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TWELFTH PARLIAMENT – THIRD SESSION – 2019

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL  
PLANNING

.....  
REPORT ON THE STATUTE LAW MISCELLENOUS AMENDMENT BILL, 2019  
(NATIONAL ASSEMBLY BILL NO. 21)

CLERKS CHAMBERS  
DIRECTORATE OF COMMITTEE SERVICES  
PARLIAMENT BUILDINGS  
NAIROBI

MAY, 2019

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## **CHAIRPERSON'S FOREWORD**

This report contains the Committee's proceedings on the consideration of the Statute Law (Miscellaneous Amendment) Bill, 2019 (National Assembly Bill No. 21). The Bill was read a first time on **3<sup>rd</sup> April, 2019** and was subsequently committed to respective Departmental Committees i.e. Justice and Legal Affairs, Administration and National Security, Finance and National Planning, Environment and Natural Resources, Sports Culture and Tourism and Transport, Public Works and Housing for consideration and facilitation of public participation pursuant to Standing Order 127. The Bill seeks to amend, among other Statutes; the Microfinance Act, 2006 (No. 19 of 2006), the Public Finance Management Act, 2012, (No. 18 of 2012) and the Value Added Tax Act, 2013 (No. 35 of 2013).

In processing the Bill, the Clerk of the National Assembly placed adverts in the print media on **10<sup>th</sup> April, 2019** seeking for comments from the public on the Bill pursuant to Article 118 of the Constitution. The Committee received memoranda from fourteen (14) stakeholders. The Committee also wrote to the Parliamentary Service Commission, Kenya Revenue Authority, Institute of Certified Public Accountants of Kenya and National Treasury and Ministry of Planning vide letters **Ref.NA/DCS/F&NP/2019/033** dated **16<sup>th</sup> April, 2019** seeking for their comments on the Bill. The Committee held a stakeholder engagement workshop at Hilton Garden Inn Hotel on **3<sup>rd</sup> and 4<sup>th</sup> May, 2019**.

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 the consideration of the Bill. Finally, I wish to express my appreciation to the Honorable Members of the Committee and all the stakeholders who made useful contributions towards the preparation and production of this report.

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 Statute Law (Miscellaneous Amendment) Bill, 2019.

## EXECUTIVE SUMMARY

The Statute Law (Miscellaneous Amendment) Bill, 2019 (National Assembly Bill No. 21) was published on **29<sup>th</sup> March, 2019**. The Bill was read a first time on **3<sup>rd</sup> April, 2019** and thereafter committed to respective Departmental Committees (Justice and Legal Affairs, Administration and National Security, Finance and National Planning, Environment and Natural Resources, Sports Culture and Tourism, and Transport, Public Works and Housing) that were expected to process the amendments of the respective Statutes that fall within their purview. The Departmental Committee on Finance and National Planning considered amendments to the Microfinance Act, 2006 (No. 19 of 2006), the Public Finance Management Act, 2012 (No. 18 of 2012) and the Value added Tax Act, 2013 (No. 35 of 2013).

The proposed amendment to the Microfinance Act, 2006 seeks to provide for the conduct of business by sharia compliant microfinance businesses. It seeks to remove sharia compliant microfinance businesses from the list of prohibited activities. The proposed amendment to the Public Finance Management Act, 2012 seeks to empower the Parliamentary Service Commission to designate by resolution additional accounting officers in the Parliamentary Service Commission in addition to the Clerks of the two Houses of Parliament. The proposed amendment to the Value Added Tax Act, 2013 provides for a taxpayer to apply any withheld tax to his credit to offset any other tax liability due from the taxpayer.

In order to fulfill the requirements of Article 118 of the Constitution, the Clerk of the National Assembly placed an advertisement in the print media on **10<sup>th</sup> April, 2019** requesting for comments from the general public on the Bill. The Committee received memoranda from fourteen (14) stakeholders. The Committee also identified stakeholders that would be affected by the proposed amendments and wrote to them vide letters **Ref.NA/DCS/F&NP/2019/33** dated **16<sup>th</sup> April, 2019** seeking for their comments on the Bill. The stakeholders that the Committee wrote to are the Parliamentary Service Commission on the Public Finance Management Act, 2012, Kenya Revenue Authority on the Value Added Tax Act, 2013, the Institute of Certified Public Accountants of Kenya and the National Treasury and Planning on all the three proposed amendments.

The Committee received memoranda from the following stakeholders: -

1. Petroleum Institute of East Africa on the proposed amendment to the Value Added Tax Act, 2013
2. GC Retail Limited on the proposed amendment to the Value Added Tax Act, 2013

3. Tsavo Power Company Limited and other Independent Power Producers on the Value Added Tax Act, 2013
4. PKF in East Africa on the proposed amendment to the Value Added Tax Act, 2013
5. Agrochemicals Association of Kenya on the proposed amendment to the Value Added Tax Act, 2013
6. PricewaterhouseCoopers Limited on the proposed amendment to the Value Added Tax Act, 2013
7. KPMG Advisory Services Limited on the proposed amendment to the Value added Tax Act, 2013
8. Coulson Harney LLP on all the proposed amendments
9. Kenya Manufacturer's Association on the proposed amendment to the Value Added Tax Act, 2013
10. Private sector on the proposed amendment to the Value Added Tax Act, 2013
11. Anonymous on the proposed amendment to the Value Added Tax Act, 2013 and the Public Finance Management Act, 2012
12. Amolo and Kibanya Co. Advocates on the proposed amendment to the Public Finance Management Act, 2012
13. Njoroge Wachira & Co. Advocates on the proposed amendment to the Microfinance Act, 2006
14. Central Bank of Kenya on the proposed amendment to the Microfinance Act, 2006

The Committee invited all the stakeholders that had submitted written memoranda on the Bill for a stakeholder engagement workshop at the Hilton Garden Inn Hotel in Machakos County on **Friday 3<sup>rd</sup>** and **Saturday 4<sup>th</sup> May, 2019**.

## 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;

1. The NT and Ministry of Planning
2. Ministry of Devolution and ASAL
3. The Commission on Revenue Allocation
4. Office of the Controller of Budget
5. Salaries and Remuneration Commission

### 1.3 COMMITTEE MEMBERSHIP

4. The Committee was constituted by the House in December, 2017 and comprises of the following Members:-

1. The Hon. Joseph K. Limo, MP – **Chairperson** – Kipkelion East Constituency – Jubilee Party
2. The Hon. Isaac W. Ndirangu – **Vice-Chairperson** – Roysambu Constituency – Jubilee Party
3. The Hon. Jimmy O. Angwenyi, MP – Kitutu Chache North Constituency – Jubilee Party
4. The Hon. Christopher Omulele, MP – Luanda Constituency – ODM Party
5. The Hon. Dr. Enoch Kibunguchy, MP – Likuyani Constituency – FORD-K
6. The Hon. Shakeel Shabbir Ahmed, MP – Kisumu Town East – Independent
7. The Hon. Abdul Rahim Dawood, MP – North Imenti Constituency – Jubilee Party
8. The Hon. Daniel E. Nanok, MP – Turkana West Constituency – Jubilee Party
9. The Hon. Andrew A. Okuome, MP – Karachuonyo Constituency – ODM Party
10. The Hon. David M. Mboni, MP – Kitui Rural Constituency – CCU Party
11. The Hon. Francis K. Kimani, MP – Molo Constituency – Jubilee Party
12. The Hon. Joseph M. Oyula, MP – Butula Constituency – ODM Party
13. The Hon. Joshua C. Kandie, MP – Baringo Central Constituency – MCC Party
14. The Hon. Lydia H. Mizighi, MP – Taita Taveta County – Jubilee Party
15. The Hon. Mohamed A. Mohamed, MP – Nyali Constituency – Independent
16. The Hon. Purity W. Ngirici, MP – Kirinyaga County – Jubilee Party
17. The Hon. Samuel Atandi, MP – Alego Usonga Constituency – ODM Party
18. The Hon. Stanley M. Muthama, MP – Lamu West Constituency – MCC Party
19. The Hon. Edith Nyenze, MP – Kitui West Constituency – WDM-K

#### **1.4 COMMITTEE SECRETARIAT**

5. The Committee is facilitated by the following staff: -

1. Ms. Leah W. Mwaura - **Senior Clerk Assistant/Lead Clerk**
2. Ms. Jennifer Ndeto - **Principal Legal Counsel I**
3. Ms. Laureen Wesonga - **Clerk Assistant III**
4. Mr. Josephat Motonu - **Fiscal Analyst I**
5. Mr. Chelang'a Maiyo - **Research Assistant III**

## 2 CONSIDERATION OF THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 2019

### 2.1 BACKGROUND INFORMATION

6. The Statute Law (Miscellaneous Amendment) Bill, 2019 seeks to among other Statutes, amend the Microfinance Act, 2006 (No. 19 of 2006), the Public Finance Management Act, 2012 (No. 18 of 2012) and the Value Added Tax Act, 2013 (No. 35 of 2013).

### 2.2 SUMMARY OF THE STATUTES

7. The Bill seeks to amend the **Microfinance Act, 2006 (No. 19 of 2006)** to provide for the conduct of business by sharia compliant microfinance businesses. The Bill seeks to remove sharia compliant microfinance businesses from the list of prohibited activities.

8. The Bill also seeks to amend the **Public Finance Management Act, 2012 (No. 18 of 2012)** to empower the Parliamentary Service Commission to designate by resolution, additional accounting officers in the parliamentary service, in addition to the Clerks of the two Houses of Parliament. The amendment seeks to actualize the resolution by the Commission at its 256<sup>th</sup> meeting held on 14<sup>th</sup> February, 2019.

9. The Bill further seeks to amend the **Value Added Tax Act, 2013 (No. 35 of 2013)** to provide for a taxpayer to apply any withheld tax to his/her credit to offset any other tax liability due from the taxpayer. This is intended to make tax administration process easier.

### **3 PUBLIC PARTICIPATION ON THE STATUTE LAW MISCELLANEOUS AMENDMENT BILL, 2019 (NATIONAL ASSEMBLY BILL NO. 21 OF 2019)**

10. Pursuant to Article 118 of the Constitution, the Clerk of the National Assembly placed an advertisement in the Daily Nation and Standard newspapers on **10<sup>th</sup> April, 2019** requesting for comments from the general public and or interested individuals/organizations. By the close of the deadline and by the time the Committee was considering the Bill, the Committee had received memoranda from eighteen (18) stakeholders. The Committee held a stakeholder engagement workshop at Hilton Garden Inn Hotel on **Friday, 3<sup>rd</sup> and Saturday, 5<sup>th</sup> May, 2019**.

11. The following stakeholders submitted their memoranda to the Committee:-

- a. Petroleum Institute of East Africa
- b. GC Retail Limited
- c. Tsavo Power Company Limited and other Independent Power Producers
- d. PKF in East Africa
- e. Agrochemicals Association of Kenya
- f. PricewaterhouseCoopers Limited
- g. KPMG Advisory Services Limited
- h. Coulson Harney LLP
- i. Njoroge Wachira & Co. Advocates
- j. Amolo and Kibanya Co. Advocates
- k. Anonymous
- l. Kenya Association of Manufacturers
- m. Private Sector
- n. Institute of Certified Public Accountants of Kenya
- o. Central Bank of Kenya
- p. Parliamentary Service Commission

- q. Kenya Revenue Authority
- r. National Treasury and Ministry of Planning

The stakeholders made the following submissions:-

### **3.1 PETROLEUM INSTITUTE OF EAST AFRICA AND ERNST AND YOUNG**

The Chief Executive Officer of the Institute submitted that:-

#### **Withholding Value Added Tax refunds and amendment of section 17(5) of the Value Added Tax Act, 2013**

##### Problem Statement

12. The Finance Act, 2014 reintroduced Withholding Value Added Tax (VAT) in Kenya and requires Withholding VAT agents to withhold 6% of the value of taxable supplies on payment to suppliers and remit the same directly to the Commissioner of KRA. The Commissioner is empowered under section 42A(1) of the Tax Procedures Act to appoint any person as a withholding VAT agent.
13. The VAT Act, 2013 exempted white petroleum products (Petrol, Diesel & Kerosene) from VAT for a period of three years. The Finance Act, 2016 extended the exemption for a further two-year period to 1<sup>st</sup> September, 2018. Since there was no further extension, white petroleum products became vatable at 16% from 1<sup>st</sup> September, 2018. However, the Finance Act, 2018 introduced a concessionary 8% VAT rate.

##### Challenges

14. Members of PIEA supply customers who have been withholding VAT agents such as KENGEN and other IPPs as well as many large industrial customers. These customers withhold 6% VAT as required under the law. This has resulted in a VAT credit to their members of approximately Kshs. 4 billion. The withholding VAT of 6% is very high as compared to the base rate of 8% VAT rate on petroleum products. As a result, the VAT credit cannot be reduced and will keep growing as the industry input will always exceed the output by far.

15. The industry being highly capital intensive has suffered from severe cash crunch as a result of a majority of its capital being held up in VAT credit from the government. The law as presently written has no mechanism for refund of Withholding VAT. This has slowed down the growth of the industry and impacted the growth of the country's economy negatively.

#### Proposal

16. As a result of the challenges faced by members of PIEA, Parliament should create a mechanism in law to address the issue of the VAT credits. They supported the amendment to section 17(5) of the VAT Act, 2013 as contained in the Statute Law (Miscellaneous amendment) Bill, 2019 to allow taxpayers to claim refunds arising from withheld VAT.

### **3.2 GC RETAIL LIMITED**

Representatives of the company submitted that:-

#### **Withholding VAT Refunds**

##### Background

17. GC Retail Limited undertook the construction of the Garden City Mall at a cost of approximately Kshs. 4 billion and at present, the companying is carrying a significant Input VAT credit of approximately Kshs. 400 million in its VAT Returns. Noting that the Mall is offering commercial rental space, GC Retail charges VAT on the rent supply, which VAT is offset against the Input VAT credit over time.

##### Appointment of VAT Withholding Agents

18. The Finance Act, 2016 introduced the provision for the appointment of VAT withholding agents via an amendment to the Tax Procedures Act, 2015 through section 42A. The Commissioner has so far appointed forty five (45) of the tenants at the mall as withholding VAT agents.

19. The Finance Act, 2017 subsequently amended section 42A of the Tax Procedures Act, 2015 by introducing a new subsection (4A) which states that "*The Commissioner may at any time exempt any supplier from the provisions of this section if such a supplier has sufficiently demonstrated that due to the nature of his business and due to the application of this section, he is going to be in a continuous credit position for a period of not less than twenty four (24) month.*"

20. In this regard, the forty five (45) tenants do not pay to GC Retail all the VAT charged due to their appointed withholding agent obligation. As such, the output VAT collected by GC Retail is less than its claimable position (Input VAT). This perpetual credit position arising from high input taxes owing to the withheld VAT has subsisted for a period exceeding twenty four (24) months.
21. They are unable to seek a refund of the excess input tax as the excess credit does not arise from zero rated supplies which is currently the only qualification for the application for refund of excess input tax as provided under section 17(5) of the VAT Act No. 35 of 2013. They anticipate that more of their tenants will be appointed as withholding VAT agents and as such the VAT credit offset previously anticipated will take much longer to materialise. This has had a direct adverse impact on their business and cash flows.
22. KRA issued “Guidelines to Taxpayers on Exemption from Withholding VAT” on 14th December, 2017. GC Retail made an application for exemption in accordance with the guidelines and they are pursuing the same with KRA.

#### Proposed Amendment

23. The proposed amendment in the Statute Law (Miscellaneous Amendment) Bill, 2019 on Section 17(5) of the Value Added Tax Act, 2013 will enable taxpayers on whom withholding VAT has had a negative cashflow impact like GC Retail, seek a refund for the VAT that is withheld by appointed agents from the Commissioner for VAT.

#### Conclusion

24. They supported the proposed amendment as it will have a direct impact on their investment.

### 3.3 INDEPENDENT POWER PRODUCERS

In their submission, representatives of IPPs stated that:-

#### **Amendment of section 17(5) of the Value Added Tax Act, 2013**

##### Background

25. Kenya Power Company Limited (KPLC), the only customer of the Independent Power producers (IPPs) is a withholding VAT agent appointed by KRA. Therefore, KPLC is under obligation to withhold VAT of 6% from payment made to various suppliers including suppliers of electrical power.

##### Challenges

26. Withholding 6% of the VAT payable to IPPs, specifically those using fossil fuels like diesel, results in the accumulation of significant VAT refunds in the books of these companies. This is because a significant component of the total amount payable by KPLC for supply of electricity constitutes fuel cost reimbursements (up to 65% during peak capacity - with the balance represented by energy and capacity charges). IPPs incur 16% input VAT on heavy fuel oils and 8% VAT on automotive gas oil which is subsequently reimbursed by KPLC at a cost. Resultantly, the output VAT payable to KRA each month tends to be less than the 6% that KPLC currently withholds directly. This locks up the cash flow of the IPPs with no prospect of getting a refund as they are not making zero-rated supplies.

27. Most of the thermal powered (especially diesel) IPPs are already in a VAT refundable position as at April 2019. Despite the fact that since the re-introduction of the withholding VAT in January 2015, they have been operating at a very low capacity factor (in many cases minimum) and thus very low input VAT due to minimal fuel purchases. This position will quickly escalate should there be an increase in operational capacity plunging the entities into impossible negative cash flow positions.

28. Moreover, the withheld VAT has resulted in accumulated irrecoverable VAT for IPPs which keeps building up and which cannot be refunded due to lack of enabling withholding VAT refund provisions under the Act.

29. Accordingly, the IPPs have no choice but to pass this cost to KPLC through a tariff adjustment in accordance with the Power Purchase Agreements which will eventually be passed to the final consumer. This is contrary to the government's aim of reducing the cost of power in order to increase competitiveness in the Kenyan economy.

### Recommendation

30. Due to the challenges highlighted above, they proposed that Parliament should create a mechanism in law to address the problems associated with accumulation of the VAT credit by IPPs. To this end, they supported the provision that the excess arising out of tax withheld by appointed tax withholding agents may be applied against any tax payable under this act.

31. They supported the amendment of section 17(5) of the VAT Act, 2013 as contained in the Bill and proposed that it should be enacted as is.

### **3.4 COULSON HARNEY LLP**

Ms. Rosemary Maina stated as follows on behalf of the Company. That:-

#### **The Value Added Tax Act (No. 5 of 2013)**

32. The VAT Act, 2013 only permits refunds where there is excess input tax as a result of making zero rated supplies; refund for tax paid in error; or on bad debts subject to certain conditions.

33. The amendment proposes two things:-

- a) To provide that one can utilize Withholding VAT (WHVAT) credits against any VAT payable in the Act and;
- b) To provide that WHVAT credits can be part of a refund claim to the Commissioner in VAT refund application.

34. WHVAT is VAT withheld by a recipient of taxable supplies who is appointed by the KRA to deduct VAT and remit the same to KRA against a supplier. The WHVAT rate is 6%. The VAT withholding agent is expected to remit the WHVAT (6%) to the KRA and remit the balance (10%) to the supplier of taxable supplies.

35. From a legislative perspective, it is not clear how a registered person could utilize the VAT credits arising from WHVAT. They noted that in the practice, suppliers utilize the VAT credit arising from the WHVAT against VAT payable when accounting for VAT.

36. Likewise, registered persons who make both standard rated supplies and zero-rated supplies and are perpetually in a VAT credit position, ordinarily include the WHVAT element in a VAT refund claim to the Commissioner.

37. The proposed amendment therefore attempts to bring clarity to what was poor law. It remains to be seen if the amendment will achieve this.

#### **The Microfinance Act, 2006 (No. 19 of 2006)**

38. Sharia compliant microfinance institutions will be able to engage in wholesale and retail trade in line with the Sharia law restrictions against interests (Riba). This amendment follows the amendments to the SACCO Societies Act, 2008 (No. 14 of 2008) by the Finance Act, 2017 providing that the CS in consultation with SASRA shall create regulations for the licensing and supervision of Sharia compliant SACCO societies. These amendments may be first stepping stones towards the establishment of suitable regulatory framework for Sharia compliant finance institutions.

#### **The Public Finance Management Act, 2012 (No. 18 of 2012)**

39. Empowers the PSC to designate accounting officers in the parliamentary service in addition to the two clerks of the Houses of Parliament. This amendment seeks to actualize the resolution already made by PSC on 14<sup>th</sup> February, 2019.

### **3.5 KPMG ADVISORY SERVICES LIMITED**

Representatives of KPMG submitted that:-

#### **Value Added Tax Act, 2013 (No. 35 of 2013)**

40. The proposed amendment is welcome and will have an impact in releasing the working capital locked in WHVAT credits that would never be utilized. Generally, WHVAT are usually significant amounts. In light of the focus on manufacturing and agricultural value addition as key

elements of the Big 4 Agenda, it is critical that KRA implements a quicker and practical solution to WHVAT refund claims given the current backlog for VAT refunds at KRA.

41. One solution would be to allow taxpayers to set off approved claims against other tax obligations such as corporation tax, Pay As You Earn (PAYE) or even withholding tax rather than waiting for actual cash refunds. This has worked well in the past and can help to cushion businesses against the cash flow constraints and interest costs associated with refund delays.

#### Issue with the Clause

42. While paragraph (c) is a welcome amendment, the proposed proviso under paragraph (d) is unclear and may negate the proposed change since the excess tax credit arises because there is no tax payable by the taxpayer under the VAT Act.

43. In addition, such a proviso would give KRA a lee way to reject applications for WHVAT refunds.

#### Proposed Amendment

They proposed that:-

44. (d) Where in relation to an application for a refund made under subsection (c) above, the Commissioner is satisfied that the tax is refundable, the Commissioner shall authorize the crediting of the taxpayer's iTax ledger with amount of the approved tax credit to be utilized against any other tax obligations by the taxpayer. Provided that a person who, prior to the commencement of this subsection, had excess tax credit arising from tax withheld by appointed withholding agents may apply for a refund under this section.

## Justification

45. The Bill seeks to amend the VAT Act to provide for a taxpayer to apply any withheld tax credit to offset any other tax liability due from them. Their proposal effectively clarifies this position as this is unclear as currently worded from the Bill.
46. The proposal allows the amount approved for refund to be available to be utilized against any other tax obligations that the taxpayer may have instead of waiting for tax refunds that presently take too long to be approved. In addition, there are taxpayers who already have excess VAT credit arising from WHVAT who will not be able to utilize them unless the provision is allowed to apply retrospectively.

### **3.6 PKF IN EAST AFRICA**

In their memorandum to the Committee, PKF submitted that:-

#### **Withholding VAT Refunds**

47. The Bill proposes to amend section 17(5) of the VAT Act, 2013 by introducing VAT refunds. Many suppliers who have their customers appointed as withholding VAT agents have ended up being in VAT credit positions. For some suppliers, the VAT credits are accumulating very fast due to the nature of their businesses. Currently VAT Act, 2013 and the Tax Procedures Act, 2015 do not have explicit provisions on refund of withheld VAT, a fact that KRA has been relying on and not processing any VAT refund applications resulting from withholding VAT.
48. In actual sense, VAT credits resulting from withholding VAT amount to overpaid tax which should be refunded to the suppliers in accordance with section 47 of the Tax Procedures Act, 2015. Unfortunately, VAT refunds arising from withholding VAT have not been processed in accordance with section 47 of the Tax Procedures Act, 2015. Through the Finance Act, 2017, section 42A of the Tax Procedures Act, 2015 was amended to give the Commissioner of KRA powers to exempt suppliers in continuous VAT credit positions for over twenty four months from the withholding VAT provisions. Some suppliers have managed to secure these exemptions which have enabled their customers who are appointed as agents not to withhold VAT when

making payments to them. However, these exemptions approvals from KRA take a long time to be processed which has frustrated many suppliers because it affects their cash flows.

49. They stated that the proposed amendment is commendable if passed into law as it will have given a clear legal provision for VAT refunds arising from withholding VAT.

### **3.7 AGROCHEMICALS ASSOCIATION OF KENYA**

Representatives of the Association submitted that:-

50. The introduction of 16% VAT on agricultural pest control products has resulted to the increase in cost of such products which has led to food insecurity/increased consumer prices, increase in cost of production for farmers, influx of counterfeit and illegal pesticides from neighboring countries, loss of competitiveness in the global horticultural market, reduced employment, reduced tax revenue and negative impact on the Big Four Agenda.

51. In view of the above, they proposed that zero rating of agricultural pest control products be reinstated in Part A of the Second Schedule of the Value Added Tax Act, 2013 as this will enable the industry to survive against external competition and assist Kenya to achieve the objectives of the Big Four Agenda.

### **3.8 PRICEWATERHOUSECOOPERS LIMITED**

Representatives of PWC proposed that the following matters should be included in the Statute Law (Miscellaneous Amendment) Bill, 2019:-

#### Refund of VAT credits arising from Withholding VAT

52. They supported the amendment to section 17(5) to the VAT Act, 2013 to introduce paragraphs (c) and (d). Once the proposed amendments are passed, registered persons will have an opportunity to either apply for a refund of VAT credits as a result of WH VAT or utilize it to offset any tax payable. The proposed amendment is a welcome move and it is expected to address cash flow challenges experienced by taxpayers following the introduction of WH VAT.

## Refund of VAT credits under special circumstances

53. Section 17 of the VAT Act, 2013 provides for VAT refunds to registered persons who are in a VAT credit position as a result of making zero rated supplies. However, there are other special circumstances in which registered persons accumulate VAT credits and are not entitled to VAT refunds under the current VAT legislation. As a result of the restrictive VAT refund regime, businesses have encountered cash flow challenges. Below are some of the scenarios that can result in huge VAT credits and their proposed amendment to the VAT Act, 2013:-
54. **VAT credit on liquidation of an entity** – some businesses have significantly high VAT credits in their VAT returns at the time of closing the operations or liquidation. Currently, there are no guidelines on the treatment of such VAT credits and from a strict interpretation of the VAT Act, such entities would not be entitled to a refund of the excess input VAT credit owing to the fact that the credits did not arise from making zero rated supplies.
55. **Changes in market strategy** – external environmental factors such as competition in the market may force businesses to make changes to their strategy and operations e.g. where a business changes its model by expanding its market outside Kenya in a bid to grow and generate foreign exchange. The expansion of a business' export market impacts the generation of output VAT as export sales are zero rated. For businesses that have accumulated VAT credits that would ideally have been off-set against future output VAT, a change to zero rated sales translates to inability to utilize or apply for a refund of the historical VAT credit.
56. **Capital investment** – businesses accrue significant VAT credits as a result of major capital investments which can only be offset against future output VAT. In some instances, the VAT on capital investments may take up to five years to be fully utilized. In such cases, the businesses may end up with cash flow constraints since they are not entitled to refunds. Where a business under this situation is unable to generate sufficient output tax to offset the inbuilt input tax, either due to the operating model or other business circumstances, the VAT credit in the company's VAT returns will not be offset in the foreseeable future and the impact would generally be on the company's cash flow and ability to continue as a going concern.

## Proposed Amendment

57. In the light of the above impact of cumulative VAT credits, they proposed that section 17(5) of the VAT Act, 2013 be amended by inserting the following paragraph, “(e) *the Commissioner is satisfied that such excess tax arises from special circumstances of the registered person’s business and the registered person has sufficiently demonstrated that due to such circumstances, the excess input tax will not be recovered as output VAT for a period of not less than 12 months*”.

## Justification

58. The amendment will address the cash flow challenges by businesses who have significantly high VAT credits without sufficient output VAT to offset the credit due to various factors some of which have been enumerated above. As a result of improved cash flows, such taxpayers will be able to undertake more investments which will spur the economic growth. This is in addition to making Kenya an attractive investment destination for companies undertaking significant capital investments.

### **3.9 KENYA ASSOCIATION OF MANUFACTURERS**

Mr. Bharat Shah proposed the following amendments on behalf of the Association:-

#### Proposed amendment

59. Delete the proviso to section 17(5) and insert the following new paragraph; “*Provided that any such excess shall be paid to the registered person the Commissioner where-*

- a) *the Commissioner is satisfied that such excess arises from making zero rated supplies; or*
- b) *the Commissioner is satisfied that such excess arises from tax withheld by appointed tax withholding agents; and*
- c) *the registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax becomes due and payable;*

- d) *the Commissioner is satisfied that such excesses arising out of tax withheld by appointed tax withholding agents may be applied as provided for under section 47(4) of the Tax Procedures Act*".

#### Justification

60. Manufacturers commend the Government for initiating the proposal to allow for initiating the proposal to allow for refund and offset of WH VAT. The proposed amendments are timely due to the existing challenges that manufacturers have been faced with in the absence of the proposed amendments. The challenges include:-

- i. Lack of legal provisions and basis to provide for refund of offsetting excess arising from WH VAT.
- ii. Increasing accumulated backlog of payments owed to manufacturers by the Government arising from such credit situations. This has caused constrained cash flows required in the economy.

61. However, the proposed amendment requires to be further amended to ensure that it is effective in addressing the stated challenges.

#### Proposed amendment

62. The numbering sequence of the paragraphs under section 17(5) should be amended as follows:-

- i. Retain paragraph "a" as it is in the Act and add the proposed word "or";
- ii. Insert the new proposed paragraph "c" to be paragraph "b" and adding the words "and";
- iii. Insert the original paragraph "b" under section 17(5) of the VAT Act to paragraph "c";
- iv. Retain the proposed amendment as paragraph "d".

#### Justification

63. This will ensure sequence coherence of the provisions

### Reference to the accurate legislation

64. Under the new proposed paragraph 17(5)(d), reference has been made to the VAT Act, 2013. The provision on withholding VAT are under the Tax Procedures Act, 2015 specifically section 47(4).

### Justification

65. Reference to the VAT Act, 2013 is erroneous and should be rectified.

### Introduce a new section 68A

66. *“That any registered person who at the date of commencement of section 17(5)(b) and (d) has a credit arising from withholding VAT may within 12 months make an application for a refund or offset, notwithstanding the 12 month limitation provided under section 17(5)(c).”*

### Justification

67. Introduce retrospective provisions to address existing outstanding credit. This is proposed through introducing a new section 68A that has taken into account:-

- i. The relevant section that the retrospective provisions will apply to under the VAT i.e. proposed section 17(5)(c). this will ensure that there is no ambiguity on its scope.
- ii. The limitation of the time period to make claims of the outstanding credit excess, by amending section 68A to include a twelve months period.

### Proposed Amendment

68. Delete the word “package” appearing at the end of section 32(3) and substitute thereof with the word “label”. The clause will read as follows, *“The statement and health warning referred to in subsection (2) shall comprise not less than 30% of the total surface area of the label”*.

## Justification

69. This provision requires the statement and health warning to comprise not less than 30% of the total surface area of the package. This is onerous on the manufacturers of alcoholic beverages for the following reasons:-

- i. The provisions require an investment on labels which usually does not cover the total surface area of the package. This will require an investment on specialized machinery and applicators to enable compliance with the provisions requiring that the statement and health warning comprising not less than 30% of the total surface area of the package.
- ii. There will be increased costs in respect of returnable packaging which require cleaning and removing of labels prior to subsequent use. The cost of cleaning the returnable packaging will increase due to the coverage of the total surface area of the package.
- iii. There is also a concern on the disposal of the labels covering the total surface area of the packaging. The current efforts by the government in environmental conservation will be thwarted if the labels are disposed off in an irregular manner.

70. The amendment of the section is necessary to manufacturers of alcoholic drinks for the following reasons:-

- i. Manufacturing is a key pillar for the Big 4 Agenda with the government setting out to incentivize and ease the cost of investment for manufacturers in the country. The provision has a countervailing effect in that it increases the costs of goods produced as it has a capital investment component.
- ii. The increased costs of goods produced will be passed on to the ultimate consumer and thus affect the affordability of alcoholic drinks. In turn, the consumers will opt for illicit and counterfeit alcoholic drinks which tend to be cheaper. This impacts on the health of the consumers as there is no quality assurance in respect of illicit and counterfeit goods. Ultimately, this will also impact a key government initiative of addressing issues with respect to illicit and counterfeit goods.

### 3.10 ANONYMOUS

The Committee also received a memorandum from an unnamed member of the public stating that:-

#### Background

71. The VAT of Goods and Services Tax (GST) was first introduced in France in 1948 (Yesegat, 2016). Since its introduction, VAT/GST has spread around the world and has been adopted in more than 160 countries. According to Yesegat, 2016 withholding excess tax can result in an increased VAT burden for the registered person that never has access to or use of the VAT payment system which may encounter difficulties in getting any refund of excess tax hence the amendment (d) is inadequate.

72. The Act is about recovery of excess VAT to a registered person. The Principle Act states that where excess input over output is due to making zero rated supplies, then VAT refund is due and should be lodged within 12 months from the date that the tax was payable. The amendment proposes that when the registered person is over taxed in the tax period, the excess amount shall be paid back to the registered person by the Commissioner in cases where the excess arises from tax withheld by appointed tax withholding agents. When such excesses arise from tax withheld by tax withholding agents, this excess may be ploughed back against any tax payable under the Act.

#### Shortcomings of the Amendment

73. Part (c) of the amendment has failed to state the requirement for a withholding agent which may include who is a withholding agent, how much a withholding agent is expected to hold and when to withhold. In addition, the amendment does not inform the registered person why the tax withholding agent must withhold taxes.

74. The amendment does not specify the specific timeframe for the refunds to be made, the mode of payment and the penalties it has put in place in case the refund is not done within the stipulated time frame. For instance, Burundi's VAT Act states that the refunds are done within 90 days from the time of application and failure to refund within the period a penalty of 1% per month of

the amount will be paid. In Burundi, excess VAT is refunded by cheque after clearance of tax debts by the taxpayer.

75. The withholding system can lead to confusion among taxable persons who consider that they are freed from further VAT obligations when VAT has been withheld by their clients and who thus fail to subsequently declare the taxable supplies they have made. WH VAT scheme can lead to several problems like an increased tax burden for the supplier that never has access to or use of the VAT payment and which may encounter difficulties in getting any refund of excess input tax.

#### Conclusion

76. They supported the amendment to section 17(5) of the VAT Act, 2013.

#### **Public Finance Management Act, 2012**

77. Currently, the Parliamentary Service Commission (PSC) consists of the Speaker of the National Assembly as the Chairman, seven members appointed by Parliament and one woman and man appointed by Parliament from persons with experience in public affairs but are not Members of Parliament. The Clerk of the Senate is the Secretary to the PSC.

#### Possible Rationale for the amendment

78. The UK which practices bicameralism, both Houses have an accounting officer. The accounting officer is the clerk of each respective House. The United States of America Congress is also bicameral and is made up of the House of Representatives and the Senate. Both Houses have different accounting officers, the Chief Administrative Officer for the House and the Secretary of the Senate serves the Senate. These Houses are autonomous in their duties.

## Weaknesses of the Proposed Amendment

79. The proposed amendment will alter financial reporting in the PSC by creating an additional accounting officer. The amendment also seems to aim at reducing the powers of the Clerk of the Senate from being an accounting officer for both Houses of Parliament to being an accounting officer for the Senate only.
80. Section 66(1) of the Public Finance Management Act, 2012 states that, *“subject to the Constitution, the accounting officer of the Judiciary, PSC, Constitutional Commissions and Independent Offices shall monitor, evaluate and oversee the management of public finances in their respective entities including other duties”*.
81. The accounting officer of the PSC is the Clerk of the Senate. The amendments further indicate that PSC will have powers to designate by a resolution additional accounting in respect of any other office in the Parliamentary Service as the Cabinet Secretary shall, upon a resolution by the PSC designate within 14 days of the resolution. In their view, this was a huge deviation from what is practiced in other commissions and independent officers contained in Chapter 15 of the Constitution.
82. All Constitutional Commissions in the country have one accounting officer. It is therefore illogical that the PSC is seeking to have additional accounting officers. It is even confusing when the amendments seek not to specify the maximum number of accounting officers that the PSC can designate.
83. It was further their submission that designating additional accounting officers in the PSC will result in distorting the membership of the PSC and water down the level of accountability in public financial management. They therefore submitted that the amendment should be rejected.

### 3.11 KENYA REVENUE AUTHORITY

Ms. Elizabeth Meyo submitted as follows on behalf of Kenya Revenue Authority. That:-

#### Value Added Tax Act, 2013

##### Proposed Amendment

84. Delete the proposed paragraph (c)

##### Justification

85. The purpose of WH VAT is to enhance tax compliance by ensuring that suppliers of goods and services to withholding VAT agents who include the government pay the VAT due on those supplies. It was introduced as a measure of curbing the challenge of persons supplying taxable supplies especially to government entities but not accounting for the VAT charged. When VAT is withheld, KRA then has information that a taxable supply has been made and is therefore able to ensure that the supplier fully accounts for the taxes.

86. The WH VAT of 6% of the taxable value as provided under section 42A of the Tax Procedures Act, is less than the VAT rate of 16% as it takes into account the input VAT that is deductible from output VAT and is therefore not intended to result in excess credit that would lead to refund claims.

87. However, there are unique cases where due to the nature of the activities of certain taxpayers, the application of WH VAT could result in excess credits. To address this, the law was amended vide the Finance Act, 2017 by introducing section 42A(4A) of the Tax Procedures Act which provides that the Commissioner may exempt from WH VAT, taxpayers/suppliers who demonstrate that they are in a continuous credit position as a result of withholding VAT.

88. The law therefore already provides an avenue to address the challenge of perpetual credits arising from WH VAT. Taxpayers can apply to the Commissioner to exempt them from WH VAT where it gives rise to perpetual credits. They submitted that the law adequately addresses

the excess credits that may arise from WH VAT and as such the refund proposal is not necessary and should be dropped.

#### Proposed Amendment

89. Delete the proposed paragraph (d)

#### Justification

90. Insertion of paragraph (d) should be deleted as it is not feasible for a taxpayer to be in both credit and payment position at the same time. It is therefore contradictory.

### **3.12 NJOROGE WACHIRA AND COMPANY ADVOCATES**

They submitted as follows in their memorandum, that:-

#### **Microfinance Act, 2006**

They presented the memorandum on behalf of their client Mr. Abdi Said. They submitted as follows:-

91. Islamic Finance, commonly known as sharia compliant financing model, is one of the recognized models of financial systems in the International Financial Services Regulation worldwide.

92. The Islamic Finance system is geared towards promoting fairness and equity in financial transactions by avoiding payment of interest, what is commonly known as haram in the Islamic faith.

93. The Islamic Finance system applies to banking and insurance products in the country. In particular, the Barclays Bank of Kenya was the first to introduce Sharia compliant banking products. In relation to insurance, Takaful Insurance Africa was the first Sharia compliant Takaful operator. Savings and Credit Cooperative Organizations (SACCOS) have also launched Sharia compliant products in response to the growing demand from members.

94. With the growing number of Islamic Finance service providers, the market has grown which has also increased the tax base for the government to collect revenue, noting many persons from the Islamic faith were previously shying away from purchasing Islamic financial products due to their unavailability in the Kenyan market.

95. The uptake of Sharia compliant financial products in the microfinance sector has however been hampered due to barriers created by the legal regimes that exist.

96. A casing point is section 14 of the Microfinance Act, 2006 which completely prohibits microfinance banks from engaging in the wholesale and retail trade of all products including Sharia compliant products.

97. They supported the proposed amendment to section 14(1)(f) of the Microfinance Act, 2006 on behalf of their client as this will allow microfinance banks which are sharia compliant to engage in wholesale and retail trade.

98. This will in turn grow the customer base for such products, increase the tax base and eventually grow government revenue targets in terms of tax collected from such businesses.

### **3.13 AMOLO AND KIBANYA COMPANY ADVOCATES**

Mr. Neville Omolo submitted that:-

#### **Public Finance Management Act, 2012**

99. The framers of the Constitution of Kenya as adopted by the people of Kenya in a Nationwide Referendum contemplated in Chapter 15 thereof the number of Constitutional Commissions and independent Offices specified in Article 248(2) and (3). The Parliamentary Service Commission (PSC) is a creature of Article 127 of the Constitution. The officers in the PSC are the chairperson (Speaker of the National Assembly), the Vice Chairperson (elected by the Members of the PSC

from among members), seven members (appointed by Parliament from among its members i.e. the National Assembly and Senate) and the secretary (Clerk of the Senate).

100. The PSC is also addressed in Article 248(2)(d). the objects, authority and funding of the Constitutional Commissions and Independent Offices are specified in great detail by Article 249 and the composition, appointment and terms of office are specified in Article 250 and Sub-Article 12 thereof proceeds in very clear terms. However, Article 250(12)(b) is otiose and indeed superfluous considering that Article 127(3) already designates the Clerk of the Senate to be the Secretary of the PSC.

101. Since Article 233(5) and (6) of the Constitution provides that the secretary of the Public Service Commission is the Chief Executive Officer (CEO). There is therefore nothing wrong with the Constitutional requirement that the secretary of the PSC is the CEO.

#### Observation

102. By reason of Constitutional fiat and imperatives, the Clerk of the Senate is the Secretary/CEO of the PSC and is designated the accounting officer by the provisions of section 2 of the Public Finance Management Act.

103. The proposed amendment in the Bill seeks to dilute the authority of the office and that of the Secretary/CEO of the PSC by creating two accounting officers who shall not consider themselves obliged to defer with the authority of the Secretary/CEO. The proposed amendment to section 2(1) of the Public Finance Management Act shall be inconsistent with and offend the Constitution and it is therefore unconstitutional for seeking to derogate from the Constitution.

104. He implored upon the Committee to decline to amend the Public Finance Management Act, 2012 as proposed in the Bill.

### 3.14 PRIVATE SECTOR

They submitted as follows in their memorandum to the Committee:-

#### Value Added Tax Act, 2013

##### Outstanding credit amounts arising from Withholding VAT

105. Withholding VAT was introduced in the country where the Commissioner of tax appoints withholding VAT agents. Businesses in perpetual credit positions can apply for exemptions. Exemption process has not happened and refunds have not been made due to absence of legal provisions on the same.

##### Recommendation

106. Withholding VAT refunds and off set are not provided for under the law. The proposed amendments under the Bill seeks to address this. There is need to however include provisions on retrospective application and limit the claim period. Refund and off set is allowed under section 17(5) of the VAT Act, 2013.

### 3.15 CENTRAL BANK OF KENYA

In their memorandum, CBK submitted that:-

#### Microfinance Act, 2006

107. CBK supports the expansion of Sharia compliant finance and financial products, including Sharia compliant microfinance banking as a channel for financial inclusion. As a matter of fact, consistent with the government's vision of the financial sector, CBK has been working over the last year to finalize a draft legal and regulatory framework for Sharia compliant banking and microfinance banking. He stated that they have benefitted tremendously from experiences of other jurisdictions and interacted closely with the international standard setter, the Islamic Financial Services Board.

108. They made the following observations on the specific proposal in the Bill:-
- i. The proposed amendment is inadequate for purposes of Sharia compliant microfinance Banking. This is in view of the fact that trade and investment, which

are key cogs in Sharia compliant banking are still prohibited under section 14(1)(a) to (e) of the Microfinance Act. An amendment to section 14(1)(f) alone will therefore not suffice.

- ii. The proposed amendment will restrict CBK's residual power to prohibit microfinance banks from engaging in risky Sharia compliant microfinance banking business. This effectively means that so long as a microfinance bank is licensed as a Sharia compliant bank, then any activity that furthers its business will be permissible, notwithstanding the fact that the activity or business may be inherently risky and a threat to financial stability.
- iii. The proposed amendment does not address other important aspects of Sharia compliant microfinance banking such as liquidity, risk management, capital adequacy and governance. Experiences elsewhere indicate that these are elements of a sound framework.

109. In their view therefore, the proposed amendment will not deliver on its intention of enabling Sharia compliant microfinance business. It was CBK's opinion that it would be more appropriate to focus on a comprehensive framework for Sharia compliant microfinance banking as opposed to the proposed amendment to the Microfinance Act. It was their expectation that the draft revised Microfinance Act and Regulations that CBK has been working on would be ready for public and stakeholder comments and submission to Parliament in the next three months. They believed that this will provide a robust legal and regulatory framework for Sharia compliant microfinance banking in Kenya that is consistent with international standards and comparable to practices in other jurisdictions.

### **3.16 INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA**

Mr. Fredrick Riaga submitted as follows on behalf of ICPAK. That: -

#### **The Public Finance Management Act, 2012**

##### Proposed Amendment

110. Delete the amendment and retain the current definition.

### Justification

111. For clarity in responsibility, order and accountability in the management of public finances.

### New Proposal to amend section 187(1)

112. Amend section 187(1) by inserting a new paragraph after (h), “(i) *the Institute of Certified Public Accountants*”.

### Justification

113. The Institute by virtue of its expertise and mandate on public finance and accountability as stipulated by the Accountants Act, 2008 will add value to the Intergovernmental Budget and Economic Council.

## **Value Added Tax Act, 2013**

### Proposed Amendment

114. They proposed the following amendment under section 17(5):-
- i. Delete the word “and” at the end of paragraph (a) so that the refund is not tied to the zero-rated supplies only.
  - ii. Delete the words “.....under this Act....” in paragraph (d) and replace with the words “.....as defined under the Tax Procedures Act.”

### Justification

115. To avoid inconsistency that may be brought by the amendment.

### 3.17 PARLIAMENTARY SERVICE COMMISSION

The Chairperson of the Finance Committee of the Parliamentary Service Commission, Hon. Adan Keynan, MP submitted that: -

116. Article 93 of the Constitution of Kenya, 2010 establishes the Parliament of Kenya which consists of the National Assembly and the Senate. Article 94 of the Constitution then vests legislative making authority in Parliament. Article 95 of the Constitution then sets out the role of the National Assembly which includes representing the people in the constituencies, legislation, budget making, exercising oversight over State Organs and approving declarations of war and extensions of states of emergency. Article 96 of the Constitution provides for the role of the Senate which includes representing the counties, participating in the law making function of Parliament, determining the allocation of national revenue among the counties and participating in the oversight of State Officers.

117. Article 127 of the Constitution establishes a single Parliamentary Service Commission for the Parliamentary Service that is responsible for the provision of such services and facilities to ensure the efficient and effective functioning of Parliament. The Parliamentary Service Commission is comprised of the following:

- (a) The Speaker of the National Assembly as chairperson;
- (b) Seven members appointed by Parliament from among its members of whom-
  - (i) Four shall be nominated equally from both Houses by the party or coalition of parties forming the national government, of whom at least two shall be women; and
  - (ii) Three nominated by the parties not forming the national government, at least one of whom shall be nominated from each House and at least one of whom shall be a woman; and
- (c) One man and one woman appointed by Parliament from among persons who are experienced in public affairs, but are not members of Parliament.
- (d) The vice-chairperson is elected from among the above seven (7) Members of Parliament.
- (e) The Clerk of the Senate is the Secretary to the Commission.

118 It is important to recall that prior to the year 2000 there was no Parliamentary Service Commission and Parliament relied on the Office of the President to provide it with services and

facilities. This was an unfortunate situation which led to Parliament not being properly facilitated to perform its constitutional duties and further infringed on the principle of separation of powers.

119 The Parliamentary Service Commission was established by an amendment to Section 45 of the former Constitution of Kenya in the year 1999 and operationalized by the enactment of the Parliamentary Service Act in 2000. The Commission has been re-established by Article 127 of the Constitution of Kenya, 2010.

120 The Parliamentary Service is organized into the following-

- (a) The National Assembly Service which is responsible for the provision of services and facilities to the National Assembly;
- (b) The Senate Service which is responsible for the provision of services and facilities to the Senate;
- (c) The Parliamentary Joint Services which is responsible for the provision of services and facilities to both Houses of Parliament that are cross-cutting in nature and whose duplication in each House would not be prudent use of resources;
- (d) The Centre for Parliamentary Studies and Training which is a semi-autonomous institution responsible for the provision of training services to Members and staff of Parliament and the County Assemblies.

121 Following the promulgation of the new Constitution, the Clerk of the National Assembly continued as the Accounting Officer for the Parliamentary Service Commission until the appointment of a Clerk to the Senate/Secretary of the Parliamentary Service Commission as the Commission's sole Accounting Officer in July 2013.

122 As the realities and challenges of managing a bi-cameral Parliament became apparent, the Parliamentary Service Commission became concerned that the activities of the National Assembly required the approval, and were accounted for, by the Clerk of the Senate despite the fact that the National Assembly had its own Clerk appointed under Article 128 of the Constitution. The Commission therefore considers that the most appropriate manner of handling the issue is to have the law provide that the Cabinet Secretary in the National Treasury shall designate as an accounting officer such other officer in the parliamentary service as the Commission may resolve.

123 The National Assembly in 2014 amended Section 2(1) of the Public Finance Management Act to have two Accounting Officers with the Clerk of the National Assembly being the additional Accounting Officer.

124 The Commission took the considered view that to enhance service delivery it would be more appropriate that those services provided jointly and equally to the Houses be under the accounting superintendence of an Accounting Officer or Accounting Officers as the Parliamentary Service Commission may deem necessary.

125 They stated that it is important to note that Section 2(1)(c) of the Public Finance Management Act provides that the accounting officer in the case of the Judiciary is the Chief Registrar of the Judiciary. The Judicial Service Commission therefore informs the Cabinet Secretary in the National Treasury who is the holder of the office of Chief Registrar of the Judiciary for purposes of formal appointment of the accounting officer for the Judiciary.

126 In respect of the national government, the Cabinet Secretary in the National Treasury designates in writing accounting officers for the various national government entities and ensures that there is an accounting officer in each national government entity.

127 The Commission is convinced that the proposed amendment to Section 2(1) of the Public Finance Management Act shall enhance service delivery as well as accountability and responsibility in the administration of Parliament.

128 The Parliamentary Service Commission therefore supported the proposed amendment.

### **3.18 NATIONAL TREASURY**

Mr. Albert Mwenda submitted as follows on behalf of the National Treasury. That: -

#### **Microfinance Act, 2006**

129 The proposed amendment is inadequate for the purposes of facilitating the sharia-compliant microfinance banking. This is in view of the fact that trade and investment, which are key components of sharia-compliant banking are still prohibited under Section 14(1)(a) to (e) of the Act. The amendment will therefore not be adequate.

130 Further, the proposed amendment will restrict Central Bank's residual power to prohibit microfinance banks from engaging in risky sharia-compliant microfinance bank business.

131 It was their opinion that CBK should be given a chance to finalise the regulations they are working on in order to properly anchor sharia-compliant banking.

### **Public Finance Management Act, 2012**

132 The accounting function can only be performed by an accounting officer as provided for under Article 226(2) of the Constitution. In addition, this position is also consistent with section 67 of the PFM Act and the two votes in the budget.

133 Further, the National Assembly proposed to amend the Public Finance Management Act, 2012 and insert a New Section 39A to read as follows: -

**39A.** (1) Not later than seven days after the estimates of revenue and expenditure are submitted to the National Assembly, the Cabinet Secretary shall submit to National Assembly a legislative proposal for the Finance Bill, setting out the revenue raising measures for the National Government.

(2) Following submission of the legislative proposal for Finance Bill by the Cabinet Secretary, the relevant committee of the National Assembly shall introduce the Bill in the National Assembly, together with the report of the Committee on the Bill.

(3) The National Assembly shall consider and pass the Finance Bill, with or without amendments, before the end of the financial year.

(4) Any recommendations made by the relevant committee of the National Assembly or adopted by the National Assembly on revenue matters shall-

(a) ensure that the total amount of revenue raised is consistent with the approved fiscal framework and the Division of Revenue Act;

(b) take into account the principles of equity, certainty and ease of collection;

(c) consider the impact of the proposed changes on the composition of the tax revenue with reference to direct and indirect taxes;

- (d) consider domestic, regional and international tax trends;
- (e) consider the impact on development, investment, employment and economic growth;
- (f) take into account the recommendations of the Cabinet Secretary as provided under Article 114 of the Constitution; and
- (g) take into account the taxation and other tariff arrangements and obligations that Kenya has ratified, including taxation and tariff arrangements under the East African Community Treaty.

(5) The recommendation of the Cabinet Secretary in subsection (4) (f) shall be included in the report and tabled in the National Assembly.

134 The National Treasury did not support this amendment given that the Finance Bill carries tax revenue raising measures which affect the entire East African Community countries. Towards this end, sharing the tax revenue raising measures may lead to holding of goods or distortion of the market forces within the East African Region.

### **Value Added Tax Act, 2013**

135 In the National Treasury's view, the proposed amendment was taken care of in the amendment made to the Tax Procedures Act in the Finance Act of 2017 where the Commissioner was given powers to exempt supplies to a taxpayer who may be in perpetual credit position from the withholding of the VAT.

136 It was therefore their opinion that the issue intended to be addressed by the proposed amendment is adequately covered and they therefore did not support the proposed amendments to the VAT Act, 2013.

#### 4 PROPOSED COMMITTEE AMENDMENTS

Having considered the Bill and after engaging with the stakeholders, the Committee proposed the following amendments: -

##### **Microfinance Act, 2006 (No. 19 of 2006)**

- 137 The Committee proposed that the proposed amendment to Section 14(1) of the Microfinance Act, 2006 should be deleted.

##### Justification

- 138 To allow the Central Bank of Kenya to come up with a comprehensive framework for Sharia-compliant microfinance banking. CBK has been working on draft revised Microfinance Act and Regulations and they expect to present them to Parliament for consideration in the next three months.

##### **Public Finance Management Act, 2012 (No. 18 of 2012)**

- 139 The proposed amendment on the Public Finance Management Act, 2012 in the Bill was agreed to by the Committee.
- 140 They proposed the following amendments to section 39 of the PFM Act, 2012:-  
Delete the words “except the Finance Bill” appearing immediately after the words “relevant Bills” in section 39.

##### New Clauses

- 141 Insert the following new clauses immediately after section 39:-
- 39A.** (1) The Cabinet Secretary shall submit to the National Assembly, on or before 30<sup>th</sup> April, the Finance Bill setting out the revenue raising measures for the National Government.
- (2) Following submission of the Finance Bill by the Cabinet Secretary, the relevant committee of the National Assembly shall introduce the Bill in the National Assembly.
- (3) The National Assembly shall consider and pass the Finance Bill, with or without amendments, in time for it to be assented to by 30<sup>th</sup> June each year.
- (4) Any recommendations made by the relevant committee of the National Assembly or adopted by the National Assembly on revenue matters shall-

- (a) ensure that the total amount of revenue raised is consistent with the approved fiscal framework and the Division of Revenue Act;
- (b) take into account the principles of equity, certainty and ease of collection;
- (c) consider the impact of the proposed changes on the composition of the tax revenue with reference to direct and indirect taxes;
- (d) consider domestic, regional and international tax trends;
- (e) consider the impact on development, investment, employment and economic growth;
- (f) take into account the recommendations of the Cabinet Secretary as provided under Article 114 of the Constitution; and
- (g) take into account the taxation and other tariff arrangements and obligations that Kenya has ratified, including taxation and tariff arrangements under the East African Community Treaty.

(5) The recommendation of the Cabinet Secretary in subsection (4) (f) shall be included in the report and tabled in the National Assembly.

142 Delete section 41 of the Act.

#### Justification

143 The amendment will ensure that the Budget is concluded by approving the revenue raising measures, tax incentives and appropriations before the beginning of the relevant financial year. This is in an attempt to avoid the necessity of a supplementary budget that may arise on account of a possible distortion of the fiscal framework when the Finance Bill is enacted after the annual Appropriations Bill.

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

144 The Committee proposed the following amendment: -

**THAT**, the Schedule be amended, in the provisions relating to the Value Added Tax, 2013, by deleting the proposed amendments to section 17(5) and substituting therefor the following new amendments—

*Provision*

*Amendment*

17(5) Delete the proviso and substitute therefor the following new provisos—

“Provided that any such excess shall be paid to the registered person by the Commissioner where—

- (a) the Commissioner is satisfied that such excess arises from making zero rated supplies; or
- (b) the Commissioner is satisfied that such excess arises from tax withheld by appointed tax withholding agents; and
- (c) the Commissioner is satisfied that such excess arising out of tax withheld by appointed tax withholding agents may be applied against any tax payable under this Act or any other written law, or is due for refund pursuant to section 47(4) of the Tax Procedures Act, 2015; and
- (d) the registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax becomes due and payable.

“Provided further that, notwithstanding section 17(5)(d), a registered person who, within a period of eighteen months prior to the commencement of section 17(5)(b) and (c), has a credit arising from withholding tax, may make an application for a refund of the excess tax within twelve months from the commencement date.

Justification

145 The amendment is intended to address a renumbering issue to ensure sequence coherence of the provisions in Section 17 (5) of the VAT Act and to also include a reference to the Tax Procedures Act. Further, the proposed Committee’s amendment intends to introduce a proviso on the commencement of section 17 (5) (b) and (c) in order to address the existing outstanding credit excesses. The amendment will ensure that there is no ambiguity and there is limitation of the time period to make claims of the outstanding credit excess.

146 The Committee proposed the following amendment to the Second Schedule:-  
Insert the following new paragraph immediately after paragraph 16-

17A. Agricultural Pest Control Products.

Justification

147 Making agricultural pest control products vatable has made them expensive and therefore unaffordable to many people. The proposed amendment will help the industry survive against external competition and in the process increase food security in the country.

SIGNED.......... DATE.....7/5/19.....

THE HON. JOSEPH LIMO, MP

CHAIRPERSON

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

## **5 ANNEXTURES**

Adoption schedule

Minutes

REPUBLIC OF KENYA



NATIONAL ASSEMBLY  
DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING  
ADOPTION SCHEDULE

**ADOPTION OF THE REPORT ON THE CONSIDERATION OF THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019**

**DATE: 4<sup>TH</sup> MAY, 2019**

NAME	SIGNATURE
1. HON. JOSEPH K. LIMO, MP – CHAIRMAN	
2. HON. ISAAC W. NDIRANGU – VICE-CHAIRMAN	
3. HON. JIMMY O. ANGWENYI, MP	
4. HON. CHRISTOPHER OMULELE, MP	
5. HON. SHAKEEL SHABBIR AHMED, MP	
6. HON. DR. ENOCH KIBUNGUCHY, MP	
7. HON. ABDUL RAHIM DAWOOD, MP	
8. HON. DANIEL E. NANOK, MP	
9. HON. ANDREW A. OKUOME, MP	
10. HON. DAVID M. MBONI, MP	
11. HON. KUKIA KIMANI, MP	
12. HON. JOSEPH M. OYULA, MP	
13. HON. JOSHUA KANDIE, MP	
14. HON. LYDIA H. MIZIGHI, MP	
15. HON. MOHAMED ALI, MP	
16. HON. PURITY NGIRICI, MP	
17. HON. SAMUEL ATANDI, MP	
18. HON. STANLEY M. MUTHAMA, MP	
19. HON EDITH NYENZE, MP	

MINUTES OF THE 4<sup>TH</sup> SITTING OF THE STAKEHOLDER ENGAGEMENT WORKSHOP OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING HELD ON SATURDAY, 4<sup>TH</sup> MAY, 2019 AT HILTON GARDEN INN HOTEL AT 2.00PM

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**PRESENT**

1. Hon. Joseph K. Limo, MP - **Chairperson**
2. Hon. Jimmy O. Angwenyi, MGH, MP
3. Hon. Daniel E. Nanok, MP
4. Hon. Andrew A. Okuome, MP
5. Hon. David M. Mboni, MP
6. Hon. Joseph M. Oyula, MP
7. Hon. Mohamed A. Mohamed, MP
8. Hon. Joshua C. Kandie, MP
9. Hon. Lydia H. Mizighi, MP
10. Hon. Purity W. Ngirici, MP
11. Hon. Stanley M. Muthama, MP

**APOLOGY**

1. Hon. Isaac W. Ndirangu, MP- **Vice Chairperson**
2. Hon. Christopher Omulele, MP
3. Hon. Shakeel Shabbir Ahmed, CBS, MP
4. Hon. Abdul Rahim Dawood, MP
5. Hon. Dr. Enoch Kibunguchy, MP
6. Hon. Francis K. Kimani, MP
7. Hon. Samuel Atandi, MP
8. Hon. Edith Nyenze, MP

**INATTENDANCE**

**SECRETARIAT**

- |                        |   |                                   |
|------------------------|---|-----------------------------------|
| 1. Mr. Nicholas Emejen | – | Deputy Director, DCS              |
| 2. Ms. Leah Mwaura     | – | Senior Clerk Assistant/Lead Clerk |
| 3. Ms. Jennifer Ndeto  | – | Principal Legal Counsel 1         |
| 4. Ms. Laureen Wesonga | – | Clerk Assistant III               |
| 5. Mr. Josephat Motonu | – | Fiscal Analyst                    |
| 6. Mr. Chelang'a Maiyo | – | Research Officer                  |
| 7. Mr. Robert Rop      | – | Audio Officer                     |
| 8. Ms. Beatrice Auma   | – | Administrative Assistant          |
| 9. Mr. John Njoro      | – | Serjeant-At-Arms                  |

**MIN.NO.NA/F&NP/2019/023: PRELIMINARIES/COMMUNICATION FROM THE CHAIRPERSON**

The meeting was called to order at 02:05 pm and a prayer was said. The Chairperson then welcomed the meeting to deliberate on the day's agenda.

**MIN.NO.NA/F&NP/2019/024: CONFIRMATION OF MINUTES**

Agenda deferred.

**MIN.NO.NA/F&NP/2019/025: MEETING TO ADOPT THE REPORT ON THE CONSIDERATION OF THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019**

The Committee adopted the report on the consideration of the Statute Law (Miscellaneous Amendments) Bill, 2019 having proposed and seconded by Hon. David Mboni, MP and Hon. Jimmy Angwenyi, MP respectively.

The Committee proposed the following amendments:-

**Microfinance Act, 2006 (No. 19 of 2006)**

The Committee proposed that the proposed amendment to Section 14(1) of the Microfinance Act, 2006 should be deleted.

Justification

To allow the Central Bank of Kenya to come up with a comprehensive framework for Sharia-compliant microfinance banking. CBK has been working on draft revised Microfinance Act and Regulations and they expect to present them to Parliament for consideration in the next three months.

**Public Finance Management Act, 2012 (No. 18 of 2012)**

The proposed amendment on the Public Finance Management Act, 2012 in the Bill was agreed to by the Committee.

They proposed the following amendments to section 39 of the PFM Act, 2012 subject to further consultation with the House Leadership:-

Delete the words "except the Finance Bill" appearing immediately after the words "relevant Bills" in section 39.

## New Clauses

Insert the following new clauses immediately after section 39:-

**39A.** (1) The Cabinet Secretary shall submit to the National Assembly, on or before 30<sup>th</sup> April, the Finance Bill setting out the revenue raising measures for the National Government.

(2) Following submission of the Finance Bill by the Cabinet Secretary, the relevant committee of the National Assembly shall introduce the Bill in the National Assembly.

(3) The National Assembly shall consider and pass the Finance Bill, with or without amendments, in time for it to be assented to by 30<sup>th</sup> June each year.

(4) Any recommendations made by the relevant committee of the National Assembly or adopted by the National Assembly on revenue matters shall-

(a) ensure that the total amount of revenue raised is consistent with the approved fiscal framework and the Division of Revenue Act;

(b) take into account the principles of equity, certainty and ease of collection;

(c) consider the impact of the proposed changes on the composition of the tax revenue with reference to direct and indirect taxes;

(d) consider domestic, regional and international tax trends;

(e) consider the impact on development, investment, employment and economic growth;

(f) take into account the recommendations of the Cabinet Secretary as provided under Article 114 of the Constitution; and

(g) take into account the taxation and other tariff arrangements and obligations that Kenya has ratified, including taxation and tariff arrangements under the East African Community Treaty.

(5) The recommendation of the Cabinet Secretary in subsection (4) (f) shall be included in the report and tabled in the National Assembly.

Delete section 41 of the Act.

### Justification

The amendment will ensure that the Budget is concluded by approving the revenue raising measures, tax incentives and appropriations before the beginning of the relevant financial year. This is in an attempt to avoid the necessity of a supplementary budget that may arise on account of a possible distortion of the fiscal framework when the Finance Bill is enacted after the annual Appropriations Bill.

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

**THAT**, the Schedule be amended, in the provisions relating to the Value Added Tax, 2013, by deleting the proposed amendments to section 17(5) and substituting therefor the following new amendments—

Delete the proviso and substitute therefor the following new provisos—

“Provided that any such excess shall be paid to the registered person by the Commissioner where—

- (a) the Commissioner is satisfied that such excess arises from making zero rated supplies;
- or
- (b) the Commissioner is satisfied that such excess arises from tax withheld by appointed tax withholding agents; and
- (c) the Commissioner is satisfied that such excess arising out of tax withheld by appointed tax withholding agents may be applied against any tax payable under this Act or any other written law, or is due for refund pursuant to section 47(4) of the Tax Procedures Act, 2015; and
- (d) the registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax becomes due and payable.

“Provided further that, notwithstanding section 17(5)(d), a registered person who, within a period of eighteen months prior to the commencement of section 17(5)(b) and (c), has a credit arising from withholding tax, may make an application for a refund of the excess tax within twelve months from the commencement date.

### Justification

The amendment is intended to address a renumbering issue to ensure sequence coherence of the provisions in Section 17 (5) of the VAT Act and to also include a reference to the Tax Procedures Act. Further, the proposed Committee’s amendment intends to introduce a proviso on the commencement of section 17 (5) (b) and (c) in order to address the existing outstanding credit excesses. The amendment will ensure that there is no ambiguity and there is limitation of the time period to make claims of the outstanding credit excess.

The Committee proposed the following amendment to the Second Schedule:-

Insert the following new paragraph immediately after paragraph 16-

17A. Agricultural Pest Control Products.

Justification


Making agricultural pest control products variable has made them expensive and therefore unaffordable to many people. The proposed amendment will help the industry survive against external competition and in the process increase food security in the country.

**MIN.NO.NA/F&NP/2019/026: ADJOURNMENT**

There being no other business to deliberate on, the meeting was adjourned at 4.05pm. The next meeting will be held on notice.

**HON. JOSEPH K. LIMO, MP**

**(CHAIRPERSON)**

SIGNED .....  ..... DATE 7/5/19 .....

MINUTES OF THE 3<sup>RD</sup> SITTING OF THE STAKEHOLDER ENGAGEMENT WORKSHOP OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING HELD ON SATURDAY, 4<sup>TH</sup> MAY, 2019 AT HILTON GARDEN INN HOTEL AT 9.00AM

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**PRESENT**

1. Hon. Joseph K. Limo, MP - **Chairperson**
2. Hon. Jimmy O. Angwenyi, MGH, MP
3. Hon. Daniel E. Nanok, MP
4. Hon. Andrew A. Okuome, MP
5. Hon. David M. Mboni, MP
6. Hon. Joseph M. Oyula, MP
7. Hon. Mohamed A. Mohamed, MP
8. Hon. Joshua C. Kandie, MP
9. Hon. Lydia H. Mizighi, MP
10. Hon. Purity W. Ngirici, MP
11. Hon. Stanley M. Muthama, MP

**APOLOGY**

1. Hon. Isaac W. Ndirangu, MP- **Vice Chairperson**
2. Hon. Christopher Omulele, MP
3. Hon. Shakeel Shabbir Ahmed, CBS, MP
4. Hon. Abdul Rahim Dawood, MP
5. Hon. Dr. Enoch Kibunguchy, MP
6. Hon. Francis K. Kimani, MP
7. Hon. Samuel Atandi, MP
8. Hon. Edith Nyenze, MP

**INATTENDANCE**

**SECRETARIAT**

- |                        |   |                                   |
|------------------------|---|-----------------------------------|
| 1. Mr. Nicholas Emejen | – | Deputy Director, DCS              |
| 2. Ms. Leah Mwaura     | – | Senior Clerk Assistant/Lead Clerk |
| 3. Ms. Jennifer Ndeto  | – | Principal Legal Counsel 1         |
| 4. Ms. Laureen Wesonga | – | Clerk Assistant III               |
| 5. Mr. Josephat Motonu | – | Fiscal Analyst                    |
| 6. Mr. Chelang'a Maiyo | – | Research Officer                  |
| 7. Mr. Robert Rop      | – | Audio Officer                     |
| 8. Ms. Beatrice Auma   | – | Administrative Assistant          |
| 9. Mr. John Njoro      | – | Serjeant-At-Arms                  |

## **NATIONAL TREASURY**

Mr. Albert Mwenda

### **MIN.NO.NA/F&NP/2019/019: PRELIMINARIES/COMMUNICATION FROM THE CHAIRPERSON**

The meeting was called to order at 9:15 am and a prayer was said. The Chairperson then welcomed the meeting to deliberate on the day's agenda.

### **MIN.NO.NA/F&NP/2019/020: CONFIRMATION OF MINUTES**

Agenda deferred.

### **MIN.NO.NA/F&NP/2019/021: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH THE NATIONAL TREASURY**

Mr. Albert Mwenda submitted that:-

#### **Microfinance Act, 2006**

The proposed amendment is inadequate for the purposes of facilitating the sharia-compliant microfinance banking. This is in view of the fact that trade and investment, which are key components of sharia-compliant banking are still prohibited under section 14(1)(a) to (e) of the Act. The amendment will therefore not be adequate.

Further, the proposed amendment will restrict Central Bank's residual power to prohibit microfinance banks from engaging in risky sharia-compliant microfinance bank business.

It was the National Treasury's opinion that CBK should be given a chance to finalize the regulations they are working on in order to properly anchor sharia-compliant banking.

#### **Public Finance Management Act, 2012**

The accounting function can only be performed by an accounting officer as provided for under Article 226(2) of the Constitution. In addition, this position is also consistent with section 67 of the PFM Act and the two votes in the budget.

Further, the National Assembly proposed to amend the Public Finance Management Act, 2012 and insert a New Section 39A to read as follows:-

**39A.** (1) Not later than seven days after the estimates of revenue and expenditure are submitted to the National Assembly, the Cabinet Secretary shall submit to National

Assembly a legislative proposal for the Finance Bill, setting out the revenue raising measures for the National Government.

(2) Following submission of the legislative proposal for Finance Bill by the Cabinet Secretary, the relevant committee of the National Assembly shall introduce the Bill in the National Assembly, together with the report of the Committee on the Bill.

(3) The National Assembly shall consider and pass the Finance Bill, with or without amendments, before the end of the financial year.

(4) Any recommendations made by the relevant committee of the National Assembly or adopted by the National Assembly on revenue matters shall-

(a) ensure that the total amount of revenue raised is consistent with the approved fiscal framework and the Division of Revenue Act;

(b) take into account the principles of equity, certainty and ease of collection;

(c) consider the impact of the proposed changes on the composition of the tax revenue with reference to direct and indirect taxes;

(d) consider domestic, regional and international tax trends;

(e) consider the impact on development, investment, employment and economic growth;

(f) take into account the recommendations of the Cabinet Secretary as provided under Article 114 of the Constitution; and

(g) take into account the taxation and other tariff arrangements and obligations that Kenya has ratified, including taxation and tariff arrangements under the East African Community Treaty.

(5) The recommendation of the Cabinet Secretary in subsection (4) (f) shall be included in the report and tabled in the National Assembly.

The National Treasury did not support this amendment given that the Finance Bill carries tax revenue raising measures which affect the entire East African Community countries. Towards

this end, sharing the tax revenue raising measures may lead to holding of goods or distortion of the market forces within the East African Region.

**Value Added Tax Act, 2013**

In the National Treasury’s view, the proposed amendment was taken care of in the amendment made to the Tax Procedures Act in the Finance Act of 2017 where the Commissioner was given powers to exempt supplies to a taxpayer who may be in perpetual credit position from the withholding of the VAT.

It was therefore their opinion that the issue intended to be addressed by the proposed amendment is adequately covered and they therefore did not support the proposed amendments to the VAT Act, 2013.

**DELIBERATIONS**

Members were concerned that the National Treasury was opposed to all the proposed amendments proposed in the Bill yet they are the originators of the Bill. Mr. Mwenda informed the meeting that the National Treasury were not aware of the origin of the proposed amendments.

The Fiscal Analyst informed the meeting that the Finance Bill provides for additional revenue raising measures, identify incentives in order to generate more revenue and to state administrative changes in the financial sector of the country. He stated that it does not therefore matter at what point the Finance Bill is presented to Parliament.

**MIN.NO.NA/F&NP/2019/022: ADJOURNMENT/ NEXT MEETING**

The meeting was adjourned at 12.45pm. The next meeting will be held at 02.00pm that day.

**HON. JOSEPH K. LIMO, MP**

**(CHAIRPERSON)**

SIGNED .....  ..... DATE..... 7/5/19.....

**MINUTES OF THE 2<sup>ND</sup> SITTING OF THE STAKEHOLDER ENGAGEMENT WORKSHOP OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING HELD ON FRIDAY, 3<sup>RD</sup> MAY, 2019 AT HILTON GARDEN INN HOTEL AT 2.00PM**

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**PRESENT**

1. Hon. Joseph K. Limo, MP - **Chairperson**
2. Hon. Isaac W. Ndirangu, MP- **Vice Chairperson**
3. Hon. Jimmy O. Angwenyi, MGH, MP
4. Hon. Daniel E. Nanok, MP
5. Hon. Andrew A. Okuome, MP
6. Hon. David M. Mboni, MP
7. Hon. Joseph M. Oyula, MP
8. Hon. Mohamed A. Mohamed, MP
9. Hon. Joshua C. Kandie, MP
10. Hon. Lydia H. Mizighi, MP
11. Hon. Purity W. Ngirici, MP
12. Hon. Stanley M. Muthama, MP
13. Hon. Edith Nyenze, MP

**APOLOGY**

1. Hon. Christopher Omulele, MP
2. Hon. Shakeel Shabbir Ahmed, CBS, MP
3. Hon. Abdul Rahim Dawood, MP
4. Hon. Dr. Enoch Kibunguchy, MP
5. Hon. Samuel Atandi, MP
6. Hon. Francis K. Kimani, MP

**INATTENDANCE**

**SECRETARIAT**

- |                        |   |                                   |
|------------------------|---|-----------------------------------|
| 1. Mr. Nicholas Emejen | – | Deputy Director, DCS              |
| 2. Ms. Leah Mwaura     | – | Senior Clerk Assistant/Lead Clerk |
| 3. Ms. Jennifer Ndeto  | – | Principal Legal Counsel 1         |
| 4. Ms. Laureen Wesonga | – | Clerk Assistant III               |
| 5. Mr. Josephat Motonu | – | Fiscal Analyst                    |
| 6. Mr. Chelang'a Maiyo | – | Research Officer                  |
| 7. Mr. Robert Rop      | – | Audio Officer                     |
| 8. Ms. Beatrice Auma   | – | Administrative Assistant          |
| 9. Mr. John Njoro      | – | Serjeant-At-Arms                  |

## **KPMG ADVISORY SERVICES LIMITED**

1. Mr. Peter Kinuthia
2. Mr. Clive Akora
3. Ms. Phoebe Njoga
4. Mr. Kenneth Maina

## **INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA**

1. Mr. Fredrick Riaga
2. Mr. Muthoni Wangai
3. Mr. Elias Wakhisi
4. Mr. Nelson Ogallo
5. Mr. David Isinye

## **KENYA ASSOCIATION OF MANUFACTURERS**

1. Mr. Bharat Shah
2. Mr. Erick Opondo
3. Mr. Dipah Shah
4. Ms. Miriam Bomett
5. Mr. Paul Mutegi – Anjarwalla and Khanna
6. Mr. Benson Kyalo – Stratten Consulting

## **KENYA REVENUE AUTHORITY**

1. Ms. Elizabeth Meyo
2. Mr. Moses Maina
3. Mr. Caxton Ngeywo
4. Ms. Sharon Kirai
5. Ms. Hannah Gakuo
6. Ms. Faith Ndanu
7. Ms. Beatrice Mundia

## **AMOLO AND KIBANYA COMPANY ADVOCATES**

Mr. Neville W. Amolo

### **MIN.NO.NA/F&NP/2019/011: PRELIMINARIES/COMMUNICATION FROM THE CHAIRPERSON**

The meeting was called to order at 2:20 pm and a prayer was said. The Chairperson then welcomed the meeting to deliberate on the day's agenda.

### **MIN.NO.NA/F&NP/2019/012: CONFIRMATION OF MINUTES**

Agenda deferred.

**MIN.NO.NA/F&NP/2019/013: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH KPMG ADVISORY SERVICES LIMITED**

Representatives of KPMG submitted that:-

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

The proposed amendment is welcome and will have an impact in releasing the working capital locked in WHVAT credits that would never be utilized. Generally, WHVAT are usually significant amounts. In light of the focus on manufacturing and agricultural value addition as key elements of the Big 4 Agenda, it is critical that KRA implements a quicker and practical solution to WHVAT refund claims given the current backlog for VAT refunds at KRA.

One solution would be to allow taxpayers to set off approved claims against other tax obligations such as corporation tax, Pay As You Earn (PAYE) or even withholding tax rather than waiting for actual cash refunds. This has worked well in the past and can help to cushion businesses against the cash flow constraints and interest costs associated with refund delays.

Issue with the Clause

While paragraph (c) is a welcome amendment, the proposed proviso under paragraph (d) is unclear and may negate the proposed change since the excess tax credit arises because there is no tax payable by the taxpayer under the VAT Act. In addition, such a proviso would give KRA a lee way to reject applications for WHVAT refunds.

Proposed Amendment

They proposed that:-

(d) where in relation to an application for a refund made under subsection (c) above, the Commissioner is satisfied that the tax is refundable, the Commissioner shall authorize the crediting of the taxpayer's iTax ledger with amount of the approved tax credit to be utilized against any other tax obligations by the taxpayer. Provided that a person who, prior to the commencement of this subsection, had excess tax credit arising from tax withheld by appointed withholding agents may apply for a refund under this section.

### Justification

The Bill seeks to amend the VAT Act to provide for a taxpayer to apply any withheld tax credit to offset any other tax liability due from them. Their proposal effectively clarifies this position as this is unclear as currently worded from the Bill.

The proposal allows the amount approved for refund to be available to be utilized against any other tax obligations that the taxpayer may have instead of waiting for tax refunds that presently take too long to be approved. In addition, there are taxpayers who already have excess VAT credit arising from WHVAT who will not be able to utilize them unless the provision is allowed to apply retrospectively.

### **MIN.NO.NA/F&NP/2019/014: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA**

Representatives of the Institute submitted that:-  
**The Public Finance Management Act, 2012**

### Proposed Amendment

Delete the amendment and retain the current definition.

### Justification

For clarity in responsibility, order and accountability in the management of public finances.

### New Proposal to amend section 187(1)

Amend section 187(1) by inserting a new paragraph after (h), “*(i) the Institute of Certified Public Accountants*”.

### Justification

The Institute by virtue of its expertise and mandate on public finance and accountability as stipulated by the Accountants Act, 2008 will add value to the Intergovernmental Budget and Economic Council.

## Value Added Tax Act, 2013

### Proposed Amendment

They proposed the following amendment under section 17(5):-

- i. Delete the word “and” at the end of paragraph (a) so that the refund is not tied to the zero-rated supplies only.
- ii. Delete the words “.....under this Act....” in paragraph (d) and replace with the words “.....as defined under the Tax Procedures Act.”

### Justification

To avoid inconsistency that may be brought by the amendment.

### **DELIBERATIONS**

1. On why ICPAK want to be represented in IBEC, they stated that they will be able to offer technical input before proposals are finalized as opposed to advising after a decision has already been made.
2. They said that they were opposed to the proposed amendment to the Public Finance Management Act, 2012 because there might be a problem of control if people who are under the accounting officer designated by the Constitution are made accounting officers. They also stated that matters of finance should be solely under the accounting officer designated by the Constitution.

### **MIN.NO.NA/F&NP/2019/015: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH KENYA ASSOCIATION OF MANUFACTURERS**

Mr. Bharat Shah proposed the following amendments on behalf of the Association:-

### Proposed amendment

Delete the proviso to section 17(5) and insert the following new paragraph; *“Provided that any such excess shall be paid to the registered person by the Commissioner where-*

- a) the Commissioner is satisfied that such excess arises from making zero rated supplies; or*

- b) the Commissioner is satisfied that such excess arises from tax withheld by appointed tax withholding agents; and*
- c) the registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax becomes due and payable;*
- d) the Commissioner is satisfied that such excesses arising out of tax withheld by appointed tax withholding agents may be applied as provided for under section 47(4) of the Tax Procedures Act”.*

### Justification

Manufacturers commend the Government for initiating the proposal to allow for initiating the proposal to allow for refund and offset of WH VAT. The proposed amendments are timely due to the existing challenges that manufacturers have been faced with in the absence of the proposed amendments. The challenges include:-

- i. Lack of legal provisions and basis to provide for refund of offsetting excess arising from WH VAT.
- ii. Increasing accumulated backlog of payments owed to manufacturers by the Government arising from such credit situations. This has caused constrained cash flows required in the economy.

However, the proposed amendment requires to be further amended to ensure that it is effective in addressing the stated challenges.

### Proposed amendment

The numbering sequence of the paragraphs under section 17(5) should be amended as follows:-

- i. Retain paragraph “a” as it is in the Act and add the proposed word “or”;
- ii. Insert the new proposed paragraph “c” to be paragraph “b” and adding the words “and”;
- iii. Insert the original paragraph “b” under section 17(5) of the VAT Act to paragraph “c”;

- iv. Retain the proposed amendment as paragraph “d”.

#### Justification

This will ensure sequence coherence of the provisions

#### Reference to the accurate legislation

Under the new proposed paragraph 17(5)(d), reference has been made to the VAT Act, 2013. The provision on withholding VAT are under the Tax Procedures Act, 2015 specifically section 47(4).

#### Justification

Reference to the VAT Act, 2013 is erroneous and should be rectified.

#### Introduce a new section 68A

*“That any registered person who at the date of commencement of section 17(5)(b) and (d) has a credit arising from withholding VAT may within 12 months make an application for a refund or offset, notwithstanding the 12 month limitation provided under section 17(5)(c).”*

#### Justification

Introduce retrospective provisions to address existing outstanding credit. This is proposed through introducing a new section 68A that has taken into account:-

- i. The relevant section that the retrospective provisions will apply to under the VAT i.e. proposed section 17(5)(c). this will ensure that there is no ambiguity on its scope.
- ii. The limitation of the time period to make claims of the outstanding credit excess, by amending section 68A to include a twelve months period.

#### Proposed Amendment

Delete the word “package” appearing at the end of section 32(3) and substitute thereof with the word “label”. The clause will read as follows, *“The statement and health warning referred to in subsection (2) shall comprise not less than 30% of the total surface area of the label”*.

## Justification

This provision requires the statement and health warning to comprise not less than 30% of the total surface area of the package. This is onerous on the manufacturers of alcoholic beverages for the following reasons:-

- i. The provisions require an investment on labels which usually does not cover the total surface area of the package. This will require an investment on specialized machinery and applicators to enable compliance with the provisions requiring that the statement and health warning comprising not less than 30% of the total surface area of the package.
- ii. There will be increased costs in respect of returnable packaging which require cleaning and removing of labels prior to subsequent use. The cost of cleaning the returnable packaging will increase due to the coverage of the total surface area of the package.
- iii. There is also a concern on the disposal of the labels covering the total surface area of the packaging. The current efforts by the government in environmental conservation will be thwarted if the labels are disposed off in an irregular manner.

The amendment of the section is necessary to manufacturers of alcoholic drinks for the following reasons:-

- i. Manufacturing is a key pillar for the Big 4 Agenda with the government setting out to incentivize and ease the cost of investment for manufacturers in the country. The provision has a countervailing effect in that it increases the costs of goods produced as it has a capital investment component.
- ii. The increased costs of goods produced will be passed on to the ultimate consumer and thus affect the affordability of alcoholic drinks. In turn, the consumers will opt for illicit and counterfeit alcoholic drinks which tend to be cheaper. This impacts on the health of the consumers as there is no quality assurance in respect of illicit and counterfeit goods. Ultimately, this will also impact a key government initiative of addressing issues with respect to illicit and counterfeit goods.

## DELIBERATIONS

On what they were doing to actualize the Government's manufacturing agenda, they stated that they had presented their proposals on how to improve the industry and actualize the Agenda to the Government for consideration.

### **MIN.NO.NA/F&NP/2019/016: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH KENYA REVENUE AUTHORITY**

Ms. Elizabeth Meyo submitted that:-

#### **Value Added Tax Act, 2013**

##### Proposed Amendment

Delete the proposed paragraph (c)

##### Justification

The purpose of WH VAT is to enhance tax compliance by ensuring that suppliers of goods and services to withholding VAT agents who include the government pay the VAT due on those supplies. It was introduced as a measure of curbing the challenge of persons supplying taxable supplies especially to government entities but not accounting for the VAT charged. When VAT is withheld, KRA then has information that a taxable supply has been made and is therefore able to ensure that the supplier fully accounts for the taxes.

The WH VAT of 6% of the taxable value as provided under section 42A of the Tax Procedures Act, is less than the VAT rate of 16% as it takes into account the input VAT that is deductible from output VAT and is therefore not intended to result in excess credit that would lead to refund claims.

However, there are unique cases where due to the nature of the activities of certain taxpayers, the application of WH VAT could result in excess credits. To address this, the law was amended vide the Finance Act, 2017 by introducing section 42A(4A) of the Tax Procedures Act which provides that the Commissioner may exempt from WH VAT, taxpayers/suppliers who demonstrate that they are in a continuous credit position as a result of withholding VAT.

The law therefore already provides an avenue to address the challenge of perpetual credits arising from WH VAT. Taxpayers can apply to the Commissioner to exempt them from WH

VAT where it gives rise to perpetual credits. They submitted that the law adequately addresses the excess credits that may arise from WH VAT and as such the refund proposal is not necessary and should be dropped.

#### Proposed Amendment

Delete the proposed paragraph (d)

#### Justification

Insertion of paragraph (d) should be deleted as it is not feasible for a taxpayer to be in both credit and payment position at the same time. It is therefore contradictory.

### **DELIBERATIONS**

1. On how much WH VAT KRA had refunded, they stated that they had refunded Kshs. 2.4 billion last month and they were hoping to refund Kshs. 4 billion this month.
2. The purpose of WH VAT is to give information on who is supposed to pay VAT. Members wanted to know why the rate cannot be reduced from 6%. KRA stated that they had submitted proposals in the Finance Bill, 2019 to reduce the rate from 6% to 2%. They further stated that since they have automated their systems, all data will have been captured in the next one year and there will therefore be no need for WH VAT.
3. On the unstable tax system in the country that was leading to the relocation of investors, KRA stated that the tax policy is under the mandate of the National Treasury and that Kenya's tax regime is under the range of other East African countries. Investors could be relocating because of incentives in other countries and not taxes.
4. On whether KRA invests the money collected from WH VAT, they stated that they do not invest taxpayer's money. The money goes to the exchequer.
5. On who between the country of export and the country of destination issues the certificate of export, the meeting was informed that the country of destination issues the certificate.

### **MIN.NO.NA/F&NP/2019/017: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH AMOLO AND KIBANYA COMPANY ADVOCATES**

Mr. Neville Omolo submitted that:-

## **Public Finance Management Act, 2012**

The framers of the Constitution of Kenya as adopted by the people of Kenya in a Nationwide Referendum contemplated in Chapter 15 thereof the number of Constitutional Commissions and independent Offices specified in Article 248(2) and (3). The Parliamentary Service Commission (PSC) is a creature of Article 127 of the Constitution. The officers in the PSC are the chairperson (Speaker of the National Assembly), the Vice Chairperson (elected by the Members of the PSC from among members), seven members (appointed by Parliament from among its members i.e. the National Assembly and Senate) and the secretary (Clerk of the Senate).

The PSC is also addressed in Article 248(2)(d). The objects, authority and funding of the Constitutional Commissions and Independent Offices are specified in great detail by Article 249 and the composition, appointment and terms of office are specified in Article 250 and Sub-Article 12 thereof proceeds in very clear terms. However, Article 250(12)(b) is otiose and indeed superfluous considering that Article 127(3) already designates the Clerk of the Senate to be the Secretary of the PSC.

Since Article 233(5) and (6) of the Constitution provides that the secretary of the Public Service Commission is the Chief Executive Officer (CEO). There is therefore nothing wrong with the Constitutional requirement that the secretary of the PSC is the CEO.

### Observation

By reason of Constitutional fiat and imperatives, the Clerk of the Senate is the Secretary/CEO of the PSC and is designated the accounting officer by the provisions of section 2 of the Public Finance Management Act.

The proposed amendment in the Bill seeks to dilute the authority of the office and that of the Secretary/CEO of the PSC by creating two accounting officers who shall not consider themselves obliged to defer with the authority of the Secretary/CEO. The proposed amendment to section 2(1) of the Public Finance Management Act shall be inconsistent with and offend the Constitution and it is therefore unconstitutional for seeking to derogate from the Constitution.

He implored upon the Committee to decline to amend the Public Finance Management Act, 2012 as proposed in the Bill.

**MIN.NO.NA/F&NP/2019/018: ADJOURNMENT**

There being no other business to deliberate on, the meeting was adjourned at 6.35pm. The next meeting will be held at 9.00am the next day.

**HON. JOSEPH K. LIMO, MP**

**(CHAIRPERSON)**

SIGNED .....  ..... DATE. 7/5/19 .....

**MINUTES OF THE 1<sup>ST</sup> SITTING OF THE STAKEHOLDER ENGAGEMENT WORKSHOP OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING HELD ON FRIDAY, 3<sup>RD</sup> MAY, 2019 AT HILTON GARDEN INN HOTEL AT 9.00AM**

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**PRESENT**

1. Hon. Joseph K. Limo, MP - **Chairperson**
2. Hon. Isaac W. Ndirangu, MP- **Vice Chairperson**
3. Hon. Jimmy O. Angwenyi, MGH, MP
4. Hon. Shakeel Shabbir Ahmed, CBS, MP
5. Hon. Daniel E. Nanok, MP
6. Hon. Andrew A. Okuome, MP
7. Hon. David M. Mboni, MP
8. Hon. Joseph M. Oyula, MP
9. Hon. Mohamed A. Mohamed, MP
10. Hon. Joshua C. Kandie, MP
11. Hon. Lydia H. Mizighi, MP
12. Hon. Purity W. Ngirici, MP
13. Hon. Samuel Atandi, MP
14. Hon. Stanley M. Muthama, MP
15. Hon. Edith Nyenze, MP

**APOLOGY**

1. Hon. Christopher Omulele, MP
2. Hon. Abdul Rahim Dawood, MP
3. Hon. Dr. Enoch Kibunguchy, MP
4. Hon. Francis K. Kimani, MP

**INATTENDANCE**

**SECRETARIAT**

- |                        |   |                                   |
|------------------------|---|-----------------------------------|
| 1. Mr. Nicholas Emejen | – | Deputy Director, DCS              |
| 2. Ms. Leah Mwaura     | – | Senior Clerk Assistant/Lead Clerk |
| 3. Ms. Jennifer Ndeto  | – | Principal Legal Counsel 1         |
| 4. Ms. Laureen Wesonga | – | Clerk Assistant III               |
| 5. Mr. Josephat Motonu | – | Fiscal Analyst                    |
| 6. Mr. Chelang'a Maiyo | – | Research Officer                  |
| 7. Mr. Robert Rop      | – | Audio Officer                     |
| 8. Ms. Beatrice Auma   | – | Administrative Assistant          |
| 9. Mr. John Njoro      | – | Serjeant-At-Arms                  |

## **PETROLEUM INSTITUTE OF EAST AFRICA**

1. Ms. Wanjiku Manyara
2. Mr. John Githiomi
3. Mr. Nathan Korir
4. Ms. Susan Mwendu
5. Mr. Isaac Maina
6. Mr. Paul Limoh
7. Mr. Hezekiah Muleshe
8. Ms. Jean Lopy
9. Ms. Rachel Njuguna
10. Mr. John Gikima
11. Ms. Anne Mubia-Murungi

## **GC RETAIL LIMITED**

Mr. Anthony Kambiriri

## **INDEPENDENT POWER PRODUCERS**

1. Mr. Gerald Ngugi
2. Mr. Norman Wanyiri
3. Mr. Abubakar Ali

## **AGROCHEMICAL ASSOCIATION OF KENYA**

1. Mr. Eric Kimunguyi
2. Mr. Joel Muturi
3. Mr. Okisegere Ojepat

## **PARLIAMENTARY SERVICE COMMISSION**

1. Hon. Adan Keynan, MP
2. Hon. Aaron Cheruiyot
3. Mr. Michael Sialai
4. Mr. Clement Nyandiere
5. Mr. M.A. Mohamed
6. Mr. Anthony Njoroge
7. Dr. George Wakah
8. Ms. Noor Galgan
9. Mr. Crispus Tima

## **PRICEWATERHOUSECOOPERS LIMITED**

1. Ms. Charlene Cheruiyot
2. Mr. Maurice Mwaniki

1. Mr. Richard Harney
2. Ms. Rosemary Maina

**MIN.NO.NA/F&NP/2019/001: PRELIMINARIES/COMMUNICATION FROM THE CHAIRPERSON**

The meeting was called to order at 9:25 am and a prayer was said. The Chairperson then welcomed Members to the two day stakeholder engagement workshop on the Statute Law (Miscellaneous Amendments) Bill, 2019. He called for introduction of those present before welcoming the meeting to deliberate on the day's agenda.

**MIN.NO.NA/F&NP/2019/002: CONFIRMATION OF MINUTES**

There were no minutes to be confirmed.

**MIN.NO.NA/F&NP/2019/003: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH PETROLEUM INSTITUTE OF EAST AFRICA**

The CEO of the Petroleum Institute of East Africa, Ms. Wanjiku Manyara submitted that:-

**Withholding Value Added Tax refunds and amendment of section 17(5) of the Value Added Tax Act, 2013**

Problem Statement

The Finance Act, 2014 reintroduced Withholding Value Added Tax (VAT) in Kenya and requires Withholding VAT agents to withhold 6% of the value of taxable supplies on payment to suppliers and remit the same directly to the Commissioner of KRA is empowered under section 42A(1) of the Tax Procedures Act to appoint any person as a withholding VAT agent.

The VAT Act, 2013 exempted white petroleum products (Petrol, Diesel & Kerosene) from VAT for a period of three years. The Finance Act, 2016 extended the exemption for a further two-year period to 1<sup>st</sup> September, 2018. Since there was no further extension, white petroleum products became vatable at 16% from 1<sup>st</sup> September, 2018. However, the Finance Act, 2018 introduced a concessionary 8% VAT rate.

Challenges

Members of PIEA supply customers who have been withholding VAT agents such as KENGEN and other IPPs as well as many large industrial customers. These customers withhold 6% VAT as

required under the law. This has resulted in a VAT credit to their members of approximately Kshs. 4 billion. The withholding VAT of 6% is very high as compared to the base rate of 8% VAT rate on petroleum products. As a result, the VAT credit cannot be reduced and will keep growing as the industry input will always exceed the output by far.

The industry being highly capital intensive has suffered from severe cash crunch as a result of a majority of its capital being held up in VAT credit from the government. The law as presently written has no mechanism for refund of Withholding VAT. This has slowed down the growth of the industry and impacted the growth of the country's economy negatively.

#### Proposal

As a result of the challenges faced by members of PIEA, Parliament should create a mechanism in law to address the issue of the VAT credits. They supported the amendment to section 17(5) of the VAT Act, 2013 as contained in the Statute Law (Miscellaneous amendment) Bill, 2019 to allow taxpayers to claim refunds arising from withheld VAT.

#### **DELIBERATIONS**

On how they had arrived at 1%, Ms. Manyara explained that they did not want to be excluded from withholding VAT but 6% is very high and therefore 1% is the best rate for them. In addition, the VAT for the oil industry is 8% thus WH VAT of 6% is quite high. The profit margins are very low and the business is very cash intensive.

#### **MIN.NO.NA/F&NP/2019/004: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH GC RETAIL LIMITED**

The representative of the company submitted that:-

##### **Withholding VAT Refunds**

#### Background

GC Retail Limited undertook the construction of the Garden City Mall at a cost of approximately Kshs. 4 billion and at present, the companying is carrying a significant Input VAT credit of approximately Kshs. 400 million in its VAT Returns. Noting that the Mall is offering commercial rental space, GC Retail charges VAT on the rent supply, which VAT is offset against the Input VAT credit over time.

### Appointment of VAT Withholding Agents

The Finance Act, 2016 introduced the provision for the appointment of VAT withholding agents via an amendment to the Tax Procedures Act, 2015 through section 42A. The Commissioner has so far appointed forty five (45) of the tenants at the mall as withholding VAT agents.

The Finance Act, 2017 subsequently amended section 42A of the Tax Procedures Act, 2015 by introducing a new subsection (4A) which states that *“The Commissioner may at any time exempt any supplier from the provisions of this section if such a supplier has sufficiently demonstrated that due to the nature of his business and due to the application of this section, he is going to be in a continuous credit position for a period of not less than twenty four (24) month.”*

In this regard, the forty five (45) tenants do not pay to GC Retail all the VAT charged due to their appointed withholding agent obligation. As such, the output VAT collected by GC Retail is less than its claimable position (Input VAT). This perpetual credit position arising from high input taxes owing to the withheld VAT has subsisted for a period exceeding twenty four (24) months.

They are unable to seek a refund of the excess input tax as the excess credit does not arise from zero rated supplies which is currently the only qualification for the application for refund of excess input tax as provided under section 17(5) of the VAT Act No. 35 of 2013. They anticipate that more of their tenants will be appointed as withholding VAT agents and as such the VAT credit offset previously anticipated will take much longer to materialise. This has had a direct adverse impact on their business and cash flows.

KRA issued “Guidelines to Taxpayers on Exemption from Withholding VAT” on 14th December, 2017. GC Retail made an application for exemption in accordance with the guidelines and they are pursuing the same with KRA.

### Proposed Amendment

The proposed amendment in the Statute Law (Miscellaneous Amendment) Bill, 2019 on Section 17(5) of the Value Added Tax Act, 2013 will enable taxpayers on whom withholding VAT has

had a negative cashflow impact like GC Retail, seek a refund for the VAT that is withheld by appointed agents from the Commissioner for VAT.

### Conclusion

They supported the proposed amendment as it will have a direct impact on their investment.

### **MIN.NO.NA/F&NP/2019/005: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH INDEPENDENT POWER PRODUCERS**

Representatives of the IPPs submitted that:-

#### **Amendment of section 17(5) of the Value Added Tax Act, 2013**

### Background

Kenya Power Company Limited (KPLC), the only customer of the Independent Power producers (IPPs) is a withholding VAT agent appointed by KRA. Therefore, KPLC is under obligation to withhold VAT of 6% from payment made to various suppliers including suppliers of electrical power.

### Challenges

Withholding 6% of the VAT payable to IPPs, specifically those using fossil fuels like diesel, results in the accumulation of significant VAT refunds in the books of these companies. This is because a significant component of the total amount payable by KPLC for supply of electricity constitutes fuel cost reimbursements (up to 65% during peak capacity - with the balance represented by energy and capacity charges). IPPs incur 16% input VAT on heavy fuel oils and 8% VAT on automotive gas oil which is subsequently reimbursed by KPLC at a cost. Resultantly, the output VAT payable to KRA each month tends to be less than the 6% that KPLC currently withholds directly. This locks up the cash flow of the IPPs with no prospect of getting a refund as they are not making zero-rated supplies.

Most of the thermal powered (especially diesel) IPPs are already in a VAT refundable position as at April 2019. Despite the fact that since the re-introduction of the withholding VAT in January 2015, they have been operating at a very low capacity factor (in many cases minimum) and thus

very low input VAT due to minimal fuel purchases. This position will quickly escalate should there be an increase in operational capacity plunging the entities into impossible negative cash flow positions.

Moreover, the withheld VAT has resulted in accumulated irrecoverable VAT for IPPs which keeps building up and which cannot be refunded due to lack of enabling withholding VAT refund provisions under the Act.

Accordingly, the IPPs have no choice but to pass this cost to KPLC through a tariff adjustment in accordance with the Power Purchase Agreements which will eventually be passed to the final consumer. This is contrary to the government's aim of reducing the cost of power in order to increase competitiveness in the Kenyan economy.

### Recommendation

Due to the challenges highlighted above, they proposed that Parliament should create a mechanism in law to address the problems associated with accumulation of the VAT credit by IPPs. To this end, they supported the provision that the excess arising out of tax withheld by appointed tax withholding agents may be applied against any tax payable under this act.

They supported the amendment of section 17(5) of the VAT Act, 2013 as contained in the Bill and proposed that it should be enacted as is.

### **DELIBERATIONS**

1. On why the WH VAT should be scrapped, they stated that KRA systems are now automated and hence all taxpayers can be netted.
2. On the impact of the amendment to the tax revenue, the meeting was informed that the amendment does not impact tax revenue in any way because it is an administrative function of KRA and not a way to collect tax revenue.

### **MIN.NO.NA/F&NP/2019/006: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH AGROCHEMICALS ASSOCIATION OF KENYA**

Representatives of the Association stated that:-

The introduction of 16% VAT on agricultural pest control products has resulted to the increase in cost of such products which has led to food insecurity/increased consumer prices, increase in cost of production for farmers, influx of counterfeit and illegal pesticides from neighboring countries, loss of competitiveness in the global horticultural market, reduced employment, reduced tax revenue and negative impact on the Big Four Agenda.

In view of the above, they proposed that zero rating of agricultural pest control products be reinstated in Part A of the Second Schedule of the Value Added Tax Act, 2013 as this will enable the industry to survive against external competition and assist Kenya to achieve the objectives of the Big Four Agenda.

## **DELIBERATIONS**

On what the Association is doing with regards to poor quality of pest control products in the country, the meeting was informed that it is the duty of the Pest Control Products Board to check the quality of the products in the country and not the Association's.

### **MIN.NO.NA/F&NP/2019/007: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH THE PARLIAMENTARY SERVICE COMMISSION**

PSC, led by the Chairperson of the Finance Committee of the Commission, Hon. Adan Keynan, MP submitted that:-

Article 93 of the Constitution of Kenya, 2010 establishes the Parliament of Kenya which consists of the National Assembly and the Senate. Article 94 of the Constitution then vests legislative making authority in Parliament. Article 95 of the Constitution then sets out the role of the National Assembly which includes representing the people in the constituencies, legislation, budget making, exercising oversight over State Organs and approving declarations of war and extensions of states of emergency. Article 96 of the Constitution provides for the role of the Senate which includes representing the counties, participating in the law making function of Parliament, determining the allocation of national revenue among the counties and participating in the oversight of State Officers.

Article 127 of the Constitution establishes a single Parliamentary Service Commission for the Parliamentary Service that is responsible for the provision of such services and facilities to

ensure the efficient and effective functioning of Parliament. The Parliamentary Service Commission is comprised of the following:

- (a) The Speaker of the National Assembly as chairperson;
- (b) Seven members appointed by Parliament from among its members of whom-
  - (i) Four shall be nominated equally from both Houses by the party or coalition of parties forming the national government, of whom at least two shall be women; and
  - (ii) Three nominated by the parties not forming the national government, at least one of whom shall be nominated from each House and at least one of whom shall be a woman; and
- (c) One man and one woman appointed by Parliament from among persons who are experienced in public affairs, but are not members of Parliament.
- (d) The vice-chairperson is elected from among the above seven (7) Members of Parliament.
- (e) The Clerk of the Senate is the Secretary to the Commission.

It is important to recall that prior to the year 2000 there was no Parliamentary Service Commission and Parliament relied on the Office of the President to provide it with services and facilities. This was an unfortunate situation which led to Parliament not being properly facilitated to perform its constitutional duties and further infringed on the principle of separation of powers.

The Parliamentary Service Commission was established by an amendment to section 45 of the former Constitution of Kenya in the year 1999 and operationalized by the enactment of the Parliamentary Service Act in 2000. The Commission has been re-established by Article 127 of the Constitution of Kenya, 2010.

The Parliamentary Service is organized into the following-

- (a) The National Assembly Service which is responsible for the provision of services and facilities to the National Assembly;
- (b) The Senate Service which is responsible for the provision of services and facilities to the Senate;
- (c) The Parliamentary Joint Services which is responsible for the provision of services and facilities to both Houses of Parliament that are cross-cutting in nature and whose duplication in each House would not be prudent use of resources;

(d) The Centre for Parliamentary Studies and Training which is a semi-autonomous institution responsible for the provision of training services to Members and staff of Parliament and the County Assemblies.

Following the promulgation of the new Constitution, the Clerk of the National Assembly continued as the Accounting Officer for the Parliamentary Service Commission until the appointment of a Clerk to the Senate/Secretary of the Parliamentary Service Commission as the Commission's sole Accounting Officer in July 2013.

As the realities and challenges of managing a bi-cameral Parliament became apparent, the Parliamentary Service Commission became concerned that the activities of the National Assembly required the approval, and were accounted for, by the Clerk of the Senate despite the fact that the National Assembly had its own Clerk appointed under Article 128 of the Constitution. The Commission therefore considers that the most appropriate manner of handling the issue is to have the law provide that the Cabinet Secretary in the National Treasury shall designate as an accounting officer such other officer in the parliamentary service as the Commission may resolve.

The National Assembly in 2014 amended section 2(1) of the Public Finance Management Act to have two Accounting Officers with the Clerk of the National Assembly being the additional Accounting Officer.

The Commission has taken the considered view that to enhance service delivery it would be more appropriate that those services provided jointly and equally to the Houses be under the accounting superintendence of an Accounting Officer or Accounting Officers as the Parliamentary Service Commission may deem necessary.

It is important to note that section 2(1)(c) of the Public Finance Management Act provides that the accounting officer in the case of the Judiciary is the Chief Registrar of the Judiciary. The Judicial Service Commission therefore informs the Cabinet Secretary in the National Treasury who is the holder of the office of Chief Registrar of the Judiciary for purposes of formal appointment of the accounting officer for the Judiciary.

In respect of the national government, the Cabinet Secretary in the National Treasury designates in writing accounting officers for the various national government entities and ensures that there is an accounting officer in each national government entity.

The Commission is convinced that the proposed amendment to section 2(1) of the Public Finance Management Act shall enhance service delivery as well as accountability and responsibility in the administration of Parliament.

The Parliamentary Service Commission supported the proposed amendment.

## DELIBERATIONS

1. On whom the PSC accounts to, the meeting was informed that PSC just like other Commissions is accountable to Kenyans through Parliament. PSC is accountable to all Committees of Parliament depending on the matter under interrogation.
2. On why a specific officer could not be assigned the role of accounting officer, the meeting was informed that the position will be assigned on need basis and thus different officers will be assigned as accounting officers depending on the matter.
3. The meeting was also informed that the essence of the amendment is to create ownership of services in Parliament hence enhancing accountability.

### **MIN.NO.NA/F&NP/2019/008: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH PRICewaterhouseCOOPERS LIMITED**

Representatives of PWC submitted that:-

#### Refund of VAT credits arising from Withholding VAT

They supported the amendment to section 17(5) to the VAT Act, 2013 to introduce paragraphs (c) and (d). Once the proposed amendments are passed, registered persons will have an opportunity to either apply for a refund of VAT credits as a result of WH VAT or utilize it to offset any tax payable. The proposed amendment is a welcome move and it is expected to address cash flow challenges experienced by taxpayers following the introduction of WH VAT.

#### Refund of VAT credits under special circumstances

Section 17 of the VAT Act, 2013 provides for VAT refunds to registered persons who are in a VAT credit position as a result of making zero rated supplies. However, there are other special circumstances in which registered persons accumulate VAT credits and are not entitled to VAT refunds under the current VAT legislation. As a result of the restrictive VAT refund regime, businesses have encountered cash flow challenges. Below are some of the scenarios that can result in huge VAT credits and their proposed amendment to the VAT Act, 2013:-

**VAT credit on liquidation of an entity** – some businesses have significantly high VAT credits in their VAT returns at the time of closing the operations or liquidation. Currently, there are no

guidelines on the treatment of such VAT credits and from a strict interpretation of the VAT Act, such entities would not be entitled to a refund of the excess input VAT credit owing to the fact that the credits did not arise from making zero rated supplies.

**Changes in market strategy** – external environmental factors such as competition in the market may force businesses to make changes to their strategy and operations e.g. where a business changes its model by expanding its market outside Kenya in a bid to grow and generate foreign exchange. The expansion of a business’ export market impacts the generation of output VAT as export sales are zero rated. For businesses that have accumulated VAT credits that would ideally have been off-set against future output VAT, a change to zero rated sales translates to inability to utilize or apply for a refund of the historical VAT credit.

**Capital investment** – businesses accrue significant VAT credits as a result of major capital investments which can only be offset against future output VAT. In some instances, the VAT on capital investments may take up to five years to be fully utilized. In such cases, the businesses may end up with cash flow constraints since they are not entitled to refunds. Where a business under this situation is unable to generate sufficient output tax to offset the inbuilt input tax, either due to the operating model or other business circumstances, the VAT credit in the company’s VAT returns will not be offset in the foreseeable future and the impact would generally be on the company’s cash flow and ability to continue as a going concern.

#### Proposed Amendment

In the light of the above impact of cumulative VAT credits, they proposed that section 17(5) of the VAT Act, 2013 be amended by inserting the following paragraph, “*(e) the Commissioner is satisfied that such excess tax arises from special circumstances of the registered person’s business and the registered person has sufficiently demonstrated that due to such circumstances, the excess input tax will not be recovered as output VAT for a period of not less than 12 months*”.

#### Justification

The amendment will address the cash flow challenges by businesses who have significantly high VAT credits without sufficient output VAT to offset the credit due to various factors some of

which have been enumerated above. As a result of improved cash flows, such taxpayers will be able to undertake more investments which will spur the economic growth. This is in addition to making Kenya an attractive investment destination for companies undertaking significant capital investments.

**MIN.NO.NA/F&NP/2019/009: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH COULSON HARNEY LLP**

Representatives of the Company submitted that:-

The VAT Act, 2013 only permits refunds where there is excess input tax as a result of making zero rated supplies; refund for tax paid in error; or on bad debts subject to certain conditions.

The amendment proposes two things:-

- a) To provide that one can utilize Withholding VAT (WHVAT) credits against any VAT payable in the Act and;
- b) To provide that WHVAT credits can be part of a refund claim to the Commissioner in VAT refund application.

WHVAT is VAT withheld by a recipient of taxable supplies who is appointed by the KRA to deduct VAT and remit the same to KRA against a supplier. The WHVAT rate is 6%. The VAT withholding agent is expected to remit the WHVAT (6%) to the KRA and remit the balance (10%) to the supplier of taxable supplies.

From a legislative perspective, it is not clear how a registered person could utilize the VAT credits arising from WHVAT. They noted that in the practice, suppliers utilize the VAT credit arising from the WHVAT against VAT payable when accounting for VAT.

Likewise, registered persons who make both standard rated supplies and zero-rated supplies and are perpetually in a VAT credit position, ordinarily include the WHVAT element in a VAT refund claim to the Commissioner.

The proposed amendment therefore attempts to bring clarity to what was poor law. It remains to be seen if the amendment will achieve this.

**The Microfinance Act, 2006 (No. 19 of 2006)**

Sharia compliant microfinance institutions will be able to engage in wholesale and retail trade in line with the Sharia law restrictions against interests (Riba). This amendment follows the amendments to the SACCO Societies Act, 2008 (No. 14 of 2008) by the Finance Act, 2017 providing that the CS in consultation with SASRA shall create regulations for the licensing and supervision of Sharia compliant SACCO societies. These amendments may be first stepping stones towards the establishment of suitable regulatory framework for Sharia compliant finance institutions.

**The Public Finance Management Act, 2012 (No. 18 of 2012)**

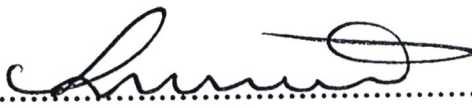
Empowers the PSC to designate accounting officers in the parliamentary service in addition to the two clerks of the Houses of Parliament. This amendment seeks to actualize the resolution already made by PSC on 14<sup>th</sup> February, 2019.

**MIN.NO.NA/F&NP/2019/010: ADJOURNMENT/ NEXT MEETING**

The meeting was adjourned at 1.20pm. The next meeting will be held at 2.15 pm that day.

**HON. JOSEPH K. LIMO, MP**

**(CHAIRPERSON)**

SIGNED .....  ..... DATE..... 7/5/19 .....