro small and medium size enterprise.*" This is because 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).

**Committee's Observation**

The Committee agreed to exempt micro small and medium size enterprise from the new Provisions of thin capitalisation. This is in order to allow for growth of the segment and also improve uptake of credit guarantee scheme. In addition, majority of business owners under MSMEs are financed through credit hence it's necessary to continue allowing the rule on debt-to-equity ratios. In view of that, the Committee supported the proposal to exempt MSMEs.

**Committee's Observation**

211. The proposed sub-clause 22(b) be deleted as it will increase the price of bread, thus negatively impacting numerous households, including the poor and informal sector workers.

**Committee's Observation**

The Committee agreed with the view raised above in order to maintain the price of ordinary bread at relatively lower levels since it's a basic commodity for the poor and informal sector people.

212. Opposed the proposal under sub-clause 25(a)(iv) seeking to amend the rate of excise duty on imported motorcycles from a fixed amount of KSh. 11,608 per unit to 15% of the excisable value, noting that the change would result to increased government revenues from high value motorcycles but will however potentially impact the *bodaboda* industry.

#### **Committee's Observation**

The Committee observed that the proposal in the Bill seeks to revise excise duty on imported motorcycles from a fixed amount of KSh. 11,608 per unit to 15% of the excisable value. The proposal will increase the price of motorcycles and therefore negatively affect the *bodaboda* industry. In view of that the Committee rejected the proposed proposal in the Finance Bill, 2021.

213. They were opposed to the provision in clause 29 which seeks to extend the statute of limitation from 5 to 7 years as this would increase the cost of administration where a business is compelled to incur costs for acquisition of storage facilities due to the high volume of transactions requiring safe custody.

#### **Committee's Observation**

The Committee agreed to delete the proposed amendment as it is in the Bill as it will increase inefficiency in tax audit.

214. Clause 10 be amended by deleting the words "*six to twelve months*" and replacing the words "*three months*" in the definition of graduate apprentice in paragraph 2 of the Income Tax Act (Set-Off Tax Rebate for Graduate Apprenticeships) 2016. Further, delete the words "*six to twelve months*" in paragraph 5(i) of the same Act. Delete the words "*ten employees*" and insert the words "*two employees*" and the words "*six to twelve months*" and insert the words "*three months*" in section 39B(1) of the Income Tax Act Cap 470. This would have a direct impact on the increase in employment rates.

#### **Committee's Observation**

The Committee observed that the above proposal to reduce the training period to three months will negate the objectives of the provision because 3 months is not sufficient time for a graduate to gain the needed skills. In addition, in order to ensure that the tax rebates are enjoyed by MSMEs, the Committee agreed to reduce the number of graduates from ten to five.

215. The proposal relating to the amendment to the Second Schedule to the Miscellaneous Fees and Levies Act, 2016 be amended by inserting a proviso to include the following provision in Part A: "*Such other goods the exemption of which was determined to be in the public interest or promotion of investment prior to 30<sup>th</sup> June, 2020*". The proposed transitional provisions allow for IDF and RDL exemption on supplies relating to contracts executed prior to 30<sup>th</sup> June, 2020 for the approved duration of the contracts.

#### **Committee's Observation**

The proposal will lead to loss of revenue and therefore it was rejected.

216. They were opposed to the proposed amendment to the First Schedule to the Excise Duty Act on the deletion of the word "*imported*" appearing in the description "*imported sugar confectionery of tariff heading 17.04*", recommending that a cost benefit analysis be carried out before implementation of the same.

#### **Committee's Observation**

The Committee observed that the proposal to impose excise duty on locally manufactured sugar confectionery and white chocolate will hurt local manufacturers. The Committee therefore proposed to raise excise duty to Shs.35 per kg. The increase in excise duty is expected to increase and continue protecting local manufacturers.

217. Section 34 of the VAT Act be amended by deleting the words, "*The Cabinet Secretaries may, in regulations, provide for the registration of a group of companies as one registered person for the purposes of the Act*" and replacing with the words "*A group of companies may be registered as one person for the purposes of the Act*". The former interpretation would increase compliance costs for VAT groups and reduce the ease of doing business.

#### **Committee's Observation**

The Committee agreed with the proposal to delete Clause 20 as it was removing the role of Parliament in the scrutiny of subsidiary legislation contrary to Statutory Instruments Act.

### **3.23 SUGAR CAMPAIGN FOR CHANGE (SUCAM)**

218. Sugar Campaign for Change submitted their memorandum, and made an oral presentation before the Committee. They proposed deletion of the words "*transportation of sugarcane from farm to milling factories*" from exempt list under Part II of the First Schedule to zero rate category under the Second Schedule of the VAT Act. This will ensure that factories will be able to claim input tax on transport services thereby reducing the related cost on the final product.

#### **Committee's Observation**

The Committee observed that the cost of transportation of sugarcane from farm to milling factories has increased. The zero rating of the transportation services will allow sugar factories to claim input tax and thereby reduce the price of sugar. The Committee proposed an amendment to put Transportation of sugarcane from farms to milling factories in the Second Schedule of the VAT Act, 2013.

### **3.24 KENYA TRANSPORTERS ASSOCIATION**

219. The Kenya Transporters Association submitted their memorandum and made an oral presentation on Thursday, 3<sup>rd</sup> June 2021. They were opposed to the exemption of exported taxable services under sub-clause 21(b) of the Bill, noting that the import of the amendment is to make the exportation of taxable services both taxable and exempt, thus making it tedious for taxpayers to comply and for the tax authorities to enforce the law.
220. They opposed the export of taxable services deleted from zero-rate schedule, as proposed under clause 22 because the destination principle dictates that domestic consumption of goods and services is taxed at the positive rate and exports (which are destined to be consumed outside that jurisdiction) are zero-rated. This is essential in ensuring international trade in goods and services doesn't suffer multiple taxation, thus the taxing right is reserved for the jurisdiction of consumption.

#### **Committee's Observation**

The Committee observed that the export of such transportation services will be uncompetitive if they are put in the exempt status. The proposed amendment in the Bill will negatively affect transportation of goods originating from Kenya to the neighbouring countries. In order to retain the competitiveness of the transportation sector, the Committee proposed the amendment to the Second Schedule to provide zero rating on transportation of goods originating from Kenya to a place outside Kenya. This will allow them to claim input tax

### 3.25 WESTMINSTER CONSULTING

Westminster Consulting Limited submitted their memorandum and made an oral presentation on 2<sup>nd</sup> June 2021. They proposed THAT—

221. Clause 7 be amended by deleting sub-paragraph (i) in the proviso to the proposed paragraph (j) of section 16(2) of the ITA and substituting therefor the following new sub-paragraph: "*(i) the following income shall be excluded from the calculation of earnings before interest, taxes, depreciation and amortization – (A) income which is exempt from tax; and (B) the income of an enterprise that supplies solar power equipment to low-income households*". Introduction of additional interest expense will subsequently result in the increase in price of solar equipment which will then be transferred to the consumer, culminating into a reduction in sales of solar products especially by low-income households in Kenya.
222. The proposed section 67(2) of the VAT Act, 2013 is maintained to ensure that there is parliamentary oversight in relation to regulations, which will also lack public participation and most likely will be subject to court disputes.
223. Sub-clause 21(b) be amended by adding the words "*but not taxable transportation services*" at the end of the proposed paragraph 32 because the transport industry is the highest contributor of excise revenue and the road development levy amongst other taxes and levies. Loss of business means loss of revenue to the Exchequer.
224. Clause 22 of the Bill be amended: (a) by deleting the words "*or taxable services*" and substituting therefor the word "*transportation*" immediately after the word "*taxable*"; (b) by deleting paragraph (b). The zero-rate status of bread enabled manufacturers to claim input VAT, thus realising stability in the price of bread. Manufacturers will not be in a position to absorb the proposed additional costs and will eventually pass it on to the consumer.
225. Clause 25 of the Bill be amended: (a) by deleting item (iii) of paragraph (a); and (b) by adding the following new paragraph immediately after paragraph (a) – (aa) Part 1 of the First Schedule to the Excise Duty Act, 2015, is amended by inserting the following new paragraph immediately after paragraph 1- 1A. For the purposes of paragraph 1, "*imported*" does not include goods originating from a partner state of the East African Community that comply with the rules of origin. This will eliminate the preferential treatment to locally manufactured glass bottles in Kenya which are not subject to excise duty, against similar products from Tanzania and the other EAC partner states.
226. Under clause 25 of the Bill, they proposed that the current structure is retained so that the nicotine pouches are cheaper compared to cigarettes and other harmful products thereby encouraging use of the same.
227. Amend the Second Schedule to the ITA by inserting the following new paragraph immediately after paragraph 1: "*1A. Notwithstanding paragraph 1, the investment deduction shall be one hundred per cent where – (a) the cumulative investment outside Nairobi County is at least three billion shillings from the year of income ending after April 2020; or (b) the person has incurred investment in a special economic zone*".
228. Sub-section 12D(i) of the ITA be amended by inserting the following new paragraphs immediately after paragraph (e): "*(f) the cumulative investment outside Nairobi County and*

*Mombasa County is at least three billion shillings from the year of income ending after April 2020; and (g) that person is not licensed under the Special Economic Zones Act, 2015".* Setting up in a special economic zone comes with additional expenses as one has to invest in the infrastructure and develop the area. The cost therefore must be compensated.

229. The Second Schedule of the VAT Act, 2013 be amended by deleting the supply of LPG from standard rated supplies. 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.
230. The Second Schedule of Excise Duty Act be amended 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.
231. Section 8A of the Miscellaneous Fees & Levies Act be amended 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. This will allow the paint, resins and shoe polish industry to access illuminating kerosene as necessary and KRA will also retain the necessary controls.

### **3.26 UBER BV**

In their memorandum, Uber BV THAT—

#### **Income Tax Act**

232. They supported the proposed amendment to Section 12E(2) of the ITA, but for purposes of clarity on the nature of information which should be provided to KRA, a format for the proposed return be provided by the taxman. The information that should be requested in the return should be limited to supplier's PIN; tax period; currency and exchange rate used; taxable amount; and tax payable.

#### **Committee's Observation**

The Committee observed that the proposal by Uber BV seeks to provide a format for submitting returns. Section 71 of the Tax Procedures Act already empowers the Commissioner to prescribe forms for submitting tax returns or other information required for tax purposes. The Commissioner has already prescribed the return for DST which is currently submitted through the KRA's iTax platform. The Committee therefore rejected the proposal by Uber BV.

#### **Value Added Tax**

233. Under the proposal to amend Section 10 (1) of the VAT Act, they proposed the following amendments to the Digital Marketplace Supply (DMS) Regulations so as to subject to VAT all supplies made by non-resident persons in relation to digital services in Kenya. 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.

234. Regulation 5 of the DMS Regulations should be 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*".
235. Regulation 6 of the DMS Regulations should be amended - c) by deleting the words "*business-to-customer*" appearing immediately before the "*a person from an export country who makes a*".
236. They were opposed to the provision in the DMS Regulations, noting that it is discriminatory to suppliers of e-services and results in increased costs. They proposed that suppliers of e-services that are registered for VAT in Kenya should be allowed to claim input tax credits on VAT incurred in Kenya in the making of those taxable supplies.

#### **Committee's Observation**

The above proposals were under the Digital Marketplace Supply (DMS) Regulations which is within the purview of the Committee on Delegated Legislations

### **3.27 SANAABIL CONSULTING LIMITED**

Sanaabil Consulting Ltd presented their memorandum Ref: SCL/TAS/001. They submitted THAT—

237. Sanaabil Consulting Ltd opposed to the proposed introduction of 16% VAT on ordinary bread under Section 13A to the Second Schedule of the VAT Act, 2013. They cited that ordinary bread is a basic commodity for most Kenyans and is largely consumed as a staple food by persons within the low-income communities due to their low wages. With the current retail price of bread between KSh. 50 and KSh. 55 per 400 grams, the introduction of VAT on ordinary bread will make it expensive and low income communities will not afford this commodity. By zero-rating bread manufacturers will be able to claim input VAT. In addition, the industry is highly competitive and the gross margins are extremely low with manufacturers relying on the volumes and scale to make minimal profits. Further, the increased cost of fuel has increased the transportation costs and the ban on polythene bags for packaging bread has equally increased the cost of production as manufacturers had to invest in additional packaging material in line with NEMA requirements. In addition, wheat as the main raw material used in the production of bread is not zero rated.

#### **Committee's Observation**

The Committee observed that bread needs to continue enjoying the zero-rate status for it to remain affordable. In view of the above, the Committee deleted the proposal in the Bill to remove bread from the Second Schedule of the VAT Act, 2013.

### **3.28 TESPOK**

Through their memorandum dated 11<sup>th</sup> May 2021, TESPOK submitted THAT—

#### **Income Tax Act**

238. They supported the proposed definition of digital market place as captured in clause 3. However, they noted that there was need to clarify better the digital market place since the definition was broad and lacked clarity and further that there was a high likelihood

that the new tax would be transferred to the consumer, resulting to an increase in prices of goods and services rendered over the internet and electronic networks.

#### **Committee's Observation**

The Committee noted that the concerns raised and further proposed to include electronic transactions as also applicable to the tax. The inclusion will provide clarity by capturing all transactions done online and electronically.

239. They supported the provision under clause 5(a)(i) noting that the proposed amendment to section 5(a)(i) of the ITA creates equity for resident providers of digital services who are already registered and complying with taxes in Kenya.
240. They supported the proposal in sub-clause 5(c) as it eliminates ambiguity in application given the provision was not explicitly provided in the main legislation.

#### **Value Added Tax**

241. They were opposed to the amendment proposed in clause 20 because it contravenes Chapter Eight of the Constitution of Kenya which grants Parliament authority for oversight and to legislate hence enhancing accountability in the legislative process.

#### **Committee's Observation**

The Committee agreed with the proposal to delete Clause 20 as it was removing the role of Parliament in the scrutiny of subsidiary legislation contrary to Statutory Instruments Act.

242. They opposed the provisions under sub-clause 21(b) recommending reinstatement of exported services under zero rating and clarify the definition of supply to assist with determination of place of consumption. The rationale for this was that the move was a departure from international practice and would negatively impact providers of exported services as input VAT incurred on such supplies would have to be disallowed.

#### **Committee's Observation**

The Committee observed that the proposed amendment in the Bill seeks to remove challenges in determination of services done in Kenya by a resident Company but purported to be enjoyed outside Kenya thus leading to loss of revenue through claiming of refunds on such transactions. In view of that, the proposal to reinstate exported services under zero rating was rejected save for transportation of goods originating from Kenya to the neighbouring countries which is proposed to be retained as a zero rated supply. This is so as to maintain their competitiveness.

#### **Excise Duty Act**

243. Under sub-clause 24(2), they proposed exemption from excise duty bulk sales from wholesalers to licensed operators and only charge excise on sale to the final consumers, explaining that excise duty is normally a tax on production not on consumption. By taxing internet usage rather than the economic value created by the Internet the Bill restricts use of free and socially beneficial services such as online learning or government e-services such as iTax. Digital services have become increasingly critical as the government moves to combat COVID-19 through social distancing.

### Committee's Observation

The Committee observed that the proposed exemption from excise duty bulk purchases of internet data from a licenced operator will erode the tax base leading to loss of revenue. In addition, the Bill has already proposed to allow offset of excise duty on bulk purchases of internet data services. The Committee therefore rejected the proposal to delete the provision.

### 3.29 NATIONAL TAXPAYERS ASSOCIATION

244. The National Taxpayers Association submitted their memorandum which supported the proposals under clause 25. They proposed a 15% increase in excise tax specifically for cigarettes and adoption of uniform specific excise tax structure. As a result, they noted that the government would be able to raise revenue from tobacco products to fund its development programmes as well as reducing the use of tobacco products thus improving public health.

### 3.30 THE AMERICAN CHAMBER OF COMMERCE IN KENYA (AMCHAM)

The American Chamber of Commerce submitted their memorandum dated 31<sup>st</sup> May 2021, they proposed THAT—

245. Clause 2 (a) on definition of "Control" be amended to 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".*

246. The term control as used in the Bill 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 licenses such as the motor business sectors which may be deemed to be controlled by resident principals/franchisors for tax purposes.

### Committee's Observations

The Committee observed that AMCHAM proposal is similar to the repealed definition of control which was restricted to ownership. The definition is deficient since it does not take into account aspects of control resulting from financial activities between parties and therefore if adopted, it will dilute the objective of the definition of control and provide opportunities for tax planning. The Committee therefore rejected the proposal by AMCHAM.

### Clause 3

247. The proposed new definition of a Digital Marketplace should be deleted because extending scope of DST would be a 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.

#### **Committee's Observation**

The proposal by US commercial Services is to delete the definition of DST. This will negate the objective of the DST which is to ensure that income derived from Kenya from the provision of digital services by non-residents is subjected to tax.

#### **Clause 5**

248. Clause be amended by deleting the words "*non-resident person*" and substituting with the words "*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.

#### **Committee's Observation**

The proposed amendment by AMCHAM to exclude the non-residents with a PE from DST will create loopholes that may lead to tax leakages and therefore not supported. For instance, where a non-resident person offers digital services but not through its PE in Kenya such an exclusion will mean that this non-resident person does not pay DST. The Committee rejected the proposal to exclude the non-residents with a PE from DST.

249. There is no requirement to file a return of the DST and the format of the return has not been uploaded on iTax. They proposed 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 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, given that the current DST legislation requires each individual entity to file separately, AMCHAM 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.

#### **Committee's Observation**

The Committee observed that the above proposal by AMCHAM proposes that the Bill should to provide a format for submitting returns. The Committee noted that Section 71 of the Tax Procedures Act already empowers the Commissioner to prescribe forms for submitting tax returns or other information required for tax purposes. The Commissioner has already prescribed the return for DST which is currently submitted through the KRA's iTax platform. The Committee therefore rejected the proposal by AMCHAM.

250. The effective date for the DST should be changed from 1<sup>st</sup> July 2021 to January 2022 to provide time to non-resident entities to prepare for the implementation. Considering that the legislation has not been enacted yet as of date, the period between the enactment of the legislation and the effective date will 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.

#### **Committee's Observation**

The Committee observed that the proposal by AMCHAM seeks change the effective date for DST. DST is already applicable to all persons and hence these non-resident companies had enough time to ensure that they put in place all necessary mechanisms to comply. The change of effective on the effective will lead to loss of revenue considering

that the request is asking for a six months' grace period. If granted, it will affect the revenue targets for the FY 2021/22.

#### **Clause 6(b)**

251. They proposed that section 15(5) of the ITA should be repealed to facilitate an automatic carrying forward of tax losses in perpetuity without the need to apply to the Minister. 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.

#### **Committee's Observation**

The proposal by AMCHAM is to delete the provision that allow a tax payer to seek approval from the Cabinet Secretary to extend carrying forward of losses after the expiry of 10 years. This Section will not be necessary after enactment of provision that allows losses to be carried forward till it is exhausted. The Committee therefore rejected the proposed repeal.

#### **Clause 7**

252. The proposed Clause 7 be 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.

#### **Committee's Observation**

The proposals by AMCHAM to delete the proposed amendments has the impact of retaining the existing provisions of interest restrictions based on debt-to-equity ratio. Maintain debt to equity ratio for restriction of interest's deductibility is susceptible to manipulation and has not been effective. The use of earnings before interest, taxes, depreciation and amortization (EBITDA) is more effective as it is based on the profitability of a business which is the determinant of how much tax an entity should pay. The debt-to-equity ratio measures efficiency of business and its profitability. Further, EBITDA is recognized as best practice in dealing with tax avoidance arising from capital structure of a company. In view of the above the proposal to delete Clause 7 was rejected. The Committee however provided few exceptions to the application of EBITDA due to the nature of their business.

#### **Clause 8**

253. The proposed Clause 8 should be 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.

#### **Committee's Observation**

The proposal by AMCHAM to require local enterprises in Kenya to file the country-by-country report is already addressed since the ultimate parent company that will be filing the report must be resident in Kenya. In view of that, the Committee rejected the proposal by AMCHAM.

### **Second Schedule to the Income Tax Act**

254. The Second Schedule should be 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.

### **Committee's Observation**

The Committee agreed to the proposed amendment on inclusion of what constitutes farm works in order to guide the implementation of investment allowance on farm works as provided in the Second Schedule.

### **Clause 15**

255. The effective date for clause 15 should be changed to January 2022 to provide time to non-resident entities to prepare for the implementation. 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.

### **Committee's Observations**

The Committee observed that the proposal by AMCHAM seeks change the effective date for DST. DST is already applicable to all persons and hence these non- resident companies had enough time to ensure that they put in place all necessary mechanisms to comply. The change of effective on the effective will lead to loss of revenue considering that the request is asking for a six months' grace period. If granted, it will affect the revenue targets for the FY 2021/22.

### **Clause 16**

With regards to clause 16, the following amendments should be made to the Digital Market Supply Regulations:

256. Regulation 4 of the DMS Regulations should be 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.
257. Regulation 5 of the DMS Regulations should be amended: a) in subsection 1(a) by deleting the words "*a recipient in Kenya in a business-to-customer transaction*" and substituting therefor the words "*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*".
258. Regulation 6 of the DMS Regulations should be 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.

### **Committee's Observations**

The above issues are contained in the Digital Market Supply Regulations which are subject to the Delegated Legislations Committee to be reviewed in line with the Statutory Instruments Act.

#### **Clause 19**

259. The provision in Section 34 (9) of the Value Added Tax, Act proposed should be retained because 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.

### **Committee's Observations**

The Committee observed that the proposed amendment in the Bill was proposing to delete a specific regulation making power relating to that section 19, yet section 19 is not being deleting. This would affect the operationalisation of that section.

The proposal by AMCHAM to delete the proposed amendment to Section 34(9) was therefore supported by the Committee.

#### **Clause 20**

260. The proposed clause 20 should be deleted because 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.

### **Committee's Observations**

The Committee agreed with the proposal to delete clause 20 as it was taking away the power for the National Assembly to scrutinise regulations made under the Value Added Tax Act, 2013. Granting such powers will give the Cabinet Secretary to make regulations without the approval of the National Assembly. In view of this, the proposal Clause 20 was deleted.

#### **Clause 21(b)**

261. They proposed 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.

### **Committee's Observation**

The Committee observed that the proposal by AMCHAM seeks to delete the proposed amendment on paragraph 1 of the Second Schedule in the Bill. The proposed amendment in the Bill is intended to remove challenges in determination of services done in Kenya by a resident Company but purported to be enjoyed outside Kenya thus leading to loss of revenue through claiming of refunds on such transactions. However, the proposed amendment affected transportation of goods originating from Kenya to the neighbouring countries. In order to retain the competitiveness of the transportation sector, the Committee proposed the amendment to the Second Schedule to provide zero rating on transportation of goods originating from Kenya to a place outside Kenya.

#### **Clause 25(b)**

262. The Clause 25 sub clause (b) should be amended by either deleting sub-clause 25(b)(c) or that the Bill includes a definition of the phrase “*return on 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.

#### **Committee’s Observation**

The Committee observed that the proposals seeks to delete the proposed amendment on the definition of ‘other fees’. This will negate the intended objective of reducing the tax expenditure. This will also erode the tax base and is therefore not supported.

**Clause 25 sub-paragraph (i) in paragraph (a) - 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.**

263. They proposed that the amendment be deleted because it 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.

#### **Committee’s Observation**

The Committee agreed to delete the proposed amendment to impose excise duty on locally manufactured sugar confectionary and imported white chocolate. The Committee proposed an amendment to sub-paragraph (i) in paragraph (a) by deleting the rate of excise duty appearing in the description “*Imported sugar confectionary of tariff heading 17.04*” and substituting therefor the following rate “*Shs.35 per kg*”. The proposed amendment is to increase the rate of excise duty on imported sugar confectionery from KSh. 20 to KSh. 35 per kg.

#### **Clause 26**

264. The proposed amendment in Clause 26 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.

#### **Committee’s Observation**

The Committee observed that the proposed amendment in the Bill seeks to have Miscellaneous Fees and Levies Act be recognized under the Tax Procedures Act. Currently, unpaid fees and levies on imported goods are not subject to penalties and interest and this affects prompt payment of fees and levies. The Tax Procedures Act provide for charging of interest and penalties for delayed payment of taxes and refunds

for other tax heads. This will allow the application of the Tax Procedures Act in respect to levying penalties, interests and refunds arising under the Miscellaneous Fees and Levies Act. In view of that, the Committee retained clause 26 as it is in the Bill.

#### **Clause 28(a)**

265. They proposed that the period for record keeping and issue of assessment should be maintained at 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. Alternatively, they proposed that the provision takes effect two years from now i.e., the relevant month in 2023 to allow all taxpayers to comply with the requirement.

#### **Committee Observation**

The Committee agreed to maintain the period for record keeping for tax assessment at five years as KRA has invested in systems that would allow tax auditing faster. The Committee proposed that clause 28(a), (c) and clause 29 be deleted.

#### **Clause 40**

266. The proposed clause 40 should be deleted because it 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.

#### **Committee Observation**

The Committee agreed with the proposal by AMCHAM to delete the proposed new clause on concurrent civil and criminal proceedings. This is because the Courts have rules and procedures that deal with such matters and enacting this provision would amount to directing the Courts on their processes.

### **3.31 ASHFORD CONSULTANTS LIMITED/ABDULBASID & ASSOCIATES**

Ashford Consultants Limited submitted their memorandum Ref. ACL/NA/020221 dated 2<sup>nd</sup> June 2021. They proposed THAT—

267. Sub-section (6) of section 133 of the Income Tax Act be amended by deleting the expression "*31<sup>st</sup> December 2021*" and substituting therefor the expression "*31<sup>st</sup> December 2022*".
268. This is because 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 this incentive the uptake would be minimal. The extended time frame would allow investors in the field ample time to complete their projects as envisaged by the tax incentive. With COVID 19 there were disruptions on 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. Given that activities have slowly begun resuming, the proposed timeline of 31<sup>st</sup> 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.

### **Committee's Observation**

The Committee observed that extension of timelines from 31<sup>st</sup> December 2021 to 31<sup>st</sup> December 2022 will allow investor sufficient time to put up this bulk storage facilities to support the Standard Gauge Railway.

In view of this, the Committee proposed an amendment to Section 133 of the Income Tax Act to extend the transitional period that was given for capital expenditure on the construction of bulk grain handling facilities supporting the SGR in the Business Laws (Amendment) Act, 2020. A further amendment was made as a consequence to change the application of investment deductions from reducing balance to in equal instalments.

### **3.32 D & M MANAGEMENT SERVICES**

D&M Management Services submitted a memorandum proposing THAT—

#### **Section 2 "Control"**

269. In the definition of the term "control", the only proposal that should be included be in the Bill is the one that relates to shareholding structure, composition of the board and voting rights over the company's affairs. This is because these forms of control demonstrate real control over the company's affairs.
270. The definition of the term control should be further expanded to include major supplier/major purchaser, where the entity is majorly financed by another person (who is not a financial institution) and where the entity is solely reliant on intellectual property/franchise which the other person is wholly dependent on to carry out his business, be deleted.

#### **Committee's Observation**

The Committee observed that removing some key provisions will weaken the definition and hence lead to loss of revenue as a result of mis-invoicing between parties that may have some relationships in terms of control. Further the proposal in the Bill is anti-tax avoidance provision and is meant to safeguard revenue leakage especially by Multi-National Companies through transfer pricing. Further, the definition does not affect persons who are not related or where there is no control and does not impose additional tax obligations to a taxpayer.

271. The power by the Commissioner to arbitrarily designate any relationship between companies as meeting the control test as this power is very wide and will lead to increased tax controversies with taxpayers. This way, companies related to each other will be subject to transfer pricing rules and suffer deemed interest where an interest free loan is advanced. The proposed deletion will ensure that these transfer pricing and deemed interest rules do not apply to otherwise independent third parties operating in the normal course of business.

#### **Committee's Observation**

The Committee agreed to provide a further amendment to ensure that the Commissioner does a thorough assessment before deeming a certain dealing as one that constitutes control.

272. The proposed Clause 7 be deleted because by making all interest that exceeds 30% of EBITDA non-deductible for tax, this means that a huge proportion of interest charged on all loans (from both Kenyan and foreign sources) will be subject to tax in Kenya at

30% corporate tax rate. For many local and foreign investors who capitalize their Kenyan operations through loans, these investments will dry up as no investor will be willing to accept an additional 30% surcharge on their investment. As such the risk is to both domestic and foreign investment. As such, this provision could deal a big blow to the government's recovery program following the COVID-19 pandemic.

#### **Committee's Observation**

The Committee observed that the above proposal seeks to maintain the existing debt to equity ratio for restriction of interest's deductibility which is susceptible to manipulation and has not been effective. The use of earnings before interest, taxes, depreciation and amortization (EBITDA) is more effective as it is based on the profitability of a business which is the determinant of how much tax an entity should pay. The debt-to-equity ratio measures efficiency of business and its profitability. Further, EBITDA is recognized as best practice in dealing with tax avoidance arising from capital structure of a company. In view of the above the proposal to delete Clause 7 was rejected.

273. The proposed Clause 8 be deleted because it may hinder foreign direct investment in Kenya, with multinationals shying away from making Kenya their Africa headquarters. This comes at a time when Kenya is already facing stiff competition from markets such as South Africa, Nigeria and Rwanda which are encouraging multinational enterprises to set up there. This proposal may disincentivise foreign direct investment.

#### **Committee's Observation**

The Committee observed that the proposal in the Bill is intended to require businesses above a prescribed threshold to report on their financial activities in other countries on a Country-by-Country basis. This will facilitate the Revenue Authority to verify the accuracy of the information reported in their returns filed locally by comparing with what is filed in the jurisdictions where their parent entity is domiciled. This will improve tax revenue collection since the audit teams will be able to analyse the group activity's structure. In view of this, the proposal to delete Clause 8 was rejected.

274. That clause 28 be deleted because the amendment allows for a transition period of 2 years, being the same period by which the new record keeping timeline has been revised. This will allow for a transition period in which taxpayers can maintain subsequent tax records as an immediate implementation will lead to non-compliance of most taxpayers who previously adhered to the 5-year rule.

#### **Committee's Observation**

The Committee agreed that Clause 28 (a) should be deleted as it was proposing to increase timelines for tax audit and record keeping from five to seven years.

275. Clause 21 be deleted as it proposes to change in status of exported services from zero rate to exempt. This means that taxpayers will not be entitled to deduct input tax incurred to make these supplies. This will increase the cost of doing business for companies exporting services from Kenya and this will potentially make Kenya an unattractive location for the provision of services globally, despite the gains made in recent years.

#### **Committee's Observation**

The Committee observed that the above proposal seeks to delete the proposed amendment on paragraph 1 of the Second Schedule in the Bill. The proposed amendment in the Bill intended to remove challenges in determination of services done in Kenya by a

resident Company but purported to be enjoyed outside Kenya thus leading to loss of revenue through claiming of refunds on such transactions. However, the proposed amendment affected transportation of goods originating from Kenya to the neighbouring countries. In order to retain the competitiveness of the transportation sector, the Committee propose an amendment to the Second Schedule to provide zero rating on transportation of goods originating from Kenya to a place outside Kenya. The proposal to delete clause 21 was therefore rejected.

276. The proposed clause 25 should be deleted because excise duty at a rate of 20% applies on other fees (fees, charges or commissions) charged by financial institutions (such as banks and insurance companies), but the definition of "other fees" specifically excludes "*fees or commissions earned in respect of a loan*". This exclusion is what is proposed to be deleted, thus increasing the cost of concluding financing arrangements.

#### **Committee's Observations**

The Committee observed that the proposal to delete the excise application on other fees would mean that fees, charges and commissions would not be subjected to excise duty and this will lead to erosion of the projected revenue base. The amendment is intended to reduce tax expenditure.

### **3.33 ERNST & YOUNG LLP**

Ernest and Young LLP submitted their memorandum with the proposal THAT—

#### **Section 2 of the Income Tax Act (ITA) Definition of "Control"**

277. The proposed definition of the term control in paragraph (h) should be deleted as it leaves the discretion of the Commissioner General 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.
278. The proposed paragraphs (b), (c), (f) & (g) proposed to be introduced under the definition of the term control should be deleted. This is to enhance certainty and limit subjective interpretation of the law.

#### **Committee's Observations**

The Committee observed that removing some key provisions will weaken the definition and hence lead to loss of revenue as a result of mis-invoicing between parties that may have some relationships in terms of control. Further the proposal in the Bill is anti-tax avoidance provision and is meant to safeguard revenue leakage especially by Multi-National Companies through transfer pricing. Further, the definition does not affect persons who are not related or where there is no control and does not impose additional tax obligations to a taxpayer.

In order to address any discretionary powers granted to the Commissioner General to deem control, the Committee proposed an amendment to paragraphs (f), (g) and (h) for him or her to carry out an assessment in order to separate ordinary market activities that have nothing to do with what constitutes control.

**Section 2 of the Income Tax Act (ITA) Definition of "Permanent Establishment"**

279. Paragraphs (c) & (d) on definition of the term Permanent Establishment should be amended by replacing the phrase "... ninety-one days.... with one hundred and eighty-three days". This is for harmonization.

**Committee's Observation**

The Committee observed that the proposal above seeks to increase the number of days for services to qualify as a permanent establishment from 91 days to 183 days. The effect of this will prohibit the government from taxing such services until 183 days. It should be noted that the time period for providing services hardly reach 183 days and therefore the government is likely to lose revenue on income derived in Kenya from the provision of those services.

**Section 15(4) of ITA Utilisation of tax losses**

280. The following new paragraph be inserted under section 15(4)(iv); "*Any deficit incurred prior to 1<sup>st</sup> July 2021 shall be deemed to have been incurred in that year of income*". This is to enhance clarity and support business in economic recovery.

**Committee's Observation**

The Committee observed that the proposal by Ernest and Young LLP seeks to provide a transition provision for treatment of unexpired tax losses incurred prior to the amendment removing the limitation of carrying forward of losses. This will provide clarity in the treatment of such losses and reduce disputes with KRA. The Committee noted however, that it should apply to unexpired tax losses under the repealed Section 15(4) as at the end of the year of income 2021.

**Section 16(2)(j) of ITA, restriction of deductibility of interest expense**

281. Paragraph 16(2) (j) is amended by deleting the terms; "*and third parties*" appearing after the term "*persons*". This is to encourage economic growth and ease of access to credit.

**Committee's Observation**

The proposed amendment in clause 7 seeks to repeal the current provision of thin capitalization rules based on debt-to-equity ratios and substitute it with interest restriction based on the interest/earnings ratio, the measure of earnings being earnings before interest, taxes, depreciation and amortization. Interest/earnings ratio is a better indicator of the economic performance of a company, hence better to use to determine deductibility of interest rather than the debt to equity ratio which is based on the capital structure of a company. In view of this, the proposal to delete Clause 7 was rejected to allow thin capitalisation based on EBIDTA. The Committee however, provided a few exceptions to the rule so that debt-to-equity ratios will remain applicable.

**Paragraph 1 of the Second Schedule to the ITA**

282. The definition of "*farm-works*" should be inserted in the Bill; "*(h) Farm-works means, farmhouses, labor quarters, any other immovable buildings necessary for the proper operation of the farm, fences, daps, drains, water and electricity supply works other than machinery, windbreaks and other works necessary for the proper operation of the farm.*" This is to enhance clarity and ease of implementation.

**Committee's Observation**

The Committee observed that the above proposal by Ernest and Young LLP seeks to define what constitutes farm works. The Committee agreed to the proposal as it will

guide the implementation of investment allowance on farm work as provided in the Second Schedule.

**Section 3 (2) (ca) & Section 12E of the ITA**

283. Section 3 (2) (ca) & Section 12E of the ITA be amended by providing a threshold 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"*. This is to enhance compliance by reducing administration costs in line with the canons of taxation.

**Committee's Observation**

The Committee rejected the proposal to exempt from Digital Service Tax (DST) on non-resident where income accruing from Kenya is less than one million. Doing so would lead to revenue loss as the proposal in the Bill seeks to exempt only resident persons from DST because DST paid by resident persons is considered as an advance tax deductible against their final tax liability and due to different (unequal) rates of DST (1.5%) and minimum tax which is 1%, charging DST on resident persons will mean such persons will be in perpetual tax refund claim, which will have negative impact on the cash flows of such persons. In view the Committee supported the proposal to only collect DST from non-residents only regardless of the income levels.

**Section 3 (2)(ca) of the ITA**

284. The amendment 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. This is for certainty.

**Committee's Observation**

The Committee observed that the proposal in the Bill seeks to expand the scope of services subject to the Digital Service Tax (DST) since Section 3 (2) (ca) of the Income Tax Act, limits imposition of DST to the platform providers and does not capture other service providers who may be deriving income through an electronic network of the internet. In view of this, the Committee rejected the proposal by Ernst and Young LLP to expunge the scope of activities through which DST is applicable.

**Tax PIN deregistration for individuals**

285. The Commissioner should come up with guidelines and a prescribed form for de-registration in line with Section 10 (2) (a) of the Tax Procedures Act. They 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; and Letter from the company confirming that the expatriate's employment in Kenya has ceased if applicable. This is to eliminate 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.

**Committee's Observation**

This will be addressed through subsidiary legislation as it is administrative in nature.

**Exportation of taxable services**

286. 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.

### **Committee's Observation**

The Committee observed that the above proposal seeks to delete the proposed amendment on paragraph 1 of the Second Schedule in the Bill. The proposed amendment in the Bill is intended to remove challenges in determination of services done in Kenya by a resident Company but purported to be enjoyed outside Kenya thus leading to loss of revenue through claiming of refunds on such transactions. However, the proposed amendment affected transportation of goods originating from Kenya to the neighbouring countries. In order to retain the competitiveness of the transportation sector, an amendment to the Second Schedule is proposed in order to provide zero rating on transportation of goods originating from Kenya to a place outside Kenya.

### **Syringes**

287. The provision be retained as is in the current VAT Act. This is because 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-19 mitigation measure that would fast track restoration to normalcy.

### **Committee's Observation**

Committee agreed with the proposal to retain syringes under the exempt status. The Committee therefore rejected the proposed deletion of paragraphs 33 and 34 from the First Schedule of the VAT Act, 2013. This will make syringes affordable especially during this COVID -19 crisis.

### **Exemption from withholding VAT**

288. The powers of the Commissioner to exempt taxpayers from withholding VAT should 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 cash flow constraints arising from withholding VAT.

### **Committee's Observation**

The Committee agreed with the proposal as it is in the Bill. The Committee noted that the proposal by Ernst and Young is to delete from the Finance Bill, 2021 the proposal to delete Section 42A (4A) of the TPA. The proposal in the Bill seeks to remove the Commissioner's powers to exempt any supplier from application of WHVAT. The provision is no longer relevant going forward considering that the rate of WHVAT was reduced from 6% to 2% and the fact that excess input tax resulting from WHVAT is refundable.

### **Ordinary bread**

289. 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.

### **Committee's Observation**

The Committee agreed to retain ordinary bread as zero-rated so as to make it affordable. In view of this, the Committee proposed an amendment to retain paragraph 13A in the Second Schedule of the VAT Act, 2013.

#### **VAT status of medical oxygen**

290. 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.

#### **Committee's Observation**

The proposal was not supported by the Committee because it will increase tax expenditure and the Government's aim is to substantially reduce it.

#### **Registration threshold under VAT (Digital Marketplace)**

291. The VAT Regulation be harmonized with the VAT Act to specifically clarify the VAT registration threshold in order to reduce possible conflict and litigation and enhance compliance. This will provide clarity and thus enhance compliance and the same time avoid possible conflict on the registration threshold. This will reduce possible conflict and litigation and enhance compliance.

#### **Committee's Observation**

To be addressed under subsidiary legislation in line with the Statutory Instruments Act. The proposal was therefore rejected.

#### **Transfer of business as going concern**

292. They proposed 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.

#### **Committee's Observation**

The proposed amendment seeks to reverse the exemption from VAT that were removed through Tax Laws (Amendment) Act, 2020. The removal intended to reduce tax expenditure which stood at 6% of the GDP which was the highest in the region. Reversal of this exemption as proposed, will negate the objectives of reducing tax expenditure and also erode the tax base.

#### **Clause 44 - Exemption threshold**

293. Clause 44 be amended by substituting the threshold of "*5 billion shillings*" with "*200 million shillings*" for an equitable taxation framework.

#### **Committee's Observation**

The above proposal will reduce the threshold under which the Cabinet Secretary can waive IDF to promote investment to two hundred million from the proposed KSh. five billion. The proposal to increase the threshold from two hundred million to five billion was informed by the need to protect the erosion of the revenue base that was witnessed when the threshold was two hundred million. In addition, an investor of KSh. 5 billion is likely to have bigger impact on the economy in terms of creation of the employment to the citizens and value addition across the value chain. The proposed amendments in the Bill are meant to empower the Cabinet Secretary to exempt from import declaration fee or railway development levy in public interest or to promote investment of not less than five billion shillings.

### 3.34 ROYAL FLORA HOLLAND (RFH) KENYA LTD

Royal Flora Holland Kenya Ltd submitted their memorandum dated 2<sup>nd</sup> June 2021. They stated THAT—

294. They were opposed the proposal to exempt from VAT the supply of taxable exported services, noting that the change will negatively impact cross border trade services in Kenya because the cost of doing business for companies exporting services from Kenya will increase. They proposed deletion of the proposed inclusion of paragraph 32, under Part II of the First Schedule of the VAT Act that provides for exemption of exported services. In view of this, they proposed the insertion under the Second Schedule of the VAT Act that provides for zero rating of taxable supplies.

#### Committee's Observation

The Committee observed that the above proposal seeks to delete the proposed amendment on paragraph 1 of the Second Schedule in the Bill. The proposed amendment in the Bill is intended to remove challenges in determination of services done in Kenya by a resident Company but purported to be enjoyed outside Kenya thus leading to loss of revenue through claiming of refunds on such transactions. However, the proposed amendment affected transportation of goods originating from Kenya to the neighbouring countries. In order to retain the competitiveness of the transportation sector, an amendment to the Second Schedule is proposed in order to provide zero rating on transportation of goods originating from Kenya to a place outside Kenya.

### 3.35 TATU CITY

In their memorandum, Ref: TCL/NA/02062021, they proposed the following amendments THAT—

295. The First Schedule to the Income Tax Act be amended by inserting the following paragraphs "*Dividends received by special economic zone enterprise, developers and operators licensed under the Special Economic Zones Act; and Dividends paid by Special Economic Zone Enterprise, developers or operators to any non-resident person.*" The objective of this incentive is to ensure they reinvest the excess funds to promote growth and development. Where such funds are distributed, then it is necessary that the receivers are subjected to tax so as to create fairness and equity.

#### Committee observation

The income of these institutions is exempt from income tax and have a preferential rate of tax. The objective of this incentive is to ensure they reinvest the excess funds to promote growth and development. Where such funds are distributed, then it is necessary that the receivers are subjected to tax so as to create fairness and equity.

296. The Second Schedule of the ITA 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; and (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'. Reinstatement of investment deductions under the Special Economic Zones (SEZs) scheme will 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.*

#### **Committee's Observation**

The Committee agreed to the amendment to support investment deductions equal to one hundred percent of the capital expenditure for the Special Economic Zones. This will make them viable and encourage more investors to invest in the SEZs.

#### **3.36 NZAMBA KITONGA ADVOCATES LLP**

In their memorandum dated 31<sup>st</sup> May 2021, the law firm highlighted the impact that the Bill has on the various elements of the country's tax regime. They observed THAT—

297. On the proposed amendment to the definition of the term "control", they noted that previously, the term "control" in relation to a body corporate was defined in the Second Schedule to the ITA 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 and replaced by a new Second Schedule, but the definition was not set out in the ITA. The Intellectual Property (IP) regime is designed to spur economic growth. Taxing innovators/owner's IP will have negative effect on innovation.

#### **Committee's Observation**

The Committee observed that the proposed definition of the term control is intended to control tax avoidance and curb revenue leakage. As such amending the proposal will weaken the intended objective. The Committee however proposed a provision to ensure that the Commissioner's powers to deem control are based on an assessment

298. They were opposed to the proposal to subject ordinary bread and other basic products to VAT explaining that the move 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.

#### **Committee's Observation**

The Committee agreed to put supply of ordinary bread in the Second Schedule of the VAT Act, 2013. This would allow for manufacturers of bread to claim input tax and thereby the price of bread at reasonably lower levels.

299. 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 noting that it will have a domino effect of increasing investment within the real estate sector.

#### **Committee's Observation**

The Committee noted the positive comments and adopted the clause as proposed in the Bill.

300. They opposed the proposed amendment to the VAT Act, 2013 to delete the requirements for Regulations made under the Act to be tabled before the National Assembly for approval before they take effect, cautioning that if passed, 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.

**Committee's Observation**

The Committee agreed to delete clause 20 as it was proposing to remove the power of the National Assembly to scrutinise Regulations made under the VAT Act.

301. They did not support the proposed increase in the limitation period of tax assessments from five (5) to seven (7) years from the end of the reporting period to which the document related. They were of the view that the proposed amendment will increase the compliance burden on the taxpayers as they will now be required to keep records for a longer period.

**Committee's Observation**

The Committee agreed to retain the period for tax assessment at five years.

302. On the proposal 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, the global impact is that CRS filings have been a useful tool for revenue authorities to enhance compliance and disclosure, effectively curbing revenue leakage.

303. On the proposed reintroduction of excise duty on betting at the rate of 20% of the amount waged, they submitted that the proposed amendment will erode the betting firms' profitability, further discouraging punters in placing bets which may ultimately lead to investors exiting the Kenyan industry.

**Committee's Observation**

The Committee observed that the proposed rate of excise on betting is high and may end up not achieving the intended revenue as most players will opt for international platforms for the betting activities. The Committee further observed that there are other forms of activities under the Betting, Lotteries and Gaming Act that have not been subjected to excise duty. In view of the above the Committee proposed to apportion the twenty percent excise across all betting and lottery transaction, that is betting, gaming, prize competitions and lottery, at seven-point five percent. As such, the new amendment will raise up to 30% on excise duty on all the betting and lottery transactions as against the 20% that was initially proposed in the Bill.

304. The proposal to amend the definition of "other fees" by deleting the words "fees or commissions earned in respect of a loan", implied 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%.

**Committee's Observation**

The amendment as proposed in the Bill is meant to create more revenue streams and therefore the deletion would lead to projected revenue loss of approximately KShs. 680 million. Furthermore, these are revenues for banks and hence should be excisable.

305. They supported the proposal to exclude glass from excise duty noting that the provision, if implemented, will be a welcome move for manufacturers who use imported glass to package their products and rely heavily on imported glass.

**Committee's Observation**

The Committee agreed to only levy excise duty on imported glass originating from outside the East Africa Community.

**3.37 BRITISH AMERICAN TOBACCO (BAT) KENYA**

BAT submitted their memorandum dated 2<sup>nd</sup> June 2021 and further made oral presentations before the Committee on 2<sup>nd</sup> June 2021. They proposed THAT—

306. "*Part III-Interpretation of schedule*" of the Excise Duty Act, 2015 be amended by inserting the following proposed definition and excise duty rate: "*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.*" Further, they proposed excise duty rate of KSh. 757 per kg as opposed to the current rate of KSh. 5,000 per kg. This is because 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 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.

**Committee's Observation**

The Committee agreed to reduce the rate KSh.1200 per kg in order to promote the growth of this new product and allow BAT to recover the huge investment made on the factory. The proposal made on KSh. 757 per kg is too low as the government needs revenue to offer services.

307. "*Part III-Interpretation of Schedule*" of the Excise Duty Act, 2015 be amended, by inserting the following proposed definitions and excise duty rates in proper alphabetical sequence: "*Electronic cigarettes*" where they propose zero excise duty on device as opposed to the current rate of KSh. 3,974.08 per unit. "*Cartridge for use in electronic cigarettes*" they proposed excise duty rate of KSh. 5 per millilitre of nicotine refilling cartridges and opposed to the current rate of KSh. 2,649.74 per unit. This will allow the government to rein in the current illicit trade in electronic cigarettes, facilitate investments by legitimate players and broaden the revenue base for Government.

**Committee's Observation**

The proposal to remove excise on the electronic cigarettes will lead to revenue loss. Consequently, reduction of excise on nicotine refilling cartridges will also negatively impact on revenue.

308. The Schedule in the Excisable Goods Management System (EGMS) Regulations, 2017, be amended by inserting the following fees for stamps: "*Excise stamp proposal – KSh. 0.5 per stamp for tobacco free containing nicotine pouches and cartridge for use in Electronic Cigarettes*". This will enable the category to be established in the market since sales are still very small.

### **Committee's Observation**

This relates to Excisable Goods Management System (EGMS) Regulations, 2017 to be reviewed in line with the Statutory Instruments Act.

309. They proposed that there should be no increase in excise duty rates on cigarettes and the inflation adjustment should be effected once every two years with no inflation adjustment in FY 2021/2022.

### **3.38 FUND MANAGERS ASSOCIATION**

310. Fund Managers Association submitted a memorandum dated 31<sup>st</sup> May 2021. They submitted that the following definition for "*post-retirement medical fund*" should be inserted in the amendment proposed to section 23 of the Retirement Benefit Act amendment, 1999:

*"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".*

311. They cited that the amendment 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.

### **Committee's Observation**

The Committee observed that the above proposal seeks to amend the definition of "post-retirement medical fund to include a pooled fund which aggregates a number of schemes". The Committee noted that the concern that is intended to be addressed by expanding the definition of post-retirement medical fund should be addressed through the Regulations that will govern the management of the funds. The Committee therefore rejected the proposal by the Fund Managers Association.

### **3.39 UNITED STATES COMMERCIAL SERVICE (USCS)**

The United States Commercial Service submitted their memorandum dated 2<sup>nd</sup> June 2021. They proposed THAT—

312. The original definitions relating to the Digital Service Tax be retained. 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.
313. The 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.

### **Committee's Observation**

The Committee rejected the above proposal by US Commercial Service because it will negate the objective of the DST which is to ensure that income derived from Kenya from the provision of digital services by non-residents is subjected to tax.

### 3.40 KENYA FLOWER COUNCIL

The Kenya Flower Council submitted their memorandum which proposed THAT—

314. The term “*control*” under sub-clause 2(a) be redefined and provide clear guidelines on interpretation of control to guide the commissioner because it has a negative impact for transfer pricing as it imposes an unnecessary burden on taxpayers.

#### Committee’s Observation

This is an anti-avoidance provision and is meant to safeguard revenue leakage. Redefining the provision will dilute the objective of safeguarding revenue leakage upon which it was proposed. In addition, there is no definition of the term control. The previous one was deleted during the repeal of the Second Schedule by the Tax Laws (Amendments) Act 2020 which poses risk of revenue leakage and especially by Multi-National Companies through transfer pricing.

315. The proposed definition of the term “*Permanent Establishment*” be amended by deleting the sub-clause “*a farm, plantation or other place where agricultural, forestry plantation or related activities are carried on*” under Clause 2(b) of the Bill, noting that inclusion of the same to the PE definition means that non-resident persons operating farms locally without due registration of those farms creates a taxable presence in Kenya.

#### Committee’s Observation

The proposal definition by Kenya Flower Council will weaken the intended objective of the Bill and lead to erosion of revenue base. The definition is necessary for purposes of payment of tax.

316. They also opposed the proposals under Clause 7 of the Bill as it would alter companies’ operations permanently by increasing the cost of doing business. Clarification should be provided on expenses incurred in connection with raising finance.

#### Committee’s Observation

The above proposal seeks to maintain the existing debt to equity ratio for restriction of interest’s deductibility which is susceptible to manipulation and has not been effective. The use of earnings before interest, taxes, depreciation and amortization (EBITDA) is more effective as it is based on the profitability of a business which is the determinant of how much tax an entity should pay. The debt-to-equity ratio measures efficiency of business and its profitability. Further, EBITDA is recognized as best practice in dealing with tax avoidance arising from capital structure of a company. In view of this, the proposal was rejected.

317. Provide a clear definition of the prescribed threshold on County-by-County (CbC) and link to global threshold to ensure the interpretation of this is not left at the discretion of the Commissioner. Making the threshold discretionary creates uncertainty with regard to taxpayers’ compliance.

#### Committee’s Observation

The above proposal by seeks to provide for a threshold of gross turnover. The threshold will be prescribed through a regulation as it varies from one jurisdiction to another. In view of this, the proposal was rejected.

318. Tax assessment period should be retained at 5 years in clause 28. An increase to 7 years imposes a higher administrative burden on taxpayers as they will have to maintain documentation supporting their operations over a longer period.

**Committee's Observation**

The Committee agreed to retain the tax audit period at five years and not at seven year as proposed in the Bill.

319. Exportable service to be returned to zero rate status because the proposed change in status from zero 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.

**Committee's Observation**

The proposal above by the Kenya Flower Council seeks to delete the proposed amendment is intended to remove challenges in determination of services done in Kenya by a resident Company but purported to be enjoyed outside Kenya thus leading to loss of revenue through claiming of refunds on such transactions. However, the proposed amendment affected transportation of goods originating from Kenya to the neighbouring countries. In order to retain the competitiveness of the transportation sector, the Committee has proposed the amendment to the Second Schedule to provide zero rating on transportation of goods originating from Kenya to a place outside Kenya.

**3.41 KENYA ELECTRICITY GENERATING COMPANY (KENGEN)**

The Kenya Electricity Generating Company submitted their memorandum, Ref. MOE/CONF/2/5/1 through the Ministry of Energy. KENGEN submitted THAT—

**Income Tax Act**

320. The proposed definition of infrastructure bond should be amended 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".*
321. Implementation of energy projects is capital intensive and as such they require sourcing of financing from the public or development partners in form of loans, equity, and infrastructure bonds.

**Committee's Observation**

The Committee agreed to the proposal to include energy projects in the definition of the term *infrastructure bonds*.

322. The proviso to Section 7A of the ITA should be amended by including: *"This section shall not apply to.....Dividends paid by company with the Government of Kenya shareholding of at least 45%."* This is because 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.

#### **Committee's Observation**

The above proposal seeks to exempt from income tax dividends paid by companies whose Government shareholding is at least 45%. The proposal will lead to erosion of revenue. The current provision only exempts collective investment schemes from taxation of dividends distributed from untaxed profit since the collective investment schemes are exempt from corporation tax. This is because the schemes are vehicles for individual to invest in capital markets and therefore not equivalent to power producing companies. In view of this the Committee rejected the proposal.

#### **Value Added Tax Act**

323. The wordings of the VAT exemption should be amended 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 25<sup>th</sup> 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 VAT Act. This will release their cash flows to undertake expansion of projects.

#### **Committee's Observation**

The proposal to exempt VAT will increase tax expenditure. The Committee rejected the proposed amendment by KENGEN.

324. The First Schedule to the VAT Act, 2013 in Part I be amended 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 upon recommendation by the Cabinet Secretary responsible for energy.*" 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.

#### **Committee's Observation**

The exemption will increase tax expenditure thereby reduce revenue.

#### **Miscellaneous Fees & Levies Act**

325. The Second Schedule to the Act: (i) In Part A, paragraph (xxvi); and (ii) In Part B, paragraph (x) by deleting the words "*KSh. 5 billion*" and substituting with the words "*KSh. 300 million*". Reduction of the threshold for 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.

#### **Committee's Observation**

The proposal by KENGEN seeks to reduce the threshold under which the Cabinet Secretary can waive IDF to promote investment to three hundred million from the proposed Ksh Five Billion. The proposal to increase the threshold from Kshs. 200M to 5Billion was informed by the need to protect the erosion of the revenue base that was witnessed when the threshold was two hundred million. The proposal by KENGEN was therefore rejected.

### **3.42 DANONE NUTRICIA**

Danone Nutricia submitted their memorandum dated 31<sup>st</sup> May 2021. They proposed THAT—

326. Infant food classified under tariff code 1901.10.00 to be accorded VAT exemption explaining that in the absence of breast milk, infant food is the most suitable source of nutrition for a developing baby as the nutrients are adapted to meet the infant's nutritional needs. The benefits of infant food are however not accessible to a vast majority of those who would benefit from it mainly due to the price of formula. As a consequence of the tax reductions, 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. Additionally, uptake of infant food (instead of unsuitable breast milk substitutes) could result in higher payment of corporation and payroll taxes.

#### **Committee's Observation**

The Committee agreed to exempt VAT on infant food classified under tariff code 1901.10.00 to make the commodity affordable.

### **3.43 LEONARDO TECHNOLOGIES AND SERVICES LIMITED**

Leonardo Technologies and Services limited submitted their memorandum which was proposing THAT—

327. The proposed amendment seeking to exempt from VAT the exportation of taxable services be deleted.

#### **Committee observation**

The proposal above seeks to delete the proposed amendment is intended to remove challenges in determination of services done in Kenya by a resident Company but purported to be enjoyed outside Kenya thus leading to loss of revenue through claiming of refunds on such transactions. However, the proposed amendment affected transportation of goods originating from Kenya to the neighbouring countries. In order to retain the competitiveness of the transportation sector, the Committee has proposed the amendment to the Second Schedule to provide zero rating on transportation of goods originating from Kenya to a place outside Kenya.

328. Further, that the VAT 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 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"; and (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*".

329. 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 paragraph "*tax invoice*".
330. 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.*"
331. In Regulation 13 by inserting the following new Regulation immediately after Regulation 13(3); "*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.*"

#### **Committee's Observation**

The proposals in paragraphs 328 to 331 are to be addressed under the VAT Regulations, 2017 in line with Statutory Instruments Act.

332. If the proposed amendment is passed into law in the Finance Act, 2021 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.

#### **Committee's Observation**

The proposal above seeks to delete the proposed amendment is intended to remove challenges in determination of services done in Kenya by a resident Company but purported to be enjoyed outside Kenya thus leading to loss of revenue through claiming of refunds on such transactions. However, the proposed amendment affected transportation of goods originating from Kenya to the neighbouring countries. In order to retain the competitiveness of the transportation sector, the Committee has proposed the amendment to the Second Schedule to provide zero rating on transportation of goods originating from Kenya to a place outside Kenya.

#### **3.44 VICTORY FARMS**

Victory Farms submitted their memorandum which was sent on their behalf by PricewaterhouseCoopers Limited (PwC). They proposed THAT—

333. An amendment be proposed in order to reintroduce 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.*" 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.

#### **Committee's Observation**

The Committee agreed to exempt VAT "*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.*"

### **3.45 ECART SERVICES LIMITED**

Ecart Services Limited (JUMIA) submitted their memorandum which was presented on their behalf by PwC. They proposed THAT—

334. The Third Schedule to the ITA 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.*" Kenya's e-commerce sector is at the infancy growth stage characterized 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.

#### **Committee's Observation**

The reduction of minimum tax to zero-point five percent of the gross turnover will result in revenue loss. The Minimum Tax is meant to bring into the tax bracket the perpetual loss making entities.

### **3.46 PRICEWATERHOUSECOOPERS (PWC)**

PricewaterhouseCoopers submitted their memorandum and made oral presentation before the Committee. They proposed THAT—

335. Sub-clause 2(a)(f) be amended by deleting paragraphs (f), (g) and (h). This is because the element of control for tax purposes should not apply to independent parties and that KRA will have unlimited powers in determining the treatment between two separate taxpayers.

#### **Committee's Observation**

The Committee agreed to retain the various circumstances under the definition of the term control as it is in the Bill. However, an amendment was proposed that the Commissioner General an assessment before deeming control.

336. Reword section 16(2)(j) of the ITA to apply only to non-resident related parties and inclusion of a proviso to exclude the applicability of interest restriction to financial institutions. This is because there is 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. Further, it will discourage loan update from third parties due to the adverse tax implications.

#### **Committee's Observation**

The Committee observed that above proposal by PWC seeks to maintain the existing debt to equity ratio for restriction of interest's deductibility which is susceptible to manipulation and has not been effective. The use of earnings before interest, taxes, depreciation and amortization (EBITDA) is more effective as it is based on the profitability of a business which is the determinant of how much tax an entity should pay.

337. Opposed the proposal under Clauses 28 and 29 of the Bill aimed at increasing the period within which assessments may be issued/amended by the Commissioner from five years to seven years and also the proposal to increase the document retention period from five years to seven years because the increased time period may erode the administrative efficiency of the KRA.

#### **Committee's Observation**

The Committee agreed on the deletion of the clause 28 (a), (c) and clause 29.

338. Removal of Withholding VAT (WHVAT) exemption provisions under clause 32 because some taxpayers will be in a perpetual VAT credit position.

**Committee's Observation**

The above proposal by PWC is to delete from the Finance Bill, 2021 the proposal to delete Section 42A (4A) of the TPA. The proposal in the Bill seeks to remove the Commissioner's powers to exempt any supplier from application of WHVAT. The provision is no longer relevant going forward considering that the rate of WHVAT was reduced from 6% to 2% and the fact that excess input tax resulting from WHVAT is refundable. In view of the above, the Committee rejected the proposals by PWC and retained the clause as it is in the Bill.

339. Clause 33 be amended by deleting the words "*of the notification*" appearing in sub-section (4A). This is because 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.

**Committee's Observation**

The Committee observed that the proposal by PWC does not state how and when the overpayment is to be established. Overpayment cannot arise without validation by the Commissioner. It is important for a taxpayer to know the effective date when the validation takes effect is the date the taxpayer is notified of the validation of the refund claim. The Committee therefore rejected the proposed deletion as it will create uncertainty.

340. They were opposed the proposed insertion of a new section 108A of the TPA to provide concurrent civil and criminal proceeding as it seeks to interfere with the judicial authority of the courts.

**Committee's Observation**

The Committee agreed with the proposed to the deletion of clause 40.

341. The provision to exempt from VAT, exportation of taxable services be deleted to ensuring that exportation of taxable services remains zero rated. This is because the exemption goes against best practice and principles of VAT on exported services as provided for under the OECD.

**Committee's Observation**

The proposal above seeks to delete the proposed amendment is intended to remove challenges in determination of services done in Kenya by a resident Company but purported to be enjoyed outside Kenya thus leading to loss of revenue through claiming of refunds on such transactions. However, the proposed amendment affected transportation of goods originating from Kenya to the neighbouring countries. In order to retain the competitiveness of the transportation sector, the Committee has proposed the amendment to the Second Schedule to provide zero rating on transportation of goods originating from Kenya to a place outside Kenya.

342. Clause 21(a)(xxiv) be amended by deleting the provision to reintroduce exemption on specialized equipment for the development and generation of solar energy. Further, they proposed the insertion of a clause under the Second schedule of the VAT Act that provides for zero rating of taxable supplies, to read as follows: "*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.* Exemption will increase the cost of solar powered equipment.

#### **Committee's Observation**

The above proposal will increase tax expenditure.

343. They were opposed the amendment proposed under sub-clause 25(c) and proposed 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 KRA and financial institutions. The Finance Act, 2019 clarified that "fees and commissions earned in respect of a loan or any share to profit" are not subject to excise duty and thereby dissipating tax disputes between KRA and financial institutions.

#### **Committee's Observation**

The above proposal will increase tax expenditure.

344. Remove excise duty on bottled water noting that 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.

#### **Committee's Observation**

The above proposal will increase tax expenditure.

### **3.4.7 RSM (EASTERN AFRICA) CONSULTING LIMITED**

RSM (Eastern Africa) Consulting Ltd submitted their memorandum dated 1<sup>st</sup> June 2021 and made oral presentation before the Committee on 3<sup>rd</sup> June 2021. They proposed THAT-

#### **Income Tax Act**

345. The definition of "Control" be amended to 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 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". 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.

#### **Committee's Observation**

The Committee proposed an amendment intended to separate the ordinary market activities that have nothing to do with control.

346. Clause 2(b) be amended by changing the definition of a "permanent establishment" to read as follows; "Permanent establishment" now includes: (i) A fixed place of business through which business is wholly or partly carried on and includes: (a) A place of management, a branch, an

office, a factory, a workshop and a sales outlet; (b) 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; (c) A warehouse in relation to a person whose business is providing storage facilities to others; or (d) 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: (a) 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 (b) 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 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; (a) 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 (b) 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: (c) The use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise; (d) 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 (e) 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". 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 ITA residency rules.

#### Committee's Observation

The Committee observed that the proposal by RSM seeks to increase the number of days for services to qualify as a permanent establishment from 91 days to 183 days. The effect of this will prohibit the government from taxing such services until 183 days. In view of this, the Committee rejected the proposal

347. Clause 7(a) of the Bill be amended by deleting paragraph (j) 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 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".
348. Paragraph (j) under Clause 7 be amended as follows: "(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 – (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)*. The provisions as worded to include payments that are economically equivalent to interest, without defining what this means could create a lacuna, as there could be a conflict with interest un-winding in the accounting sense, which is not interest. Additionally, the interest expense paid on loans provided by local lenders is 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.

#### **Committee's Observation**

The Committee observed that the proposal by RSM seeks to maintain the existing debt to equity ratio for restriction of interest's deductibility which is susceptible to manipulation and has not been effective. The use of earnings before interest, taxes, depreciation and amortization (EBITDA) is more effective as it is based on the profitability of a business which is the determinant of how much tax an entity should pay. The debt-to-equity ratio measures efficiency of business and its profitability. Further, EBITDA is recognized as best practice in dealing with tax avoidance arising from capital structure of a company.

The Committee however agreed to make exemptions to the EBITDA rule on banks or financial institutions licensed under the Banking Act; and micro and small enterprises registered under the Micro and Small Enterprises Act, 2012 as well enterprises that supplies solar power equipment to low-income households.

349. Clause 8(2) be amended by providing a turnover threshold because the multinational groups whose Ultimate Parent Entities are located in Kenya need this information for certainty on compliance with the provision.

#### **Committee's Observation**

The Committee noted that the proposal seeks to provide for a threshold of gross turnover. The threshold will be prescribed through a regulation as it varies from one jurisdiction to another. In view of this, the Committee rejected the proposal to provide threshold in the proposed amendment as it is not necessary.

#### **Value Added Tax Act**

350. Clause 20 proposing to amend Section 67 of the VAT Act be deleted because it 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.

#### **Committee's Observation**

The Committee agreed to delete clause 20.

351. Clause 21(b) be amended so as to read as follows; *"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.

#### **Committee's Observation**

The Committee observed that the above proposal seeks to delete the proposed amendment on paragraph 1 of the Second Schedule in the Bill. The proposed amendment in the Bill is intended to remove challenges in determination of services done in Kenya by a resident Company but purported to be enjoyed outside Kenya thus leading to loss of revenue through claiming of refunds on such transactions. However, the proposed amendment affected transportation of goods originating from Kenya to the neighbouring countries. In order to retain the competitiveness of the transportation sector, an amendment to the Second Schedule is proposed in order to provide zero rating on transportation of goods originating from Kenya to a place outside Kenya.

#### **Tax Procedures Act**

352. The proposed increase in the audit period from five (5) to seven (7) years, as provided for under clause 29 of the Bill be deleted because persons who make a volunteer declaration under the Voluntary Tax Disclosure Program (VTDP), 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 Program since an audit may be triggered for the remaining two years not captured under VTDP.

#### **Committee's Observation**

The Committee agreed to the deletion of clause 28 (a), (c) and clause 29.

353. They submitted that the provision for withholding VAT exemption should not be deleted but be retained, noting that despite the reduction in the VAT withholding tax rate, some suppliers may still find themselves in a significant VAT refund position.

#### **Committee's Observation**

354. Insert a new sub-section under section 47 of the TPA to read as follows: "*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*". 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.

#### **Committee's Observation**

The proposal by RMS seeks to introduce an offset of overpaid tax against future tax liability upon verification of overpaid tax by the Commissioner. The provision for offset provided under this Section covers all tax heads and therefore the proposed new provision by RMS is a duplication.

The aim of the proposal in the Bill is to provide that interest or penalties shall not accrue on the amount applied to the payment of the outstanding tax from the date of the notification to the taxpayer.

### **Excise Duty Act**

355. Opposed the proposed definition of "other fees" under clause 25(c) because it 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.

### **Committee's Observation**

The Committee observed that the above proposal seeks to delete the proposed amendment on the definition of 'other fees'. This will negate the intended objective of reducing the tax expenditure. This will also erode the tax base and is therefore not supported

### **3.48 DELOITTE & TOUCHE**

Deloitte and Touche memorandum submitted their memoranda Ref: FK/NA/010621. They also made oral presentation before the Committee on 2<sup>nd</sup> June 2021. They proposed THAT—

### **Income Tax Act**

356. The proposed definition of *permanent establishment ('PE')* as provided for under Clause 2(b) of the Bill be amended. They recommended that the threshold relating to the number of days is amended to one hundred and eighty-three days. The recommended proposals are intended to align with the international best practice and maintain consistency with the model tax conventions.

### **Committee's Observation**

The Committee observed that the proposal by Deloitte and Touche seeks to increase the number of days for services to qualify as a permanent establishment from 91 days to 183 days. The effect of this will prohibit the government from taxing such services until 183 days. In view of this, the Committee rejected the proposal.

357. The proposed definition of "*infrastructure bond*" should be 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 system, a communication network or an energy project*". 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.

### **Committee's Observation**

The proposal was agreed to so as to include energy projects in the definition of the term "*infrastructure bond*".

358. The proposal amending Section 12E (1) of the ITA should be deleted and replaced with the following: "*Notwithstanding any other provision of this Act, a tax to be known as digital service tax shall 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.*" This aligns Section 12E (1) with the provisions of Section 3(2) (ac) and eliminates any likely ambiguities.

### **Committee's Observation**

The proposal by Deloitte and Touche seeks to align the scope of digital service tax with the proposed amendment to Section 3 (2) (ca) so as to cover income accruing over the internet or electronic platform including through a digital market place. The Committee

observed that the proposed amendment will provide clarity and as such proposed an amendment to clause 5 in line with Deloitte and Touche.

359. The Bill should be amended in clause 5 by introducing 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 Digital Service Tax (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.

#### **Committee's Observation**

The proposal by Deloitte is to provide a threshold of KSh. 5 million for a person to be subjected to DST. Considering this tax applies to non-residents and have no physical presence, it will be difficult to monitor whether one has reached a threshold or not. This will create loopholes for revenue leakages and is therefore not supported. In view of this, the Committee rejected the proviso.

360. The Bill should be amended in clause 5 introducing a proviso to be to read as follows: *"For Avoidance of doubt, non-resident persons with Permanent Establishments in Kenya are outside the scope of Digital Service Tax"*. Non-residents with permanent establishments in Kenya are treated for tax purposes like residents. The proposed amendment will eliminate the perceived bias and provide a level playing ground for the non-resident persons with PEs in Kenya with resident persons.

#### **Committee's Observation**

The Committee observed that the proposed amendment by Deloitte to include a proviso that excludes the non-residents with a PE from DST will create loopholes that may lead to tax leakages. For example, where a non-resident person offers digital services but not through its PE in Kenya such an exclusion will mean that this non-resident person does not pay DST. In view of this, the Committee rejected the proviso to exempt non-resident persons with Permanent Establishments in Kenya from DST.

361. Amend sub-clause 5(c) of the Bill to read as follows: *"(3) Despite subsection (1), digital service tax shall not apply to income chargeable under section 35"*. The recommended proposal shall ensure equity in taxation and encourage non-residents whose income is taxable under section 9(2) to invest in Kenya.

#### **Committee's Observation**

The Committee observed that the amendment is targeted on non-resident companies. The proposal to exclude the non-residents with a Permanent Establishment from DST will create loopholes that may lead to tax leakages and therefore not supported. For example, where a non-resident person offers digital services but not through its PE in Kenya such an exclusion will mean that this non-resident person does not pay DST.

362. They supported the proposal to remove the capping of the tax loss utilisation period under clause 6(b) of the Bill. Further, they recommended introduction of the proviso under Section 15 (4) of the ITA 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.

363. The proposal to introduce earnings before interest, taxes, depreciation and amortization (EBITDA) based interest limitation rule would discourage businesses from borrowing/debt-financing, resulting to negative impact on the economy, as many businesses depend on loans for capital.
364. They recommended the following: (i) 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; (ii) Allowing persons who are affected by the interest limitation rule to carry forward any excess interest for deduction against subsequent profits; (iii) financial institutions licensed under the Fourth Schedule to the ITA; and (iv) 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.

#### **Committee's Observation**

The Committee agreed to make exemptions to the EBITDA rule on banks or financial institutions licensed under the Banking Act; and micro and small enterprises registered under the Micro and Small Enterprises Act, 2012 as well enterprises that supplies solar power equipment to low-income households.

365. An amendment be made on the threshold of turnover that the Multinational Enterprises (MNEs) should meet for the Ultimate Parent Entity (UPE) to comply with this requirement. They recommended a threshold of KSh. 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.

#### **Committee's Observation**

The Committee noted that the proposal seeks to provide for a threshold of gross turnover. The threshold will be prescribed through a regulation as it varies from one jurisdiction to another. In view of this, the Committee rejected the proposal to provide threshold in the proposed amendment as it is not necessary.

366. A recommendation be made on the 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 recommendation guarantees the much-needed certainty and pre-empt any potential tax disputes with the KRA.

#### **Committee's Observation**

The Committee agreed to the proviso in order to provide a transitional period.

367. The proviso appearing under Section 7A of the ITA be amended 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.

#### **Committee's Observation**

The Committee observed that the current provision only exempts collective investment schemes from taxation of dividends distributed from untaxed profit since the collective investment schemes are exempt from corporation tax. This is because the schemes are vehicles for individual to invest in capital markets and therefore not equivalent to power producing companies. In view of this, the Committee rejected the proposal.

#### **Value Added Tax**

368. The zero-rating of exported taxable services be maintained and further 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.

#### **Committee's Observation**

The Committee observed that the above proposal seeks to delete the proposed amendment on paragraph 1 of the Second Schedule in the Bill. The proposed amendment in the Bill is intended to remove challenges in determination of services done in Kenya by a resident Company but purported to be enjoyed outside Kenya thus leading to loss of revenue through claiming of refunds on such transactions. However, the proposed amendment affected transportation of goods originating from Kenya to the neighbouring countries. In order to retain the competitiveness of the transportation sector, an amendment to the Second Schedule is proposed in order to provide zero rating on transportation of goods originating from Kenya to a place outside Kenya.

369. The proposal to move the VAT status of the supply of ordinary bread from zero-rated products to taxable at 16% be deleted. This is because of the gains made through zero rating of ordinary bread could disproportionately be reversed through increased cost of living for the ordinary Kenyan.

#### **Committee's Observation**

The Committee agreed on the proposal to zero-rate supply of ordinary bread.

370. The proposal in Paragraph 114 under Part A of the First Schedule is amended by inserting the words "*of Kenya or any government agency implementing energy projects*" immediately after the word "*Government*". 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.

#### **Committee's Observation**

The proposal will increase tax expenditure and as such, the Committee rejected it.

371. LPG in the zero-rating be reinstated under second schedule noting that 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.

### Committee's Observation

The Committee rejected the proposal to reinstate LPG under the zero-rating schedule. This is because zero rating LPG will attract input tax refund which will consequently contribute to tax expenditure.

372. The transfer of business as a going concern be reinstated 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*". Reinstatement of exemption of transfer of business as a going concern will support businesses which require restructuring post COVID-19.

### Committee's Observation

The proposed amendment seeks to reverse the exemption from VAT that were removed through Tax Laws (Amendment) Act, 2020. The removal intended to reduce tax expenditure which stood at 6% of the GDP which was the highest in the region. Reversal of this exemption as proposed, will negate the objectives of reducing tax expenditure and also erode the tax base. In addition, it will create uncertainty in the tax policy since these amendments were made last year.

373. The proposal to reinstate 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: "*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*". 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 envisaged at inception.

### Committee's Observation

The proposal will increase tax expenditure and as such, the Committee rejected it.

### Employee Taxes (Excluded from the Bill)

374. 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.*" 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.

### Committee's Observation

The proposal will lead to erosion of revenue base. The Committee therefore rejected the proposal

375. Section 5 (2) (a) (iii) should be 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 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". The KSh. 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.

#### **Committee's Observation**

The Committee rejected the proposal at it will increase tax expenditure.

376. 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". The provision was introduced in 2005 and has been in existence for 16 years despite changes in inflation and economic conditions.

#### **Committee's Observation**

The Committee rejected the proposal at it will increase tax expenditure.

377. Paragraph 2 of the Third Schedule to the ITA is amended to read as follows: "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." This will encourage uptake of insurance products relating to education, life and medical hence is aligned with the government's development agenda.

#### **Committee's Observation**

The Committee rejected the proposal at it will increase tax expenditure.

378. Insert 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.

#### **Committee's Observation**

The Committee rejected the proposal at it will increase tax expenditure.

379. Section 5(2B) of the ITA be amended by deleting the words "higher of". Further, that the section be 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 — (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) 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 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.

### **Committee's Observation**

The Committee rejected the proposal as it will increase tax expenditure.

380. Section 5(4) of the ITA be amended to include the following sub-sections: "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.

### **Committee's Observation**

The Committee rejected the proposal as it will increase tax expenditure.

### **Excise Duty Act**

381. Amend definition of the term "interest" in Part III of the First Schedule to the Excise Duty Act (EDA), 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*". 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.

### **Committee's Observation**

The above proposal by Deloitte and Touche seeks to delete the proposed amendment on the definition of 'other fees'. This will negate the intended objective of reducing the tax expenditure. This will also erode the tax base and is therefore not supported. Further, the proposal seeks to introduce a definition of the term 'interest' and align it with the definition provided under the Income Tax Act. It is noted that the definition provided under the ITA has a wide scope as it is intended for the imposition of the income tax. If the same is adopted for excise duty purposes, it will erode the tax base as it will expand the scope of tax exemptions. In view of this, the Committee rejected the proposal by Deloitte and Touche.

382. Opposed the provisions under clauses 28 and 29 because 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 cash flow demands given the wider periods open for audit.

### **Committee's Observation**

The Committee agreed to delete clause 28 (a) and (c) and clause 29.

383. Delete clause 32 because taxpayers in perennial VAT credit positions due to the application of Withholding VAT (WHVAT) will be detrimentally impacted.

### **Committee's Observation**

The Committee observed that the above proposal seeks to delete from the Finance Bill the proposal to delete Section 42A (4A) of the TPA. The proposal in the Bill seeks to remove the Commissioner's powers to exempt any supplier from application of WHVAT. The provision is no longer relevant going forward considering that the rate of WHVAT was reduced from 6% to 2% and the fact that excess input tax resulting from WHVAT is refundable. In view of this, the Committee rejected the proposal.

384. Amend the proviso under Section 47 (1) of the TPA by adding the following phrase after 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.

#### **Committee's Observation**

The Committee proposed an amendment to provide that that once the Commissioner notifies that he is satisfied that there is an overpayment of tax, the it is deemed to be offset against future tax liabilities.

385. Delete the phrase "*the date of the notification*" under Section 47 (4A) and replace with the phrase "*the date the overpayment first arose*". 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.

#### **Committee's Observation**

The Committee observed that the above proposal by seeks to amend the provision in the Bill. In so doing it makes an assumption that once a notification has been issued, it is as good as a confirmation of the verification of the refunds. This is however not correct as the refund claims have to be verified. The notification cannot be sufficient in this context and this the proposal is not supported.

386. Clause 42 be deleted because the 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.

#### **Committee's Observation**

The Committee observed that the amendment proposed in clause 42 seeks to include vendors using digital market in the requirement to provide PIN to the platform providers. Currently, vendors using digital platforms are not obliged to provide the PIN as part of the information required by the platform providers and the Commissioner does not have a legal basis to require the provision of this PIN to the platform providers.

In the case of non-residents with no physical presence Section 15 A provides for the appointment of a tax representative who the Commissioner General shall issue a PIN for purposes of filing tax returns.

#### **Miscellaneous Fees and Levies**

387. Paragraphs xxvi and x of Part A and Part B of the Second Schedule 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.

#### **Committee's Observation**

The Committee observed that the above proposal by Deloitte and Touche seeks to reduce the threshold under which the Cabinet Secretary can waive IDF to promote investment to three hundred million from the proposed Ksh Five Billion. The proposal to increase the threshold from Kshs. 200M to 5Billion was informed by the need to protect the erosion of the revenue base that was witnessed when the threshold was two hundred million. In addition, an investor of Kshs 5 billion is likely to have bigger impact on the economy in terms of creation of the employment to the citizens and value addition across the value chain. In view of the above, the proposal by Deloitte to reduce the threshold to Kshs. 300 million is not supported.

#### **3.49 MR. CHARLES WANGUHU**

388. In his petition dated 13<sup>th</sup> May 2021, he petitioned the National Assembly to: (i) Review to reduce the amount of taxes and levies charged on petroleum products to alleviate the burden on the consumer; (ii) Revoke the intended increment and amends the imposed VAT on LPG including propane from the standard rate to the previous rate; (iii) Direct the Cabinet Secretary to explain the reasons for the sharp increase in the petroleum development levy, provide an account of how previous generated from the levy has been utilized, and provide relevant enabling legislation relied upon for compensation of private sector players; (iv) Halt or decline any intended increase in VAT by 6% on petroleum products; (v) Direct 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; and (vi) Direct 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. With international oil prices on an upward trend, it is expected that it left unchecked, prices will continue to increase, further worsening the existing poor socio-economic status of Kenyans.

#### **Committee's Observation**

The Committee rejected the proposal as it will lead to revenue loss.

#### **3.50 COCACOLA**

389. In their memorandum, they proposed a review of the Electronic Goods Management System (EGMS) regulations to reduce the cost of the excise stamps by 10 cents, thus revising the cost of non-alcoholic beverages from 60 cents to 50 cents and for bottled water from 50 cents to 40 cents. Further, that the capital expenses incurred in the implementation of EGMS be treated as an allowed expense for tax purposes as these costs borne by the tax payer to assist the government in tax compliance, widening the tax base and increasing excise tax collections. 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. Reducing the cost of tax stamps will result in maintaining affordable solutions for consumers and sustain investment and employment across the value chain.

### **Committee's Observation**

To be addressed under the Electronic Goods Management System (EGMS) regulations in line with Statutory Instruments Act, 2013.

390. They recommended 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, noting that a yearly inflation adjustment impacts on the producer's capacity for production and distribution of excisable products which have a ripple effect on micro and small enterprises along the value chain.

### **Committee's Observation**

The Committee observed that Section 10 of the Excise Duty Act provide powers to the Commissioner General to adjust the rates of excise duty on excisable goods that have a specific rate of tax to account for inflation. The adjustment is meant to ensure that Government revenue from excisable goods subject to specific rate of excise duty is not eroded. However, the Finance Act, 2020 amended Section 10 of the Excise Duty Act to provide flexibility to the Commissioner General in consultation with the Cabinet Secretary, National Treasury and planning to adjust the specific excise duty rate on excisable goods depending on prevailing economic circumstances. This therefore, does not require further amendments to the law. In view of the above, the Committee rejected the proposal.

### **3.51 GRANT THORNTON TAXATION SERVICES LIMITED**

In their memorandum dated 30<sup>th</sup> May 2021, they proposed the following amendments:

#### **Income Tax Act**

391. Amend clause 7 by providing 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. This is to provide clarity on whether the EBITDA refers to the book/accounting EBITDA or tax EBITDA.
392. They proposed that clause 12 is amended in order to protect some of the tax provisions like the Second Schedule to ensure that there are no changes aside from additional incentives for instance within five years. This is to prevent uncertainties in the business environment since businesses are not able to plan accordingly.

#### **Value Added Tax Act**

393. Amend clause 15 by defining and providing clarity as to what constitutes local supply on digital supply for purposes of VAT OR provide further guidelines on how to determine a local supply for VAT purposes. This is because the amendment will increase compliance burden for SMEs and sole proprietors who have expanded their operations into e-commerce because it is sustainable for the business. The proposal does not address the uncertainties in the determination of a local supply for purposes of VAT.
394. Opposed clause 20 because it withdraws legislative functions from Parliament to the CS in charge of Finance.

### **Committee's Observation**

The Committee adopted their proposal.

395. They supported the amendment to exempt the purchase of specialised solar equipment from VAT. Alternatively, they proposed that the items should be reclassified from exemption to zero-rating to allow investors to claim input VAT on VAT charged for the installation of solar and wind power in order to promote investment in green energy and a cleaner environment.

**Committee's Observation**

The Committee adopted their proposal

396. Delete clause 21 because imposition of VAT on ordinary bread and disposable plastic syringes and other syringes will increase their prices hence add a huge burden to the common citizens who are yet to recover from the adverse economic effects of COVID-19.

**Committee's Observation**

The Committee adopted their proposal.

397. Delete clause 22 because the affected companies may charge higher prices for exported services in order to recover the VAT paid on the cost of production. This may render the export of services from Kenya less competitive.

**Committee's Observation**

The Committee adopted their proposal.

**Excise Duty Act**

398. Amend clause 25 by deleting the proposal to introduce 20% excise duty on betting on because the betting sector is overburdened by different tax obligations. The Government should impose administrative regulations to regulate operations in the sector rather than discourage investments in a single industry.

**Committee's Observation**

The Committee observed that the proposed rate of excise on betting is high and may end up not achieving the intended revenue as most players will opt for international platforms for the betting activities. The Committee further observed that there are other forms of activities under the Betting, Lotteries and Gaming Act that have not been subjected to excise duty. In view of the above the Committee proposed to apportion the twenty percent excise across all betting and lottery transaction, that is betting, gaming, prize competitions and lottery, at seven-point five percent. As such, the new amendment will raise up to 30% on excise duty on all the betting and lottery transactions as against the 20% that was initially proposed in the Bill.

399. Amend clause 25 by deleting the proposal to introduce 20% excise duty on processing fees on borrowing because it will increase the cost of credit since financial institutions will transfer the cost to borrowers.

**Committee's Observation**

The amendment as proposed in the Bill is meant to create more revenue streams and therefore the deletion would lead to projected revenue loss of approximately KShs. 680 million. Furthermore, these are revenues for banks and hence should be excisable.

**Tax Procedures Act**

400. Amend clause 28 by deleting the proposal to extend the period taxpayers are required to keep financial records for investigation by KRA because it shall add to the taxpayers' administrative costs.

**Committee's Observation**

The Committee adopted their proposal.

401. Amend clause 40 so as to prevent concurrent prosecution against similar issues/matters in an ongoing proceeding as its against fair administration of justice whereby the accused lacks sufficient time and resources to prove their case.

**Committee's Observation**

The Committee adopted their proposal.

## PART IV

### 4 COMMITTEE RECOMMENDATION

402. The Committee having considered the Finance Bill, 2021 recommends that the House approves the Bill with amendments as proposed in the schedule.

## PART V

### 5 SCHEDULE OF PROPOSED AMENDMENTS

The Committees proposed the following amendments to be considered by the House in the Committee stage:

#### CLAUSE 2

403. Amend clause 2 (a) of the Bill -

(a) in the proposed definition of the term "*control*" by-

(i) deleting the word "or" appearing in paragraph (f) (i) and substituting therefor the word "*and*";

(ii) by deleting paragraph (f) (ii) and substituting therefor the following new sub paragraph-

(ii) upon assessment, the Commissioner deems influence in the price or other condition of the supply of the purchases of another person;

#### Justification

The amendment is intended to link the supply of purchases with the assessment of the Commissioner leading him to deem control. The amendments intended to separate the ordinary market activities that have nothing to do with control.

(iii) deleting the word "or" appearing in paragraph (g) (ii) and substituting therefor the word "*and*";

(iv) by deleting paragraph (g) (ii) and substituting therefor the following new sub paragraph-

(ii) upon assessment, the Commissioner deems influence in the price or other condition of the sales of another person;

#### Justification

The amendment is intended to link the price and conditions of sale with the assessment of the Commissioner leading him to deem control. The amendments intended to separate the ordinary market activities that have nothing to do with control.

(b) in the proposed definition of the term "*infrastructure bond*" by inserting the words "*or energy project*" immediately after the words "*communication network*".

#### Justification

The amendment is to include energy projects in the definition of the term infrastructure bond.

#### CLAUSE 3

404. Amend clause 3(b) of the Bill in the proposed new paragraph (ba) by inserting the words "*or electronic*" immediately before the word "*platform*".

#### Justification

The amendment is to expand the definition of digital marketplace to include the word electronic, in order to capture electronic sale transactions.

#### **NEW CLAUSE**

405. Amend the Bill by inserting the following new clause immediately after clause 4-  
4A. The Income Tax Act is amended in section 11 by inserting the following new sub-section immediately after sub-section (3)-

(3a) In the case of a registered trust, sub-section (3) shall only apply to-

- (a) any amount that is paid out of the trust income on behalf of any beneficiary and is used exclusively for the purpose of education, medical treatment or early adulthood housing;
- (b) income paid to any beneficiary which is collectively below ten million shillings in the year of Income;
- (c) 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.

#### **Justification**

**The amendment is as a consequence to the proposed changes in trust law to allow for family trusts. The proposed amendment is to provide the family trust income be deemed as income under the Income Tax Act.**

#### **NEW CLAUSE**

406. Amend the Bill by inserting the following new clause after clause 4-  
4A. Section 12D of the Income Tax Act is amended in sub-section (1) by inserting the following new paragraphs immediately after paragraph (e)-

- (f) that person is not engaged in manufacturing and whose cumulative investment in the preceding four years is at least ten billion shillings; or
- (g) that person is not licensed under the Special Economic Zones Act, 2015.

#### **Justification**

**The amendment is to exempt from Minimum Tax a person who is engaged in manufacturing and whose investment cumulative investment is at least ten billion shillings and also a person who is licensed under the Special Economic Zones Act.**

#### **CLAUSE 5**

407. Amend clause 5 by deleting the proposed paragraph (a) and substituting therefor the following new paragraph -

(a) by deleting sub-section (1) and substituting therefor the following new sub-section-

- (1) Notwithstanding any other provision of this Act, a tax to be known as digital service tax shall 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.

#### **Justification**

**The amendment is to clean up the provision in line with the amendment in clause 3(a) and to specify that the tax does not apply to resident persons.**

**CLAUSE 7**

408. Amend clause 7 (a) of the Bill in the proposed paragraph (j) by inserting the following new sub-paragraph immediately after sub-paragraph (ii)-  
(iii) this paragraph shall not apply to -
- (A) banks or financial institutions licensed under the Banking Act;
  - (B) micro and small enterprises registered under the Micro and Small Enterprises Act, 2012; and
  - (C) enterprises that supply solar power equipment to low-income households.

**Justification**

**The amendment is to exclude banks and Micro and Small Enterprises from the application of the proposed thin capitalization provision.**

**NEW CLAUSE**

409. Amend the Bill by inserting the following new clauses immediately after clause 8-
- 8A. Section 25 of the Income Tax Act is amended in sub-section (7) in the definition of the term "*settlement*" by inserting the words "*through a registered family trust or*" immediately after the words "*transfer of assets*".
- 8B. Section 26 of the Income Tax Act is amended in sub section (5) in the definition of the word "*settlement*" by inserting the words "*other than a registered family trust*" immediately after the word "*covenant*".

**Justification**

**The amendment is as a consequence of the proposed changes in trust law to allow for family trusts. The amendments are in the definition of the term "settlement" to include family trust.**

**NEW CLAUSE**

410. Amend the Bill by inserting the following new clause immediately after clause 9-
- 9A. Section 35 of the Income Tax Act is amended by inserting the following paragraph immediately after paragraph (n)-  
(o) transportation of goods other than by air or sea;

**Justification**

**The amendment is to provide that deductions for transport by air or sea are not allowable in computation of income tax.**

**CLAUSE 10**

411. Amend the Bill by deleting the proposed clause 10 and substituting therefor the following new clause -
10. Section 39B of the Income Tax Act is amended by deleting sub-section (1) and substituting therefor the following new sub-section-
- (1) Any employer who engages at least five university or technical and vocational education and training graduates as apprentices for a period of six to twelve months during any year of income shall be eligible for tax rebate in the year subsequent to the year of such engagement.

### Justification

In addition to the amendment proposed in the Bill to include TVET graduates for an employer to qualify for the rebate, this is a further amendment to reduce the number of graduate from 10 to 5.

### CLAUSE 11

412. Delete the proposed clause 11 and substitute therefor the following new clauses –
11. The Income Tax Act is amended by deleting section 41 and substituting therefor the following new section–
41. (1) Every special arrangement for relief from double taxation made with the Government of any country outside of the Republic of Kenya with a view of affording relief from double taxation in relation to income tax and any taxes of similar character imposed by the laws of that country shall, subject to sub-section (2) but notwithstanding any other provision to the contrary in this Act or in any other written law, have effect in relation to income tax, and every such agreement shall be subject to the provisions of the Treaty Making and Ratification Act, 2012.
- (2) Subject to sub-section (3), where an arrangement made under this section provides that income derived from Kenya is exempt or excluded from tax, or the application of the arrangement results in a reduction in the rate of Kenyan tax, the benefit of that exemption, exclusion, or reduction shall not be available to a person who, for the purposes of the arrangement, is a resident of the other contracting state if fifty per cent or more of the underlying ownership of that person is held by a person or persons who are not residents of that other contracting state for the purposes of the agreement.
- (3) Sub-section (2) shall not apply if the resident of the other contracting state is a company listed in a stock exchange in that other contracting state.
- (4) In this section, the terms "person" and "underlying ownership" have the meaning assigned to them in the Ninth Schedule.
- 11A. The Income Tax Act is amended in section 41A by deleting the words "*specified in the notice being arrangements*".

### Justification

In addition to the amendment proposed in the Bill to delete the words "*an individual or individuals*" and replace with "*a person or persons*", this amendment is made to provide that Double taxation agreements/arrangements should be considered in accordance with the Treaty making and Ratification Act and not the Statutory Instruments Act. This is in line with the Committee's recommendations last year during consideration of the Mauritius DTA.

### NEW CLAUSE

413. Amend by inserting the following new clauses immediately after clause 11–
- 11B. Section 133 of the Income Tax Act is amended –
- (a) in sub-section (6) by deleting the expression "*31<sup>st</sup> December 2021*" and substituting therefor the expression "*31<sup>st</sup> December 2022*";

- (b) by inserting the following new sub-section immediately after sub-section (6) –
- (7) Subject to the provisions of section 12 of this Act, any investment allowance on any written down values as at the date of commencement of this Act, shall be claimed on a straight-line basis.

**Justification**

Section 133 of the Income Tax Act is the transitional provision. The amendments in paragraph (a) is to extend the transition period that was given for capital expenditure on the construction of bulk grain handling facilities supporting the SGR in the Business Laws (Amendment) Act, 2020.

The amendment in paragraph (b) is consequential to the amendment in clause 12 where a change is made in the application of investment deductions from reducing balance to in equal instalments.

11C. The First Schedule to the Income Tax Act is amended –

- (a) in paragraph 36 by inserting the following new paragraph immediately after paragraph (h)–
- (g) property, including investment shares, which is transferred or sold for the purpose of transferring the title or the proceeds into a registered family trust.
- (b) by inserting the following new paragraphs immediately after paragraph 56–
57. The income or principal sum of a registered family trust.
58. Any capital gains relating to the transfer of title of immovable property to a family trust.

**Justification**

The amendment is as a consequence of the proposed changes to trust law. It is proposed to exempt certain family trust transactions from income tax.

**CLAUSE 12**

414. The Bill be amended by deleting clause 12 and substituting therefor the following new clause–

12. The Second Schedule to the Income Tax Act is amended—

- (a) in paragraph 1–
- (i) in sub-paragraph (a), by deleting the words “*on reducing balance*” wherever they occur and substituting therefor the words “*in equal instalments*”;
- (ii) in sub-paragraph (b)—
- (A) by deleting the words “*on reducing balance*” wherever they occur and substituting therefor the words “*in equal instalments*”;
- (B) by deleting the words “*under a mining right*” appearing in sub-paragraph (xi);
- (iii) in sub-paragraph (c), by deleting the words “*on reducing balance*” and substituting therefor the words “*in equal instalments*”;
- (iv) in sub-paragraph (d), by deleting the words “*on reducing balance*” and substituting therefor the words “*in equal instalments*”;

(v) in the proviso—

(A) by deleting the words “*through the national grid*” appearing immediately after the word “*electricity*” appearing in subparagraph (f) thereof;

(B) by adding the following new sub-paragraphs immediately after subparagraph (f)—

(g) civil works include —

- i. roads and parking areas;
- ii. railway lines and related structures;
- iii. water, industrial effluent and sewerage works;
- iv. communications and electrical posts and pylons and other electrical supply works; and
- v. security walls and fencing.

(h) “*Farm works*” means *farmhouses, labour quarter, any other immovable building necessary for the proper operation of the farm, fences, daps, drains, water and electricity supply works other works necessary for the proper operation of the farm*”;

(b) by inserting the following new sub-section immediately after sub-section (1) —

(1A). Notwithstanding paragraph 1, the investment deduction shall be one hundred per cent where—

- (a) the cumulative investment value in the preceding three years outside Nairobi City County and Mombasa County is at least ten billion shillings; or
- (b) the person has incurred investment in a special economic zone.

#### **Justifications**

**Clause 12 proposed to change the application of investment deductions from reducing balance to in equal instalments.**

**Further, under sub-paragraph(v) (B) the definition of Civil words and formworks for the purpose of investment deductions have been inserted.**

**Under paragraph (b) it is proposed to allow for 100% investment deduction for investments made outside Nairobi and Mombasa.**

#### **NEW CLAUSE**

415. The Bill be amended by inserting the following new clause immediately after clause 12-12A. The Third Schedule to the Income Tax Act is amended in—

(a) paragraph 3 by inserting the following new sub-paragraph immediately after sub-paragraph (p)–

(q) transportation of goods, other than by air or sea, twenty percent of the gross amount payable;

(b) paragraph 5 by inserting the following new sub-paragraph immediately after sub-paragraph (ja)–

(jb) in respect to the disbursement of deemed income to beneficiaries under section 11 (3) (c) the rate of twenty five percent.

**Justification**

The amendment is as a consequence of the proposed changes to trust law. It is proposed to set the rate of withholding tax on disbursements out of a family trust.

**CLAUSE 19**

416. The Bill be amended by deleting clause 19.

**Justification**

The amendment was proposing to delete a specific regulation making power relating to that section 19, yet section 19 is not being deleting. This would affect the operationalisation of that section.

**CLAUSE 20**

417. The Bill be amended by deleting clause 20.

**Justification**

The clause was proposing to delete the requirement for submitting regulations under the VAT Act to the National Assembly.

**CLAUSE 21**

418. The Bill be amended in clause 21 by-
- (a) deleting sub-paragraph (i) of paragraph (a);

**Justification**

The proposed paragraph 33 relates to Disposable plastic syringes. The proposal to apply VAT at 16% on syringes is being deleted.

- (b) deleting sub-paragraph (ii) of paragraph (a);

**Justification**

The proposed paragraph 34 relates to other syringes with or without needles. The proposal to apply VAT at 16% on syringes is being deleted.

- (c) by inserting the following new sub-paragraph in paragraph (a) immediately after sub-paragraph (iii)-
  - (iiia) by deleting paragraph 111;

**Justification**

This is a new amendment. A proposal to delete maize flour from exempt status. it is a consequential amendment to the amendment proposed at Clause 22 in the new paragraph 23.

- (d) inserting the following tariff number and the corresponding description in paragraph (iv) in the proper numerical sequence-

<b>Tariff Number</b>	<b>Description</b>
1901.10.00	Food preparations suitable for infants or young children put up for retail sale

### **Justification**

**This is a new amendment to include food preparations suitable for infants under exempt status, in order to make them cheaper.**

- (e) inserting the following items in subparagraph (xxiv) immediately after item 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 cook stoves;
  135. Taxable supplies including 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 on the recommendation of the relevant state department;
  136. Pre-fabricated biogas digesters
  137. Biogas
  138. Sustainable fuel briquettes for household and commercial use
  139. The supply of denatured ethanol of tariff number 2207.20.00 (for household cooking and heating)
  140. Denatured bioethanol of tariff number 2207.20.00
  141. Plant and machinery of chapters 84 and 85 used for the manufacture of goods: Provided that the exemption shall lapse on 31<sup>st</sup> December 2021.

### **Justification**

**The proposed amendments are to include cleaning cooking items, fishing supplies and plant and machinery used for manufacture of goods under exempt status.**

- (f) by inserting the following paragraph immediately after paragraph (b)-  
(c) in Part II, by deleting paragraph 18A.

### **Justification**

**The proposed amendment relates to “*transportation of sugar cane from farms to milling factories*”. This amendment is consequential to the amendment in clause 22 in paragraph 21.**

### **CLAUSE 22**

419. The Bill be amended in clause 22 by deleting paragraph (b) and substituting therefor the following new paragraph-
- (b) in paragraph 1 of Part A by inserting the following items immediately after paragraph 19-
20. The transportation of goods originating from Kenya to a place outside Kenya.
  21. Transportation of sugarcane from farms to milling factories.
  22. The supply of maize (corn) flour, cassava flour, wheat or meslin flour and maize flour containing cassava flour by more than ten per-cent in weight.

### **Justification**

**The proposed amendment is zero rate the items listed under paragraph 20, 21 and 22.**

**CLAUSE 25**

420. The Bill be amended in clause 25-

- (a) by deleting sub-paragraph (i) in paragraph (a) and substituting therefor the following new sub-paragraph-
- (i) by deleting the rate of excise duty appearing in the description "*Imported sugar confectionary of tariff heading 17.04*" and substituting therefor the following rate "*Shs.35 per kg*";

**Justification**

The proposed amendment is to increase the rate of excise duty on imported sugar confectionery from Shs. 20 to Shs. 35.

- (b) by deleting sub-paragraph (iii) in paragraph (a) and substituting therefor the following new sub-paragraph-
- (iii) by inserting the following proviso "*provided that it shall not apply to glass bottles imported from any of the countries within the East African Community*" at the end of the description "*imported glass bottles (excluding glass bottles for packaging of pharmaceutical products)*"

**Justification**

The proposed amendment is to exclude import of glass bottles from the East African community countries from the Excise Duty.

- (c) in paragraph (a) by deleting sub-paragraph (iv);

**Justification**

The proposed amendment is to delete the proposal to impose excise duty on motor cycles at a specific rate of 15%.

- (d) in paragraph (a) in sub-paragraph (v) by deleting the rate corresponding the description "*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*" and substituting therefor the following new rate "*Shs. 1,200 per kg*".

**Justification**

The proposed amendment is to reduce the proposed rate of excise on products containing nicotine from KSh. 5000 per kg to KSh. 1200.

- (e) in paragraph (a) in sub-paragraph (v) by inserting the following new items-
- i. Single use plastic bottles of tariff heading 3923.30.00 – Excise Duty rate of 10%.
  - ii. Imported pasta of tariff 1902 whether cooked or not cooked or stuffed (with meat or other substances) or otherwise prepared, such as spaghetti, macaroni, noodles, lasagne, gnocchi, ravioli, cannelloni, couscous, whether or not prepared – Excise Duty rate of 20%.
  - iii. Imported furniture of any kind used in offices, kitchen, bedroom and other wooden furniture of tariff number 9403.30.00, 9403.40.00, 9403.50.00 and 9403.60.00 – Excise Duty rate of 25%.

- iv. 3907.91.00 unsaturated polyester; 3907.50.00 Alkyd; 3905.91.00 Emulsion VAM; 3903.20.00 Emulsion-styrene Acrylic; 3905.19.00 Homopolymers; and 3906.90.00 Emulsion B.A.M – Excise Duty rate of 10%.

**Justification**

The proposed amendment in paragraph (e) is to impose excise duty on the items listed above at the corresponding rates. These are new amendments to the Bill.

- (f) by inserting the following paragraph immediately after paragraph (a)-  
(ab) in part II by deleting the expression "*the rate of fifteen percent*" appearing in paragraph 1 and substituting therefor the expression "*the rate of twenty percent*";

**Justification**

The proposed amendment is to increase the rate of excise duty from 15% to 20% on Telephone and internet data services.

- (g) in paragraph (b) by deleting the word "*twenty*" in the proposed new paragraph 4A and substituting therefor the word "*seven-point five percent*";

- (h) in paragraph (b) by inserting the following new paragraphs immediately after the proposed new paragraph 4A-

- 4B. Excise duty on gaming shall be seven-point five percent of the amount wagered or staked.  
4C. Excise duty on price competition shall be seven-point five percent of the amount paid or charged to participate in a prize competition.  
4D. Excise duty on lottery (excluding charitable lotteries) shall be seven-point five percent of the amount paid or charged to buy the lottery ticket.

**Justification**

The amendment is to apply excise duty on all betting and lottery transaction, that is betting, gaming, price competitions and lottery, at seven-point five percent. Further the new amendment will raise up to 30% on excise duty on all the betting and lottery transactions as against the 20% that was initially proposed in the Bill.

**NEW CLAUSE**

421. The Bill be amended by inserting the following new clause immediately after clause 25-25A. The Second Schedule to the Excise Duty Act is amended by inserting the following new paragraph immediately after paragraph 12-  
13. Illuminating kerosene supplies to licenced or registered manufacturers of paint, resin or shoe polish in such quantities as the Commissioner may approve.

**Justification**

The amendment is to exempt the manufacturers of paint, resin and shoe polish from the excise duty. This is because it is an input in the manufacture of their products.

**CLAUSE 28**

422. The Bill be amended in clause 28 by deleting paragraphs (a) and (c).

**Justification**

The amendment is to delete the proposed extension of the period for keeping tax records from 5 years to 7years.

**CLAUSE 29**

423. The Bill be amended by deleting clause 29.

**Justification**

The amendment is to delete the proposed extension of the period for amendment of assessments from 5 years to 7years.

**CLAUSE 33**

424. The Bill be amended in clause 33 by inserting the following new sub-section immediately after sub-section 4B-

4C. Without prejudice to the provisions of this section, once the Commissioner notifies of a decision under sub-section (3) and the Commissioner is satisfied that there is an overpayment of tax, the overpaid tax shall be deemed to have been offset against the taxpayer's future tax liabilities.

**Justification**

The amendment is to provide that once the Commissioner notifies that he is satisfied that there is an overpayment of tax, then it is deemed to be offset against future tax liabilities.

**CLAUSE 40**

425. The Bill be amended by deleting clause 40.

**Justification**

The amendment is to delete the proposed new clause on concurrent civil and criminal proceedings. The court has rules and procedures that deal with such matters.

**CLAUSE 42**

426. Clause 42 of the Bill be amended by deleting the proposed item 14 and substitute therefor the following new item-

14. Carrying out business over the internet or an electronic network including through a digital marketplace.

**Justification**

The amendment is a clean-up as a consequence of the amendments under clause 3(b) in the definition of digital market place.

**NEW CLAUSE**

427. The Bill be amended by inserting the following new clause immediately before clause 43-

42A. The Miscellaneous Fees and Levies Act, 2016 is amended in section 8A by deleting sub-section (4) and substituting therefor the following new sub-section-

(4) The levy shall not apply to a licenced or registered manufacturer of paint, resin or shoe polish.

### **Justification**

The amendment is to exempt the manufacturers of paint, resin and shoe polish from the Anti-Adulteration Levy. This is because it is an input in the manufacture of their products.

### **CLAUSE 51**

428. Amend clause 51(b) by deleting the proposed definition of the term "*post-retirement medical fund*" and substitute therefor the following new definition-  
*"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*";

### **Justification**

This amendment is to clarify that post-retirement medical fund applies to funds established under the RBA Act. This is to weed out unregulated schemes.

### **NEW CLAUSE**

429. THAT, the Bill be amended by inserting the following new clause immediately after clause 62-

62A. Section 53B of the Retirement Benefits Act is amended by inserting the following new sub-sections immediately after the existing provision -

- (2) Where an employer has failed to remit contributions, the Trustees may with the approval of the Authority, appoint the Kenya Revenue Authority, as an agent, to collect unremitted contributions, interests, and penalties.
- (3) Subject to subsection (2), the Trustees shall in writing request the Authority for approval and shall demonstrate that they have taken all reasonable effort to recover unremitted contributions from a defaulting employer without any success.
- (4) The Authority shall either approve or reject the request in writing within twenty-one days from the date of receipt of the request.
- (5) Despite subsection (2), where the Authority is of the opinion that the Trustees have failed or have not made reasonable effort to recover the unremitted contributions, interests and penalties, the Authority shall give notice to the Trustees instructing them to appoint the Kenya Revenue Authority as an agent to recover the unremitted contributions, interests and penalties.
- (6) Upon appointment under subsection (2) or (5), the Kenya Revenue Authority shall issue a twenty-one-day notice in writing to the defaulting employer requiring it to remit the unremitted contributions, interests, penalties and recovery costs.
- (7) Where an employer fails to comply with the notice, the Kenya Revenue Authority shall -
  - (a) serve such employer with an agency notice;
  - (b) attach the bank accounts of the defaulting employer; and
  - (c) remit the attached funds to the Scheme.

(8) The cost of the recovery of unremitted contributions shall be borne by the defaulting employer.

**Justification**

The amendment is to provide for collection of unremitted retirement benefits, through appointment of an agent (KRA). The appointment is to be done by the trustees of a scheme but with approval of the Retirement Benefits Authority.

**NEW CLAUSE**

430. Amend the Bill by inserting the following new clauses immediately after clause 66-67. Section 52 of the Stamp Duty Act is amended in sub-section 2 by inserting the words "or a registered family trust" in paragraph (b) after the word "established".
68. Section 117 of the Stamp Duty Act is amended in sub-section (1) by inserting the words "registered family trust" in paragraph (h) immediately after the word "codicil".


**Justification**

The amendment is as a consequence of the proposed changes to trust law. It is proposed to exempt from stamp duty certain family trust transactions.

SIGNED..... DATE. 22<sup>nd</sup> June 2021

THE HON. GLADYS WANGA, CBS, MP  
CHAIRPERSON,

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 22 JUN 2021	
TUESDAY	
TABLED BY:	CHAIR, DC-FINANCE
CLERK-AT-THE-TABLE:	HPO