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REPUBLIC OF KENYA



NATIONAL ASSEMBLY

ELEVENTH PARLIAMENT – THIRD SESSION

THE DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING & TRADE

REPORT ON THE CONSIDERATION OF TAX PROCEDURES BILL, 2015

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DIRECTORATE OF COMMITTEE SERVICES  
PARLIAMENT BUILDINGS  
NAIROBI

AUGUST, 2015

*V. 20*

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## ABBREVIATIONS

CMA	-	Capital Markets Authority
CS	-	Cabinet Secretary
EAC	-	East African Community
ICPAK	-	Institute of Certified Public Accountants of Kenya
ITA	-	Income Tax Act
KAM	-	Kenya Association of Manufacturers
KEPSA	-	Kenya Private Sector Alliance
KOGA	-	Kenya Oil and Gas Association
KRA	-	Kenya Revenue Authority
PSA	-	Production Sharing Agreement
PWC	-	PricewaterHouseCoopers
VAT	-	Value Added Tax
VDP	-	Voluntary Disclosure Programme

## 1.0 PREFACE

### Hon Speaker,

On behalf of the Departmental Committee on Finance, Planning and Trade 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 Tax Procedure Bill, 2015. The Bill was committed to the Committee on 25<sup>th</sup> June, 2015 and it is on the basis of this that the Committee makes this report pursuant to Standing Order 127.

## 1.1 MANDATE OF THE COMMITTEE

The Committee on Finance, Planning and Trade is one of the Departmental Committees of the National Assembly established under Standing Order 216 and mandated to:-

- (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 the implementation.
- (iii) **To study and review all legislation referred to it;**
- (iv) To study, assess and analyse 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 204 (*Committee on Appointments*); and
- (vii) Make reports and recommendations to the House as often as possible, including recommendation of proposed legislation.

## 1.2 COMMITTEE MEMBERSHIP

The Departmental Committee on Finance, Planning and Trade comprises of the following members:-

1. Hon. Benjamin Langat, MP (**Chairman**)
2. Hon. Nelson Gaichuhie, MP (**Vice Chairman**)
3. Hon. Jones M Mlolwa, MP
4. Hon. Anyanga, Andrew Toboso, MP

5. Hon. Timothy M .E. Bosire, MP
6. Hon. Shakeel Shabbir Ahmed, MP
7. Hon. Joash Olum, MP
8. Hon. Dr. Oburu Oginga, MP
9. Hon. Patrick Makau King'ola, MP
10. Hon. Abdullswamad Sheriff, MP
11. Hon. Sumra Irshadali, MP
12. Hon. Ogendo Rose Nyamunga, MP
13. Hon. Iringo Cyprian Kubai, MP
14. Hon. Dennis Waweru, MP
15. Hon. Tiras N. Ngahu, MP
16. Hon. Sakaja Johnson, MP
17. Hon. Jimmy Nuru Angwenyi, MP
18. Hon. Ronald Tonui, MP
19. Hon. Mary Emase, MP
20. Hon. Joseph Limo, MP
21. Hon. Lati Lelelit, MP
22. Hon. Kirwa Stephen Bitok, MP
23. Hon. Sammy Mwaita, MP
24. Hon. Daniel E. Nanok, MP
25. Hon. Eng. Shadrack Manga, MP
26. Hon. Abdul Rahim Dawood, MP
27. Hon. Sakwa John Bunyasi, MP
28. Hon. Alfred W. Sambu, MP
29. Hon. Sammy Koech, MP

### **1.3 CONSIDERATION OF THE BILL**

The Tax Procedure Bill, 2015 was published on 11<sup>th</sup> June 2015 and read a First Time on 25<sup>th</sup> June, 2015 and thereafter committed to the Departmental Committee on Finance Planning and Trade for consideration pursuant to Standing Order 127.

In processing the Bill, the Committee invited comments from the public by placing advertisements in the Daily Nation and Standard newspapers on 26<sup>th</sup> June, 2015 pursuant to Article 118 of the Constitution. The Committee also met with the officers from the National Treasury, and several stakeholders whose views are captured and contained in the body of the Report.

The Committee held a meeting a retreat from 13<sup>th</sup> to 16<sup>th</sup> August 2015 where it met several stakeholders including the following:

- (i) Anjawalla & Khanna
- (ii) Kenya Association of Manufactures (KAM)
- (iii) Institute of Certified Public Accountants of Kenya (ICPAK)
- (iv) Price Water House Coopers (PwC)

The submission of the various stakeholders is herein contained in this report.

The Committee having held meetings with the various stakeholders, analyzed submissions from the public, observed that the Bill is critical in providing harmonized procedural rules applicable to the administration of tax laws in Kenya but also falls short in certain areas to which the Committee will be proposing amendments as contained in the Report during the Committee Stage of the Bill.

#### **1.4 ACKNOWLEDGMENT**

**Mr. Speaker, Sir,**

The Committee is grateful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee wishes to thank all the stakeholders for their participation in scrutinizing the Bill. Finally, I wish to express my appreciation to the Honorable Members of the Committee who made very useful contributions during the preparation and production of the report.

It is my pleasant duty and privilege, on behalf of the Departmental Committee on Finance, Planning and Trade to table its Report on the consideration of the Tax Procedure Bill, 2015 in the House pursuant to Standing Order 127.

SIGNED .....  ..... DATE..... 25-08-2015 .....

**HON. HON. BENJAMIN LANGAT, MP**

**CHAIRPERSON**

**DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING AND TRADE**

## 2.0 BACKGROUND INFORMATION

The Tax Procedures Bill 2015 provides harmonized rules applicable to the administration of the tax laws in Kenya. It is divided into 13 parts that address issues ranging from powers and functions of the commissioner to the making of tax returns, making of tax decisions, matters dealing with ruling etc. In specific, the simplification of the tax system and enactment of tax laws for better compliance and ease of doing business are of priority to the Government. The Harmonization of tax laws is geared towards improvement of tax compliance and reconstruct tax issues.

The Bill combines all tax procedures into a single tax law known as the Tax Procedures Bill 2015. Some of the key provisions of the Bill include the following:

- (i) The Bill provides a better connection/link between the commissioner and the tax payer in case of disputes i.e. the commissioner is required to notify the taxpayer in writing in many occasions in case of a dispute.
- (ii) The Bill enables the commissioner to issue a departure prohibition order (including passport, visa or identity card retention) preventing a taxpayer from leaving the country until such a time that the tax payable due is paid or a substantial arrangements to pay the tax has been made
- (iii) The Bill creates clear use of electronic tax system e.g. tax returns in electronic form or the payment of tax electronically. Failure to do so will result in penalty of Kshs. 100,000/ - (Kenya Shillings One hundred thousand )
- (iv) The Bill also sets the jurisdiction to try cases i.e. a person found to have contravened the tax law may be prosecuted in any place in Kenya and even in courts designated to try offences of corruption or economic crimes.
- (v) The Bill also gives an authorized officer the power to prosecute on behalf of the commissioner , under the directions of the Director of Public Prosecutions (DPP) and shall have all the powers of a public prosecutor under the office of the Director of Public Prosecution Act, 2013
- (vi) The Bill does not contain any changes expected to have any substantial negative impact on raising revenues in the country.

### 3.0 CONSIDERATION OF THE TAX PROCEDURE BILL, 2015

The Committee held a retreat from 13<sup>th</sup> to 16<sup>th</sup> August 2015 in Mombasa to receive and consider stakeholders views on the Tax Procedure Bill, 2015 among other Bills. The following section provides detailed submissions on the Bill by the various stakeholders.

#### 3.1 KENYA ASSOCIATION OF MANUFACTURERS (KAM)

The following is a summary of the issues raised by Kenya Association of Manufacturers (KAM) on the Tax Procedure Bill, 2015:

(i) **CLAUSE 3- INTERPRETATIONS**

**Proposal a:** THAT clause 3 be amended- (a) in the definition of “relative” by inserting the word “or biological child “immediately after the words “adopted child” in paragraph (a);

**Justification:** The term biological child should be included to avoid ambiguity)

**Proposal (b):** in the definition of “tax” by deleting paragraph (a) and substituting therefor the following new paragraph-“(a) a tax imposed under a tax law”;

**Justification:** The word “penalty” should be removed from the definition of tax. This has been done away with in the recent Income Tax amendments to ensure that a penalty is not subject to both further penalty and late payment interest. It amounts to double punishment on the same offence. This was in Section 94(1) (b) of Income Tax Act that is being repealed through the Bill.

(ii) **CLAUSE 38**

**Proposal:** THAT clause 38 of the Bill be amended by inserting the following new sub clause immediately after sub clause (7)-“(8) *Despite subsections (1) to (7), the interest payable that accrues may not, in aggregate, exceed the unpaid balance of the principal tax liability as at the time of default occurs.*

**Justification:** It would be important to ensure that the interest provisions under the Bill also provide for the in DUPLUM RULE. The rule provides that a tax payer should not be required to pay more than double the interest and penalties due from him. This rule has been introduced in the Banking Act Section 44A to ensure that a person who owes an institution a debt will not be required to pay more than double the interest due from him to the bank.

(iii) **CLAUSE 46**

**Proposal:** THAT clause 46(2) be deleted.

**Justification:** This provision is unfair because it requires a transferor who is not in possession of the subject matter of the tax liability to shoulder the tax liability of another in whose possession the subject matter of the tax liability lies. A tax payable should be borne personally by the person owing and should not be recoverable from any other person.)

(iv) **CLAUSE 47**

**Proposal:** THAT clause 47 of the Bill be amended *-(a) in sub clause (1) by deleting the words “one year” and substituting therefor the words “six months”.*

**Justification:** Amendments should be made to give taxpayers the benefit of having their refunds within six months from the date of lodging the refund claim. Recently cases have been referred to High Court and been decided that Kenya Revenue Authority has no right to delay refunds because of pending audits .Provision should also be put for objecting to decision taken by Kenya Revenue Authority not to/alter refunds.

**Proposal b:** in sub clause (2) by inserting the words *“for a duration not exceeding six months immediately after the words “to an audit”;*

**Justification:** The section would be prone to misuse by the Commissioner /officers if time within which the audits to be finalized is not stipulated. We therefore propose that there should be a time limit of 6 months from the time the refund claim is submitted.

**Proposal c:**by inserting the following new sub clause immediately after sub clause (4)*“(5) Where a tax refund remains unpaid to the tax payer for thirty days after applying for such refund the Commissioner will pay a late payment interest of 2% per month from that time to the time the refund is ultimately paid.”*

**Justification:** This sub-clause will open a can of worms and is likely to be a huge source of fund siphoning from KRA. Corrupt individuals are likely to use conduits to delay their payments so that such interests become owed to them.

**(v) CLAUSE 50**

Proposal: THAT clause 50(1) of the Bill be deleted.

**Justification:** This sub-clause will hinder the taxpayers from accessing justice to the highest Court and is therefore unconstitutional. It should be removed in its entirety. All decisions should be appealable to higher bodies .The sub-clause also contradicts section 51, 52, 53, 54 and 55 which allow for objections and appeals.

**(vi) CLAUSE 51**

Proposal: THAT clause 51 of the Bill be amended in sub clause (4) by deleting the word “immediately” and substituting therefor the words “within sixty days “

**Justification:** This should be amended to specify the time given to the objector whose notice of objection was found not to be validly lodged.

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

The following is a summary of the issues raised by the Institute of Certified Public Accountants of Kenya (ICPAK) on the Tax Procedure Bill, 2015:

**(i) Clauses 18, 19 & 21:** Licensing and cancellation of tax agents licensing.

**Issue:** These Clauses compromises independence & impartiality for the regulator of tax agency services (Kenya Revenue Authority).

**Proposal:** THAT clause 19 of the Bill be amended by deleting sub-clause (1) and substituting therefor the following new clause-

*“(1) an individual, a partnership, accompany may apply to the Institute of Certified Public Accountants of Kenya for a license as a tax agent.*

By inserting a new sub clause immediately after subclasses (1)-

*“(1A) Tax agents shall be members of the Institute of Certified Public Accountants of Kenya as defined by the Accountants Act, No.15 of 2008.”*

**Justification:** This is *in order to professionalize the tax industry in Kenya*)

**(ii) Part VIII: Clause 51 (2):** Appeal of appealable decision to the Tribunal

**Issue:** This clause adjudges a person guilty before he/she is heard and therefore conflicts with the rules of natural justice where a person is innocent until proved guilty. All avenues of justice should be exhausted before payment of any penalties

**Proposal:** Delete Section 51(2)

**(iii) Part VII: Clause 47:-** Erroneous refund of tax

**Issue:** This Clause is one-sided since it looks at erroneous tax refunds only rather than the entire tax transaction spectrum.

**Proposal:** THAT Clause 47 of the Bill be amended by inserting the following new sub clause immediately after sub clause (4) - *“(5) whereas tax refund under subsection (4) is contemplated, the Commissioner shall-*

*(a) Notify the tax payer of the refund due within ninety days of the tax payer filing the claim for refund;*

*(b) pay the taxpayers refund claim within ninety days after the date he notifies the tax payer of the tax payer refund being due under paragraph (a);*

*(c) Payment of the refund is not done as contemplated under paragraph (b), pay the taxpayer interest on such outstanding refunds based on the Kenya Bankers Reference Rate as published from time to time and to accrue from the sixth month after the taxpayer filed the tax refund claim until the claim is paid.*

**Justification:** This is to introduce an interest on the Commissioner when he delays on payment of the tax refund and therefore address both erroneous tax refunds & erroneous tax payments made by the taxpayer to KRA

- (iv) Part V: Clause 23:** Tax Returns (where a licensed tax agent who assists in the preparation of tax return of a tax payer shall provide a certificate).

**Issue:** This adds to the complexity of return filing process

**Proposal:** Delete Sec. 23 (3).

- (v) Part IX: Clause 55 (2):** Enforcement: Production of records

**Issue:** Definition of “financial institutions ”not provided for

**Proposal:** Financial Institutions” *should be defined as the organizations listed under the Fourth Schedule to the Income Tax Act.*

**Justification:** To provide for the definition/interpretation of the phrase “Financial Institutions”

- (vi) Part XII: Clause 79 (4):** The Voluntary Disclosure Programme (VDP)

**Issue:** VDP should be enshrined in the entire tax legislation since it communicates the government’s position of enhancing tax compliance.

**Proposal:** VDP should be enshrined in Rules that clarify the procedure of making a voluntary disclosure.

The following are other proposals which are not contained in the Bill as drafted but were recommended by the Institute of Certified Public Accountants of Kenya (ICPAK)

- (vii) **Issue:** The Bill fails to give specific timelines under which KRA officials will respond to application & queries from tax payers.  
**Proposal/Rationale:** State the responsibilities and timelines of the taxpayers & authorities under each Clause.  
**Recommendation:** State KRA's recourse accompanied by proper timelines specifically in Clauses- 24 (3), 32 (3), 41 (2), 46 (3), et al.)
- (viii) **Issue:** Offset of tax credits refunds against tax payables  
**Proposal/Rationale:** Include clear provisions on the tax offset possibilities available to the tax payer.  
**Recommendation:** Include a clause to read, "*a tax payer will be allowed to offset any tax overpayments credit against a tax obligation from any tax head*"
- (ix) **Issue:** Interest on tax refunds pending from the tax administrator. KRA does not pay any interest on tax refunds that have been approved but are yet to be remitted to the tax payer.  
**Proposal/Rationale:** Introduce an interest charge payable by the tax administrator in case of delay in paying tax refunds.  
**Recommendation:** Stipulate the timeline within which a claim for refund of tax should be approved for payment. Introduce an interest charge payable by the tax administrator in case of delays in payment
- (x) **Issue:** KRA has been known to ask for documents relating to period over 20 years prior.  
**Proposal/Rationale:** Stipulate the timeline within which the tax administrator is allowed to carry out an audit of a period.  
**Recommendation:** The time limit should be aligned to Clause 79 provisions of the Income Tax Act, Chapter 470 of the Laws of Kenya
- (xi) **Issue:** Statement of account: - The statement of accounts is received as late as 15 years after the period to which they relate.  
**Proposal/Rationale:** This is a huge inconvenience on the taxpayer as it makes the reconciliation of the tax payable or receivable an onerous task  
**Recommendation:** In view of i-Tax and online tax filings, the Statement of accounts ought to be up to date at any one time. Income Tax Act (ITA) provides for 7 years as the maximum period for which tax documents should be kept.

### 3.3 ANJAWALLA & KHANNA

The following is a summary of the issued and proposals made by Anjawalla & Khana on Tax Procedure Bill, 2015:

(i) **CLAUSE 3:** Interpretation of terms.

**Proposal 1:** THAT clause 3 of the Bill be amended by deleting the definition “relative” and substituting therefor the following new definition- “relative” means-

- (a) a spouse;
- (b) a son, daughter, brother, sister, uncle, aunt, nephew, niece, step-father, step-mother, step-child, or in the case of an adopted child his adopter or adopters; or
- (c) the spouse of any such relative as is mentioned in subparagraph (ii)

**Justification:** The definition in the Bill is not accurate as it does not directly include the individual’s legitimate children. The definition is also wide. The term ancestor may mean a broad range of persons who may be under this definition. Further a descendant of the grandparents is too broad a description and leaves room for misrepresentation)

**Proposal 2:** by deleting the definition “tax avoidance” and substituting therefor the following new definition “*tax evasion*” means a transaction or a scheme designed to evade liability to pay under any tax law;

**Justification:** tax avoidance is the legal usage of tax regime to one’s own advantage to reduce the amount of tax that is payable by means which are within the law

(ii) **CLAUSE 8**

**Proposal:** THAT clause 8 of the Bill be amended by inserting the following new sub clause immediately after sub clause (9)-

*“(9) A foreign person who is required to register for purposes of undertaking any transaction specified in the first schedule may be registered upon production of a certified copy of his or her passport.”*

**Justification:** Under the current tax regime, foreigners face a number of problems when registering for taxes in Kenya. Among them is the application by a foreign company to Kenya revenue authority and the Kenya investment authority. This may delay the process for up to 3-5 working days for a

letter of recommendation from Kenya investment authority. The process thus becomes lengthy unnecessarily.

Another major problem a foreign company faces is the registration of the directors where one of them has to come from their respective country in order to apply for a PIN which is inconvenient and discourages potential investors.

It should be noted that foreign directors are often based abroad and would not have any taxes payable in Kenya.

**(iii) CLAUSE 9**

THAT clause 9 of the Bill be amended in paragraph (b)-

**Proposal 1:** (a) *by inserting the words “of the incorporated person” immediately after the words “issued share capital” in subparagraph (i);*

**Proposal 2:** (b) by inserting the words “where applicable” immediately after the words “of trustees and” in subparagraph (iii).

**Justification:** Notification of the changes on the beneficiaries in a discretionary trust will not be possible because the beneficiaries and their entitlements to the discretionary trust are not fixed but determined by the criteria set out in the instrument. The beneficiaries are therefore not known until the criterion is satisfied.)

**(iv) CLAUSE 10**

**Proposal:** THAT clause 10 of the Bill be amended by inserting the following new sub clause immediately after sub clause (6)-

(6A) A person shall be deemed to be deregistered where the Commissioner does not respond to the application for deregistration within six months.

**Justification:** The bill does not give a timeline within which the Commissioner is required to respond to an application for deregistration. This may create uncertainty on the part of the tax payer, especially in the case of a foreign entity that wishes to exit from the Kenyan market.

**(v) CLAUSE 17**

**Proposal:** THAT clause 17 sub clause 3 paragraphs (c) be deleted.

**Justification:** The provision goes against the principle of law of agency that when a person is acting solely on behalf of another he is not liable to the third party on it. The tax representative or appointed person is a mere instrument and the tax payer bears the risk of inadequate representation. This should be carefully thought as it could result in a situation where a person who has not handled funds of a company could end up being liable to pay taxes due from a company.

(vi) **CLAUSE 18**

**Proposal 1:** THAT clause 18 be amended –

(a) by deleting sub clause (1);

**Justification:** This provision contradicts section 16(2) of the companies Act and the concept of a registered company being a legal person. This means that the company's debts are not the debts of its members or directors. The only instance that could occasion personal liability to the directors should be where there is a case of fraud and the corporate veil is lifted. Therefore, a company's creditor (including KRA) cannot institute legal proceedings against a company's member in order to recover from him what he owes the company.

(b) In sub clause (2)- by inserting the words “ with the intention to defraud” immediately after the words “been entered into”;

**Justification:** The term arrangement is very wide and has not been defined. It does not also set out a test which excludes transactions which have a commercial purpose that are not designed to obtain any tax advantage.

Proposal 2: (ii) by deleting the words “or future” immediately after the words “a current”;

**Justification:** It is not possible to know what a future tax liability is. One of the canons of tax law is that tax liability should be certain. The term future tax liability creates uncertainty.

**Proposal 3:** by deleting the words “company secretary” wherever they occur;

**Justification:** This provision should not apply to company secretaries who are required to be appointed under the Institute of Public Secretaries in Kenya. A company secretary will often have no understanding of what is going on in the company; they have no power to vote and thus should not be held liable under this provision.

(vii) **CLAUSE 31**

THAT clause 31 be amended-

(a) by inserting a the following new sub clause immediately after sub clause (2)-

“(2A) where a tax payer submits an amended self-assessment electronically, the amended self-assessment shall be deemed accepted where the Commissioner does not respond within thirty days.”

(b) by inserting the words “, falling which it will be deemed accepted” immediately after the words “receiving the application” in sub clause 3.

(viii) **CLAUSE 32**

THAT clause 32 of the Bill be amended by inserting the following new sub-classes immediately after sub clause (2)-

“(3) The Commissioner shall on application, exempt a tax payer to pay tax electronically, where the tax payer -

(a) does not have sufficient access to the Internet;

(b) is incapacitated due to age,

(c) is incapacitated due to physical or mental infirmity; or

(d) is illiterate.”

(4) The Commissioner shall provide adequate access to the service of payment of tax electronically in not more than five years.

**Justification:** The provision makes electronic payment of taxes compulsory. Electronic payment should not be made compulsory because of certain factors that may come into play like tax payer’s illiteracy, access to electronic systems or the payment systems not functioning.

(ix) **CLAUSE 33**

THAT clause 33 be amended-

(a) in sub clause (2) by inserting the following new paragraph immediately after paragraph (b)-

“(c) shall not levy penalties or interest as a result of that extension.”

*(To provide for no penalties or interest to be charged where an extension has been approved)*

(b) in subclasses (4) by inserting the words “ and interest or penalties shall be made only on the outstanding amount” immediately after the words “become immediately payable”.

**Justification:** To provide for penalties or interests to be levied only on the remaining amount

**(x) CLAUSE 35**

THAT clause 35 of the Bill be amended by inserting the following new sub clause immediately after sub clause (2)-

“(3) Despite subsections (1) and (2), the penalty or interest payable that accrues may not, in aggregate, exceed the unpaid balance of the principal tax liability as at the time the default occurs.”

**Justification:** It would be important to ensure that the interest provisions under the Bill also provide for the in DUPLUM RULE. The rule provides that a tax payer should not be required to pay more than double the interest and penalties due from him. This rule has been introduced in the Banking Act Section 44A to ensure that a person who owes an institution a debt will not be required to pay more than double the interest due from him to the bank.

**(xi) CLAUSE 38**

THAT clause 38 of the Bill be amended by inserting the following new sub clause immediately after sub clause (7)-

“(8) Despite subsections (1) to (7), the interest payable that accrues may not, in aggregate, exceed the unpaid balance of the principal tax liability as at the time of default occurs.

**Justification:** It would be important to ensure that the interest provisions under the Bill also provide for the in DUPLUM RULE. The rule provides that a tax payer should not be required to pay more than double the interest and penalties due from him. This rule has been introduced in the Banking Act Section 44A to ensure that a person who owes an institution a debt will not be required to pay more than double the interest due from him to the bank.

**(xii) CLAUSE 39**

THAT clause 39 of the Bill be amended by inserting the following new sub clause immediately after sub clause (2)-

“(3) Where a recovery of unpaid tax has been objected to in accordance with section 51 of this Act, the summary recovery of the unpaid taxes shall be subject to the procedures as set out in Part VIII of this Act.”

**Justification:** As it currently stands in the Bill, this section (39) provides for summary recovery of taxes due but does not recognize that such taxes may be subject to a dispute and may have been objected to under section 51 of the Bill.

(xiii) **CLAUSE 40**

THAT clause 40 of the Bill be amended-

(a) in sub clause (1)-

(i) by inserting the words “ and has not objected in accordance with section 51 of this Act,” immediately after the words “the due date,”;

**Justification:** The commissioner’s decision to use a tax payer’s property as security for unpaid tax should be subject to section 51 of the Bill)

(ii) by deleting the words “ seven days” and substituting therefor “thirty days” in the proviso;

**Justification:** The commissioner to give 30 days’ notice for compliance as is the case under the Income tax Act)

(b) in sub clause (3) by inserting the words “ and mortgagor” immediately after the words “rights of the mortgagee”

**Justification:** *The rights of the mortgagor should be included*

(xiv) **CLAUSE 41**

THAT clause 41 of the Bill be amended-

(a) in sub clause (1) by inserting the words “ where an objection has not been raised” immediately after the words “property of a tax payer”;

**Justification:** Collection of tax in distress should be an alternative to suing for the unpaid tax

(b) by inserting the words “ with a court order” immediately after the words “at any time” in sub clause (3), paragraph (a);

**Justification:** The provision as it is goes against the provisions of the criminal procedure code which requires an officer to have a warrant to enter a person’s premises

(xv) **CLAUSE 46**

THAT clause 46 be amended-

(a) in sub clause (1), by deleting the words “all or some of the assets of the business” and substituting therefor the words “ all or substantially all of the assets of the business”

**Justification:** This is to avoid a case where purchase of a single asset such as a car may be deemed to trigger this provision.

(b) in sub clause (2), by inserting the words “within a period of three years” immediately after the words “from the transferor”

**Justification:** The limitation period should be introduced so that a transaction would only be caught if the authority seeks to pursue an asset transferred within this period. In insolvency, transfers undertaken to related parties within a period of one year can be revoked and the liquidator can access such properties so transferred.

(xvi) **CLAUSE 50**

THAT clause 50(1) be deleted.

**Justification:** This provision attempts to preclude judicial review powers of the High court which are granted under the Constitution

(xvii) **CLAUSE 66**

THAT clause 66 be amended in sub clause (1) by deleting the word “avoidance” and substituting therefor the word “evasion”.

**Justification:** Tax avoidance is the legal usage of tax regime to one’s own advantage to reduce the amount of tax that is payable by means which are within the law

(xviii) **CLAUSE 83**

THAT clause 83 (1) (a) be deleted.

**Justification:** *The liability in this clause should be borne by the employer.*

(xix) **CLAUSE 84**

THAT clause 84 be amended-

(a) in sub clause (1), paragraph (a)-

(i) by inserting the word “knowingly” immediately after the words “if that person” ;

(ii) by inserting the word “knowingly” immediately after the words “material particular or”

**Justification:** *These statements or omissions should be made knowingly)*

(b) by deleting sub clause (6).

**Justification:** Sub clause 62(3) and subclasses 65(5) states that a public or private ruling is not binding. The scope of a reasonably arguable position should be laid out in the Bill.

(xx) **CLAUSE 85**

THAT clause 85 of the bill be amended by deleting the word “avoidance” whenever it occurs and substituting therefor the word “evasion”

**Justification:** Tax avoidance is the legal usage of tax regime to one’s own advantage to reduce the amount of tax that is payable by means which are within the law

(xxi) **CLAUSE 92**

That clause 92 of the bill be amended in paragraph (c) by deleting the word “avoidance” and substituting therefor the word “evasion”

**Justification:** tax avoidance is the legal usage of tax regime to one’s own advantage to reduce the amount of tax that is payable by means which are within the law

**3.4 PRICEWATERHOUSECOOPERS (PWC)**

The following is a summary of the issues raised by Price Water House Coopers (PwC) on the Tax Procedure Bill, 2015.

**(i) Issue: - VAT Procedures for Oil and Gas Companies**

Subject to an amendment being passed to zero-rate the provision of goods and services to the oil and gas companies, it should be noted that the current tax exemption procedures for locally purchased and imported goods are cumbersome.

**Proposal:** *Exemption per license* - Oil &G Gas companies which have been granted prospecting or exploration license, apply for VAT exemption to National Treasury upon recommendation by the Ministry of Energy and Petroleum on signing the Production Sharing Agreement (PSA) or as an addendum to the existing PSA.

*The voucher system* - A licensed E&P company to issue a voucher in a prescribed form to suppliers on purchase of an exempt supply. Oil and Gas companies to then issue a certificate to the supplier indicating supplier details and value of purchase and thereafter make monthly reconciliations and returns to whom certificates have been issued.

**Justification:** No guidance is in place with regard to the administrative process some procedures were provided for under the repealed Act.

(ii) **Issue on Customs Procedures:** -The current tax exemption procedures for locally purchased and imported goods are cumbersome.

**Proposal:** *Clearance under a special regime* – Creating a separate specific customs clearance regime for items imported and declared under Paragraph 30 of EACCMA.

*Exemption based on approved master list* -we propose for the MOE&P, and thereafter the National Treasury to approve a master list of equipment, based on an agreed work program, and thereafter Customs Service Department to clear goods based on the pre-approved exemption list.

*Customs bond proposal* – - we propose that customs bond for release of goods imported by an E&P company, and for which the E&P company is entitled to exemption, be discharged upon presentation of an exemption letter, without the necessity for a further bond.

**Justification:** No guidance is in place with regard to the administrative process. Cost of disruption is extremely high. Exploration projects require large volume of goods and services at short notice and on a continuous basis. Long duration in obtaining exemption letters leading to suppliers accounting for VAT at 16%.

(iii) **Issue on Penalty Regimes :** The penalty for failure to register or deregister for taxes is punitive i.e. KES 100,000 per month up to a limit of Kshs. 1,000,000

**Proposal:-**The penalty for individuals should be reduced to a reasonable amount Kshs. 10,000

**Justification:-**A punitive penalty regime is counterproductive.

#### 4.0 SUMMARY OF CLAUSE BY CLAUSE OF BILL

The following section provides clause by clause analysis and observations

CLAUSE	GENERAL PROVISIONS
2: Object & purpose	Gives the following as the object and purpose of the act: For consistency and efficiency in administration of tax laws, facilitation of tax compliance by tax payers and for effective and efficient collection of tax.
3: Interpretation	Defines or provides for the definition of terms such as: Accounting officer, advance assessment, authorized officer, company, excise duty, income tax etc.
Clause 4: Functions and powers of the Commissioner	<ul style="list-style-type: none"> <li>✓ States the responsibilities of the commissioner as; the control and collection of tax, accounting for collected taxes and the general administration of tax laws</li> <li>✓ Gives the provision of appointment of Authorized officer to enforce and ensuring compliance with tax law.</li> </ul>
Clause 5: Delegation	This relates to powers delegated to the Authorized officer, the revocation of such terms by the commissioner or the amendment of such an agreement by both parties.
Clause 6: Confidentiality	<ul style="list-style-type: none"> <li>✓ Relates to confidentiality of the commissioner or authorized person to protection of confidentiality of documents or information obtained in the course administering the law.</li> <li>✓ It gives specification on persons with whom information can be shared with e.g. a tribunal, court, customs officer or authority responsible for investigation of corruption, Attorney General etc.</li> </ul>
Clause 7: Authorized officers to have powers of police officers	Gives authorized officers the powers, rights, privileges and protection of a police officer
Clause 8: Registration of Taxpayers	<ul style="list-style-type: none"> <li>• Gives the requirement of persons with tax liability provided under tax law (income, excise &amp; value added tax), to apply and register with the</li> </ul>

CLAUSE	GENERAL PROVISIONS
	<p>commissioner.</p> <ul style="list-style-type: none"> <li>The commissioner may use the registration information to register or license the applicant under the provisions of any other tax law without requiring the applicant to separately apply to be registered under that tax law</li> </ul>
Clause 9: Supply of information upon change in particulars	Requires businesses notify the commissioner (within 30 days) if there are any changes in terms of: business name, shareholding, partnership, cessation etc.
Clause 10: Deregistration	Addresses deregistration of persons who are eligible or have applied for deregistration i.e. liquidated company, death of a natural person etc.
Clause 11: Personal Identification Number (PIN)	Ensures the issue of PIN to a persons registered for purposes of tax law
Clause 12: Issue of PIN	Addresses PIN application requirements (documents that the commissioner may require) and issue of PIN by the commissioner.
Clause 13: Use of PIN	<ul style="list-style-type: none"> <li>✓ States the transactions for which personal identification number is required</li> <li>✓ I.e. on return of document use for the purposes of a tax law and in transactions stated in the 1<sup>st</sup> Schedule, and regulates the use of tax PIN by tax agent.</li> </ul>
Clause 14: PIN cancellation	The PIN may be cancelled by the commissioner with a written notification.
Clause 15: Taxpayer's tax representative	Creates the circumstances under which/for which, a tax representative may exist i.e. in representing a persons with legal disability, accounting officer of the national or county governments as well as parliamentary and the judiciary service commission, for a non-resident etc.
Clause 16: Liabilities and obligations of	The legal liabilities of a tax representative hereby set i.e.

CLAUSE	GENERAL PROVISIONS
tax representative	to perform any duty/obligation imposed by a tax law on the tax payer. It also sets the limits of their liability in relation to tax payable. There is however no relief to the tax payer from any obligation imposed under tax law.
Clause 17: Duties of appointed persons	<p>Appointed persons include: executor of a will, trustee-in-bankruptcy, receiver or liquidator appointed to administer manage or liquidate the affairs of a tax payer.</p> <p>This clause sets their obligations/liabilities with respect to taxpayers assets tax payable and the commissioner</p>
Clause 18: Liability for tax payable by a company	<p>✓ Every director, senior officials or controlling member in a private company is liable for tax payable for the company by due date.</p> <p>✓ This section also provides for circumstances for which a director or other senior official can be exempted if an arrangement entered into renders the company unable to satisfy a current or future tax liability.</p>
Clause 19: Application of tax agent licence	Creates an option for an individual or partnership to apply to the commissioner for a license as a tax agent
Clause 20: Licensing of tax agents	The commissioner is to issue a license to an applicant if the applicant is fit and proper person to prepare tax returns, notices of objection or otherwise transact business with the commissioner
Clause 21: Limitation on the performance of tax services for tax payers	This clause sets a caveat that only a tax agent can represent another person as a tax agent or offer assistance to another person for a reward for that other person's rights or obligations.
Clause 22: Cancellation of tax agents	Provides for the cancellation of a tax agents license

CLAUSE	GENERAL PROVISIONS
license	either through application by the agent for the cancellation or by the commissioner if tax agent has ceased to carry on business as a tax agent, does not satisfy conditions as a tax agent or has prepared and filed false material
Clause 23: Record Keeping	<ul style="list-style-type: none"> <li>✓ This states that any document required under tax law shall be maintained so as to enable the persons tax liability be readily ascertained, shall be in either official languages and shall be maintained for 5 years.</li> <li>✓ The unit of currency in books of account shall be in Kenya shillings</li> </ul>
Clause 24: Submission of Tax Returns	This clause places the onus of submitting tax return on the taxpayer and in the approved form and allows the commissioner to use all information available (beyond that in the tax return) to assess the tax payers tax liability.
Clause 25: Extension of time to submit tax return	<ul style="list-style-type: none"> <li>✓ This clause allows a taxpayer to apply for an extension for extension required to submit tax returns and the commissioner may grant such an extension if satisfied that there is reasonable cause</li> <li>✓ This extension shall however not alter the date for payment of tax due i.e. original due date, and interest rate is payable</li> </ul>
Clause 26: Commissioner may require taxpayer to submit a tax return	<ul style="list-style-type: none"> <li>✓ Through this clause the commissioner may require tax payer or representative to submit tax return or pay tax due in relation to the return, at any time during a reporting period.</li> <li>✓ This option is applicable if the commissioner believes the tax payer is about to leave Kenya permanently, may cease to carry out business in Kenya or in bankruptcy liquidation or winding up proceedings</li> </ul>

CLAUSE	GENERAL PROVISIONS
Clause 27: Tax return duty submitted	A tax return purported to have been submitted by or on behalf of a tax payer by another person shall be treated as having been submitted by the tax payer or with the tax payers authority unless the contrary is proved.
Clause 28: Self – Assessment	Sets the preconditions for persons to be considered to have submitted a self-assessment, defines deficit & excess output tax assessment
Clause 29: Default assessment	This section empowers the commissioner to carry out an assessment to determine the excess, deficit or tax payable for a persons who has not done self-assessment and notify the individual on matters such as late submission penalty, late payment interest etc.
Clause 30: Advance Assessment	This section allows the commissioner to make advance assessment of a tax payer has not submitted a return
Clause 31: Amendment of Assessment	This section allows the commissioner to amend (by alterations or additions) to the original taxpayer assessment. It also allows a taxpayer to apply to the commissioner to make such an amendment.
Clause 32: Tax as a Debt due to State	<ul style="list-style-type: none"> <li>✓ Tax payable by a person under a tax law shall be a debt to the government and shall be payable to the commissioner.</li> <li>✓ Tax payers who are required to submit tax returns electronically under section 75, shall only do so unless authorized</li> </ul>
Clause 33: Extension of time to pay tax	<ul style="list-style-type: none"> <li>✓ Allows a taxpayer to apply to the commissioner for an extension of time to pay tax due.</li> <li>✓ After grant of extension and a tax payer defaults on installments, the balance becomes payable immediately</li> </ul>
Clause 34: Priority Of Tax	Determines value added tax on taxable supplies, excise duty payable on removal of excise goods from a factory, withholding tax etc. as tax held in trust for the government by the person receiving or withholding the

CLAUSE	GENERAL PROVISIONS
	amount.
Clause 35: Order of Payment	Gives direction if tax payer pays less penalty or late payment interest than that due i.e. first to payment of tax liability, payment of penalty then lastly late payment interest.
Clause 36: security for payment of tax	Creates the provision for the commissioner to receive security for securing payment for tax due
Clause 37: relief because of doubt or difficulty in recovery of tax	<ul style="list-style-type: none"> <li>✓ Allows the commissioner, with written approval of the CS treasury, to refrain from assessing or recovery of an unpaid tax and the liability in relation to the tax shall be deemed to extinguished, abandoned or remitter</li> <li>✓ Also enable the CS treasury to direct the commissioner to take action as the CS may deem fit or obtain directions of the court in relations to the case.</li> </ul>
Clause 38: Late payment interest	<p>Applies a simple interest rate of 1% @ month on tax payable after due date. This is apart from late payment penalty due.</p> <p>Allows for refund of interest paid</p>
Clause 39: recovery of unpaid tax by suit	<ul style="list-style-type: none"> <li>✓ Allows the commission to recover unpaid tax as a civil debt to the government and where it exceeds KSh. 100,000, the debt is recovered summarily.</li> <li>✓ In the case of a suit, the bill allows the production of a certificate by the commissioner indicating name and address of the person and the amount of tax and late payment interest due as conclusive evidence that the amount stated on the certificate is due from the person</li> </ul>
Clause 40: security on property for unpaid tax	Where a land owner fails to pay due tax, the commissioner may direct the land registrar have the land subjected to as security to the extent of the tax payers interest. This directive can be cancelled upon the

CLAUSE	GENERAL PROVISIONS
	payment of the unpaid tax.
Clause 41: Distress orders	Allows the commissioner to issue an order for the recovery of unpaid tax by distress and sale of movable property of a tax payer.
Clause 42: Power to collect tax from person owing money to a tax payer	<ul style="list-style-type: none"> <li>✓ The commissioner is enabled to pursue payment of tax through 3<sup>rd</sup> party individuals i.e. who owe or hold money for the tax payer, who has defaulted but the amount shall not exceed the unpaid tax.</li> <li>✓ The above provision also applies to joint accounts all holders have unpaid tax liabilities</li> <li>✓ The amount shall not exceed 20% of each payment of salary, wages or other remuneration.</li> </ul>
Clause 43: preservation of funds	In case the defaulting tax payer has made taxable supplies, or collected tax that has not been accounted for; the commissioner may require a 3 <sup>rd</sup> party i.e. party individuals i.e. who owe or hold money for the tax payer, not to transfer or deal with the money within ten days pending a hearing to be determined by the high court.
Clause 44: seizure & forfeiture of goods	<ul style="list-style-type: none"> <li>✓ This clause gives the commissioner the authority to seize goods that relate to; the payment of VAT &amp; Excise Duty, excise goods for which a refund has been unlawfully obtained, excise goods subject to excise control that have been moved.</li> <li>✓ These goods are held until such a time as the payment of the tax due is made. Otherwise the goods are forfeited to the commissioner who can dispose of them to recover tax due</li> </ul>
Clause 45: departure prohibition order	This enables the commissioner to issue a departure prohibition order for a person's reasonably believed to be in the intention of leaving Kenya without paying tax until the tax payable is fully paid or satisfactory arrangements have been made to do so.

CLAUSE	GENERAL PROVISIONS
Clause 46: transferred tax liabilities	In case of a situation that a transferor (of assets with tax liability) transfers assets to transferee, the transferee becomes liable for tax payable.
Clause 47: Refund of overpaid tax	Allows for the application for a tax refund in case of overpayment within a period of 1 year
Clause 48: erroneous refund	Allows for the repayment of refund awarded erroneously with late repayment interest accruing from the date that the erroneous payment was done.
Clause 49: statement of reasons	Statement of reasons to be issued where the commissioner has refused an application under tax law
Clause 50: Conclusiveness of tax decisions	Gives the proceedings except from the above clause i.e. tax decision is final, production of a notice of assessment by the commissioner is conclusive evidence and the production of the self-assessment
Clause 51: Objection to tax decision	Allows an objection to be raised regarding a tax decision within a 30 day period, from which the commissioner has 60 days to make a decision otherwise the objection is allowed.
Clause 52: Appeal of appealable decision to the tribunal	Allows for a dissatisfied person to appeal an appealable decision
Clause 53: Appeals to high court	Allow for the appeal in the high court, by a person dissatisfied with a decision of the tribunal
Clause 54: Appeals in the court of appeal	Allow for the appeal in the Court of appeal, by a person dissatisfied with a decision of the High court
Clause 55: Settlement out of court	Allows for the settlement of disputes out of court
Clause 56: General provision	Establishes the onus of proof of incorrect tax decision on the tax payer, based on the grounds stated on the objection.

CLAUSE	GENERAL PROVISIONS
Clause 57: admissibility of evidence	Determines what can act as evidence and is admissible in civil or criminal proceedings under the Act.
Clause 58: Power to inspect goods, records etc.	<ul style="list-style-type: none"> <li>✓ Gives an authorized officer the power to inquire into the affairs of a person under tax law and have full access to material such as, all lands buildings, places, equipment etc.</li> </ul>
Clause 59: Production of records	<ul style="list-style-type: none"> <li>✓ for purposes of obtaining information on tax liability, the bill places requirement for individuals to produce documents for examination or furnishing of information to the persons tax liability,</li> <li>✓ Financial institutions i.e. documents under examination shall not be removed from the premises or and confidentiality shall be maintained</li> <li>✓ Information may also be given under oath, verified by a statutory declaration</li> <li>✓ The bill shall have effect despite any law relating to privilege or public interest</li> </ul>
Clause 60: Power of search & seize	<p>Gives the commissioner of authorized officer the capacity to have full access (with a warrant), and secure, places, property, documents etc. for purposes of administering. All is done at the risk and expense of the occupier of the premises.</p> <p>Allows the commissioner to make copies of seized material and allows persons with seized data storage device; access during business hours and the device cannot be held for longer than 6 months</p>
Clause 61: Notice to appear before the commissioner	Gives the commissioner the power to summon a person who has committed an offence under tax law
Clause 62: Binding public rulings	Public ruling from the commissioners interpretation of tax law is binding until withdrawn by the commissioner
Clause 63: Making public ruling	States the modalities of the public ruling i.e. published in at least 2 newspapers of national circulation, take

CLAUSE	GENERAL PROVISIONS
	effect on the date specified on the public ruling etc.
Clause 64: Withdrawal of a public ruling	Gives the commissioner the option of withdrawing a public ruling (either partly or in full) if it is inconsistent with another public ruling
Clause 65: Binding private rulings	Creates the option of a tax payer to apply for a private ruling in relation to the interpretation of a tax law on a transaction entered to by the tax payer. The ruling shall be issued within 45 days.
Clause 66: refusing an application for a private ruling	Gives the conditions that the commissioner may decline to issue a private ruling
Clause 67: making a private ruling	States the modalities for preparing a private ruling i.e. assumptions, notifying the applicant, identifying tax law relevant to the private ruling etc.
Clause 68: withdrawal of a private ruling	Gives the commissioner the option of withdrawing a private ruling (either partly or in full) if it is inconsistent with another public ruling
Clause 69: Publication of private rulings	The private rulings shall be published in at least 2 daily newspapers of national circulation but the applicants name shall not be published
Clause 70: Official languages	Sets the official languages in Kenya as the official languages of tax laws
Clause 71: prescribed form	A tax document i.e. tax return, application, notice etc. shall be submitted to the commissioner in the prescribed form
Clause 72: Tax Compliance Certificate	Any person may apply to the commissioner for a Tax Compliance Certificate
Clause 73: Manner of submitting documents to the commissioner	Documents required to be submitted electronically shall be submitted so, otherwise, through personal delivery or through normal post
Clause 74: service of notices by the commissioner	Relates to documents to be served by the commissioner i.e. shall be through electronic, post to the person or the

CLAUSE	GENERAL PROVISIONS
	representative. When the person refuses or fails to collect the letter it is treated as having been delivered
Clause 75: Application of electronic tax system	States the functions that can be carried out through the use of information technology i.e. application for registration, lodging tax returns, payment of tax etc.
Clause 76: Admissibility of documents produced electronically	Statements on documents transmitted in electronic form shall be admissible as evidence
Clause 77: Due date for submission & payment	Relates to situation when the due date lies on a weekend or a public holiday of which it shall be the previous working day
Clause 78: Defect not to affect validity of tax	The validity of documents is maintained if it is submitted consistently with the tax law and that the person intended to be assessed.
Clause 79: rectification of mistakes	Gives the commissioner the power to correct a mistake on a document if it does not involve a dispute as to the interpretations of the law or facts of the case
Clause 80: General provisions relating to administrative penalties & offences	A person shall not be subject to both penalty and the prosecution of an offence of the same act in relation to a tax law. The commissioner can decide which is fit
Clause 81: Penalties relating to registration or licensing	A person who fails to apply for registration or deregistration/cancellation is liable to a penalty equal to KSh. 100,000, for every month or part of a month for that period
Clause 82: Penalty for failing to keep documents	Failure to keep, retain or maintain a document without reasonable course shall result in a penalty of 10% of tax payable on the tax to which the document relates or KSh. 100,000
Clause 83: late submission	Sets penalties for late submission i.e. turnover tax will lead to KSh. 5000 penalty. Late submission of other documents will lead to a penalty of KSh. 1000 per day.
Clause 84: Tax Short fall	Sets penalties for persons who provide misleading

CLAUSE	GENERAL PROVISIONS
	statement that lead to a lower tax liability shortfall
Clause 85: Tax avoidance penalty	A tax payable is liable for tax avoidance penalty equal to double the tax amount
Clause 86: penalty for failing to comply with electronic tax system	Failure to comply with electronic submission as required will lead to a KSh. 100,000 tax penalty
Clause 87: Penalties for failure to appear before the commissioner	Failure to do so will result in penalties of KSh. 10,000 and KSh. 100,000 to an individual and for any other case
Clause 88: Penalty in relation to fraudulent claim for refund	Penalty is equal to 2 times the claim
Clause 89: General provisions relating to penalty	Gives the provisions on penalty imposed i.e. each to be calculated separately to each section, commissioner to decide on the penalty in cases of multiple impositions
Clause 90: Offences relating to registration or licensing	It's an offence not to apply for registration, deregistration or cancellation of registration without reasonable cause, and also if one applies for deregistration, or cancellation of registration if one is required to be registered
Clause 91: Offences relating to PINs	The use of a false or another person's PIN is an offence
Clause 92: Offences by tax agent	An agent commits an offence when he/she fails to notify the commissioner as required under section 22(1), contravenes clause 21 and assists a tax payer to create a tax avoidance scheme
Clause 93: failure to maintain documents	A person commits an offence if the person deliberately prepares or maintains or authorizes another person to prepare or maintain false documents
Clause 94: Failure to submit tax return or other document	Failure to submit tax return by due date is an offence

CLAUSE	GENERAL PROVISIONS
Clause 95: failure to pay tax	Failure to pay tax by the due date is an offence
Clause 96: False or misleading statements	Any persons any person who makes a false or misleading statement or omits a matter thereby leading to a false statement, commits an offence
Clause 97: Fraud in relation to tax	Omissions in returns, claiming unentitled relief, making incorrect tax liability statement etc. are offences
Clause 98: Offences relating to recovery of tax	Failure to provide security for tax payable, rescue property distrained or goods seized, or failure to comply by a court orders, attempts to depart from Kenya in contravention of departure order etc. constitute an offence
Clause 99: Offences relating to enforcement powers	Failure to provide information to, appear before or answer any questions put before the person by the commissioner constitutes an offence
Clause 100: Obstruction of authorized officer	Hindering or obstruction of the commissioner of authorized person from performing duties under tax law, constitutes an offence
Clause 101: Aiding or abetting an offence	Aiding and abetting an offence shall be liable for a sanction as imposed on the principal offence
Clause 102: Offences by officers & staff of the authority	Addresses offences committable by authorized officers e.g. making a false entry, acting in breach of duty, willfully contravenes the provision of tax law in order to gain undue advantage
Clause 103: Offences by employees, agents & companies	<ul style="list-style-type: none"> <li>✓ Adjoins a principal to consequences of offences committed by the agent.</li> <li>✓ Offences committed by a company shall be treated as committed by an individual if committed by the treasurer, CEO, managing director, company secretary etc.</li> </ul>
Clause 104: Sanctions for offences	Person a person convicted under this act shall not be

CLAUSE	GENERAL PROVISIONS
	<p>liable to a fine exceeding KSh. 1000,000 or imprisonment exceeding 3 years</p> <p>A person convicted of an offence under sections 98 and 102 shall be liable to a fine not exceeding KSh. 2000,000</p>
Clause 105: Payment of tax on conviction	The court may order a convicted person to pay the commissioner the whole or part of unpaid tax in addition to penalty
Clause 106. Jurisdiction to try cases.	States that a person charged with the commissioner of an offence under tax law may be prosecuted in any place in Kenya and may be tried in the court designated to try offences of corruption or economic crimes
Clause 107: Authorized person may appear on prosecution	<ul style="list-style-type: none"> <li>✓ An authorized person may appear on behalf of the commissioner in proceedings in which the commissioner is part</li> <li>✓ Subject to the direction of the Director of Prosecutions that officer may prosecute an accused with all powers of a public prosecutor</li> </ul>
Clause 108: Tax to be paid despite prosecution	Tax payable shall remain payable despite prosecution of a tax payer for an offence under the tax law
Clause 109: Jurisdiction to try cases	When a person has committed an offence the commissioner may compound the offence and may order that person to pay such a sum of money, not exceeding the amount of the fine to which he/she could have been liable having undergone a prosecution
Clause 110: consequential amendments CAP 470 No. 35 of 2013	Income tax and value added tax are amended in the 2 <sup>nd</sup> schedule
Clause 111:Protection of officers	Omits personal liability upon officers functioning in accordance to the tax law except if committed dishonestly, in negligence or in contravention of the tax law

CLAUSE	GENERAL PROVISIONS
Clause 112: regulations	Creates a provision for regulations to be made
Clause 113: Transitional & saving	Addresses transitional instructions on tax liability, prosecution etc. that were committed before the commencement of the bill.

## 5.0 COMMITTEE RECOMMENDATION

Having listened to the stakeholders and from its own analysis, the Committee has consolidated amendments for further discussion with the National Treasury in line with Article 114 for possible introduction into the Tax Procedures Bill, 2015 during the Committee Stage. The amendments are annexed to this report.

## **CONSOLIDATED AMENDMENTS FROM STAKEHOLDERS**

### **ANJARWALLA & KHANNA ADVOCATES**

#### **CLAUSE 3**

THAT clause 3 of the Bill be amended-

(a) by deleting the definition “relative” and substituting therefor the following new definition-

“relative” means-

- (a) a spouse;
- (b) a son, daughter, brother, sister, uncle, aunt, nephew, niece, step-father, step-mother, step-child, or in the case of an adopted child his adopter or adopters; or
- (c) the spouse of any such relative as is mentioned in subparagraph (ii)”

*(The definition in the Bill is not accurate as it does not directly include the individual’s legitimate children. The definition is also wide. The term ancestor may mean a broad range of persons who may be under this definition. Further a descendant of the grandparents is too broad a description and leaves room for misrepresentation)*

(b) by deleting the definition “tax avoidance” and substituting therefor the following new definition

“tax evasion” means a transaction or a scheme designed to evade liability to pay under any tax law;

*(tax avoidance is the legal usage of tax regime to one’s own advantage to reduce the amount of tax that is payable by means which are within the law)*

#### **CLAUSE 8**

THAT clause 8 of the Bill be amended by inserting the following new subclause immediately after subclause (9)-

“(9) A foreign person who is required to register for purposes of undertaking any transaction specified in the first schedule may be registered upon production of a certified copy of his or her passport.”

*(Under the current tax regime, foreigners face a number of problems when registering for taxes in Kenya. Among them is the application by a foreign company to Kenya revenue authority and the Kenya investment authority. This may delay the process for up to 3-5 working days for a*

*letter of recommendation from Kenya investment authority. The process thus becomes lengthy unnecessarily.*

*Another major problem a foreign company faces is the registration of the directors where one of them has to come from their respective country in order to apply for a PIN which is inconvenient and discourages potential investors.*

*It should be noted that foreign directors are often based abroad and would not have any taxes payable in Kenya. )*

#### **CLAUSE 9**

THAT clause 9 of the Bill be amended in paragraph (b)-

(a) by inserting the words “ of the incorporated person” immediately after the words “ issued share capital” in subparagraph (i);

*(editorial)*

(b) by inserting the words “where applicable” immediately after the words “of trustees and” in subparagraph (iii).

*(Notification of the changes on the beneficiaries in a discretionary trust will not be possible because the beneficiaries and their entitlements to the discretionary trust are not fixed but determined by the criteria set out in the instrument. The beneficiaries are therefore not known until the criterion is satisfied.)*

#### **CLAUSE 10**

THAT clause 10 of the Bill be amended by inserting the following new subclause immediately after subclause (6)-

(6A) A person shall be deemed to be deregistered where the Commissioner does not respond to the application for deregistration within six months.

*(The bill does not give a timeline within which the Commissioner is required to respond to an application for deregistration. This may create uncertainty on the part of the tax payer, especially in the case of a foreign entity that wishes to exit from the Kenyan market.)*

#### **CLAUSE 17**

THAT clause 17 subclause 3 paragraph (c) be deleted.

*(The provision goes against the principle of law of agency that when a person is acting solely on behalf of another he is not liable to the third party on it. The tax representative or appointed person is a mere instrument and the tax payer bears the risk of inadequate representation. This*

*should be carefully thought as it could result in a situation where a person who has not handled funds of a company could end up being liable to pay taxes due from a company.)*

## **CLAUSE 18**

THAT clause 18 be amended-

(a) by deleting subclause (1);

*(This provision contradicts section 16(2) of the companies Act and the concept of a registered company being a legal person as was clearly set out in Salmon v. Salmon, where it was held that once a company is incorporated, it must be treated like any other independent person with his own rights and liabilities appropriate to itself. This means that the company's debts are not the debts of its members or directors. The only instance that could occasion personal liability to the directors should be where there is a case of fraud and the corporate veil is lifted. Therefore, a company's creditor (including Kra) cannot institute legal proceedings against a company's member in order to recover from him what he owes the company.)*

(b) in subclause (2)-

(i) by inserting the words “ with the intention to defraud” immediately after the words “been entered into”;

*(The term arrangement is very wide and has not been defined. It does not also set out a test which excludes transactions which have a commercial purpose that are not designed to obtain any tax advantage.)*

*PLEASE SEE CLAUSE 18 SUBCLAUSE 5 ON THE DEFINITION OF ARRANAGEMENT.*

(ii) by deleting the words “ or future” immediately after the words “ a current”;

*(It is not possible to know what a future tax liability is. One of the cannons of tax law is that tax liability should be certain. The term future tax liability creates uncertainty)*

(c) by deleting the words “ company secretary” wherever they occur;

*(This provision should not apply to company secretaries who are required to be appointed under the Institute of Public Secretaries in Kenya. A company secretary will often have no understanding of what is going on in the company; they have no power to vote and thus should not be held liable under this provision.)*

## **CLAUSE 31**

THAT clause 31 be amended-

(a) by inserting a the following new subclause immediately after subclause (2)-

“(2A) Where a tax payer submits an amended self-assessment electronically, the amended self-assessment shall be deemed accepted where the Commissioner does not respond within thirty days.”

(b) by inserting the words “, falling which it will be deemed accepted” immediately after the words “receiving the application” in subclause 3.

### **CLAUSE 32**

THAT clause 32 of the Bill be amended by inserting the following new subclauses immediately after subclause (2)-

“(3) The Commissioner shall on application, exempt a tax payer to pay tax electronically, where the tax payer -

- (a) does not have sufficient access to the Internet;
- (b) is incapacitated due to age,
- (c) is incapacitated due to physical or mental infirmity; or
- (d) is illiterate.”

(4) The Commissioner shall provide adequate access to the service of payment of tax electronically in not more than five years.

*(The provision makes electronic payment of taxes compulsory. Electronic payment should not be made compulsory because of certain factors that may come into play like tax payer's illiteracy, access to electronic systems or the payment systems not functioning.)*

### **CLAUSE 33**

THAT clause 33 be amended-

(a) in subclause (2) by inserting the following new paragraph immediately after paragraph (b)-

“(c) shall not levy penalties or interest as a result of that extension.”

*(To provide for no penalties or interest to be charged where an extension has been approved)*

(b) in subclause (4) by inserting the words “ and interest or penalties shall be made only on the outstanding amount” immediately after the words “become immediately payable”.

*(To provide for penalties or interests to be levied only on the remaining amount)*

### **CLAUSE 35**

THAT clause 35 of the Bill be amended by inserting the following new subclause immediately after subclause (2)-

“(3) Despite subsections (1) and (2), the penalty or interest payable that accrues may not, in aggregate, exceed the unpaid balance of the principal tax liability as at the time the default occurs.”

*(It would be important to ensure that the interest provisions under the Bill also provide for the in DUPLUM RULE. The rule provides that a tax payer should not be required to pay more than double the interest and penalties due from him. This rule has been introduced in the Banking Act Section 44A to ensure that a person who owes an institution a debt will not be required to pay more than double the interest due from him to the bank.)*

### **CLAUSE 38**

THAT clause 38 of the Bill be amended by inserting the following new subclause immediately after subclause (7)-

“(8) Despite subsections (1) to (7), the interest payable that accrues may not, in aggregate, exceed the unpaid balance of the principal tax liability as at the time of default occurs.

*(It would be important to ensure that the interest provisions under the Bill also provide for the in DUPLUM RULE. The rule provides that a tax payer should not be required to pay more than double the interest and penalties due from him. This rule has been introduced in the Banking Act Section 44A to ensure that a person who owes an institution a debt will not be required to pay more than double the interest due from him to the bank.)*

### **CLAUSE 39**

THAT clause 39 of the Bill be amended by inserting the following new subclause immediately after subclause (2)-

“(3) Where a recovery of unpaid tax has been objected to in accordance with section 51 of this Act, the summary recovery of the unpaid taxes shall be subject to the procedures as set out in Part VIII of this Act.”

*(As it currently stands in the Bill, this section (39) provides for summary recovery of taxes due but does not recognize that such taxes may be subject to a dispute and may have been objected to under section 51 of the Bill.)*

### **CLAUSE 40**

THAT clause 40 of the Bill be amended-

(a) in subclause (1)-

(i) by inserting the words “ and has not objected in accordance with section 51 of this Act, immediately after the words “the due date,”;

*(The commissioner’s decision to use a tax payer’s property as security for unpaid tax should be subject to section 51 of the Bill)*

(ii) by deleting the words “ seven days” and substituting therefor “thirty days” in the proviso;

*(The commissioner to give 30 days’ notice for compliance as is the case under the Income tax Act)*

(b) in subclause (3) by inserting the words “ and mortgagor” immediately after the words “rights of the mortgagee”

*(The rights of the mortgagor should be included)*

#### **CLAUSE 41**

THAT clause 41 of the Bill be amended-

(a) in subclause (1) by inserting the words “ where an objection has not been raised” immediately after the words “property of a tax payer”;

*(Collection of tax in distress should be an alternative to suing for the unpaid tax)*

(b) by inserting the words “ with a court order” immediately after the words “at any time” in subclause (3), paragraph (a);

*(The provision as it is goes against the provisions of the criminal procedure code which requires an officer to have a warrant to enter a person’s premises)*

#### **CLAUSE 46**

THAT clause 46 be amended-

(a) in subclause (1), by deleting the words “all or some of the assets of the business” and substituting therefor the words “ all or substantially all of the assets of the business”

*(This is to avoid a case where purchase of a single asset such as a car may be deemed to trigger this provision.)*

(b) in subclause (2), by inserting the words “within a period of three years” immediately after the words “from the transferor”

*(The limitation period should be introduced so that a transaction would only be caught if the authority seeks to pursue an asset transferred within this period. In insolvency, transfers*

*undertaken to related parties within a period of one year can be revoked and the liquidator can access such properties so transferred)*

**CLAUSE 50**

THAT clause 50(1) be deleted.

*(This provision attempts to preclude judicial review powers of the High court which are granted under the Constitution)*

**CLAUSE 66**

*That clause 66 be amended in subclause (1) by deleting the word "avoidance" and substituting therefor the word "evasion".*

*(tax avoidance is the legal usage of tax regime to one's own advantage to reduce the amount of tax that is payable by means which are within the law)*

**CLAUSE 83**

THAT clause 83 (1) (a) be deleted.

*(The liability in this clause should be borne by the employer)*

*SEE THE CLAUSE 3 DEFINITION OF "PERSON"*

**CLAUSE 84**

THAT clause 84 be amended-

(a) in subclause (1), paragraph (a)-

(i) by inserting the word "knowingly" immediately after the words "if that person" ;

(ii) by inserting the word "knowingly" immediately after the words "material particular or"

*(These statements or omissions should be made knowingly)*

(b) by deleting subclause (6).

*(Subclause 62(3) and subclause 65(5) states that a public or private ruling is not binding, since the rulings are not binding on can take a different position from that of the authority even in making self-assessment. The scope of a reasonably arguable position should be laid out in the Bill.)*

**CLAUSE 85**

THAT clause 85 of the bill be amended by deleting the word“avoidance” whenever it occurs and substituting therefor the word“evasion”

*(tax avoidance is the legal usage of tax regime to one’s own advantage to reduce the amount of tax that is payable by means which are within the law)*

#### **CLAUSE 92**

That clause 92 of the bill be amended in paragraph (c) by deleting the word “avoidance” and substituting therefor the word “evasion”

*(tax avoidance is the legal usage of tax regime to one’s own advantage to reduce the amount of tax that is payable by means which are within the law)*

#### **KENYA ASSOCIATION OF MANUFACTURES**

#### **CLAUSE 3**

THAT clause 3 be amended-

(a) in the definition of “relative” by inserting the word “ or biological child “ immediately after the words “ adopted child” in paragraph (a);

*(The term biological child should be included to avoid ambiguity)*

(b) in the definition of “tax” by deleting paragraph (a) and substituting therefor the following new paragraph-

“(a) a tax imposed under a tax law”;

*(The word “penalty” should be removed from the definition of tax. This has been done away with in the recent Income Tax amendments to ensure that a penalty is not subject to both further penalty and late payment interest. It amounts to double punishment on the same offence. This was in Section 94(1) (b) of Income Tax Act that is being repealed through the Bill.)*

#### **CLAUSE 38**

THAT clause 38 of the Bill be amended by inserting the following new subclause immediately after subclause (7)-

“(8) Despite subsections (1) to (7), the interest payable that accrues may not, in aggregate, exceed the unpaid balance of the principal tax liability as at the time of default occurs.

*(It would be important to ensure that the interest provisions under the Bill also provide for the in DUPLUM RULE. The rule provides that a tax payer should not be required to pay more than double the interest and penalties due from him. This rule has been introduced in the Banking Act*

*Section 44A to ensure that a person who owes an institution a debt will not be required to pay more than double the interest due from him to the bank.)*

#### **CLAUSE 46**

THAT clause 46(2) be deleted.

(This provision is unfair because it requires a transferor who is not in possession of the subject matter of the tax liability to shoulder the tax liability of another in whose possession the subject matter of the tax liability lies. A tax payable should be borne personally by the person owing and should not be recoverable from any other person.)

#### **CLAUSE 47**

THAT clause 47 of the Bill be amended -

(a) in subclause (1) by deleting the words “one year” and substituting therefor the words “six months”.

*(Amendments should be made to give taxpayers the benefit of having their refunds within six months from the date of lodging the refund claim . Recently cases have been referred to H. Court and been decided that kra has no right to delay refunds because of pending audits .Provision should also be put for objecting to decision taken by kra not to/alter refunds.)*

(b) in subclause (2) by inserting the words “ for a duration not exceeding six months “immediately after the words “to an audit”;

*(The section would be prone to misuse by the Commissioner /officers if time within which the audits to be finalized is not stipulated. We therefore propose that there should be a time limit of 6 months from the time the refund claim is submitted. )*

(c) by inserting the following new subclause immediately after subclause (4)

“(5) Where a tax refund remains unpaid to the tax payer for thirty days after applying for such refund the Commissioner will pay a late payment interest of 2% per month from that time to the time the refund is ultimately paid.”

*(This proposal opens a can of worms and is likely to be a huge source of fund siphoning from KRA. Corrupt individuals are likely to use conduits to delay their payments so that such interests become owed to them.)*

#### **CLAUSE 50**

THAT clause 50(1) of the Bill be deleted.

*(This subsection will hinder the taxpayers from accessing justice to the highest Court and is therefore unconstitutional. It should be removed in its entirety. All decisions should be appealable to higher bodies. The subsection also contradicts section 51, 52, 53, 54 and 55 which allow for objections and appeals.)*

#### **CLAUSE 51**

THAT clause 51 of the Bill be amended in subclause (4) by deleting the word “immediately” and substituting therefor the words “within sixty days “

*(This should be amended to specify the time given to the objector whose notice of objection was found not to be validly lodged.)*

#### **KEPSA**

#### **CLAUSE 32**

THAT clause 32 of the Bill be amended by inserting the following new subclauses immediately after subclause (2)-

“(3) The Commissioner shall on application, exempt a tax payer to pay tax electronically, where the tax payer -

- (a) does not have sufficient access to the Internet;
- (b) is incapacitated due to age,
- (c) is incapacitated due to physical or mental infirmity; or
- (d) is illiterate.”

#### **CLAUSE 38**

THAT clause 38 of the Bill be amended by inserting the following new subclause immediately after subclause (7)-

“(8) Despite subsections (1) to (7), the interest payable that accrues may not, in aggregate, exceed the unpaid balance of the principal tax liability as at the time of default occurs.

*(It would be important to ensure that the interest provisions under the Bill also provide for the DUPLUM RULE. The rule provides that a tax payer should not be required to pay more than double the interest and penalties due from him. This rule has been introduced in the Banking Act Section 44A to ensure that a person who owes an institution a debt will not be required to pay more than double the interest due from him to the bank.)*

## **ICPACK**

### **CLAUSE 3**

THAT clause 3 of the Bill be amended by inserting a new definition in its proper alphabetical sequence-

“tax agent” means a person licensed for purposes of advising a taxpayer on matters envisaged under section 19 of this Act, providing tax services and for purposes connected or ancillary thereto.”

### **CLAUSE 19**

THAT clause 19 of the Bill be amended-

(a) by deleting subclause (1) and substituting therefor the following new clause-

“(1) an individual, a partnership, accompany may apply to the Institute of Certified Public Accountants of Kenya for a licence as a tax agent.

(b) by inserting a new subclause immediately after subclause (1)-

“(1A) Tax agents shall be members of the Institute of Certified Public Accountants of Kenya as defined by the Accountants Act, No.15 of 2008.”

*(in order to professionalise the tax industry in Kenya)*

### **CLAUSE 46**

THAT clause 46 of the Bill be amended-

(a) by deleting subclause (1) and substituting therefor the following new subclause-

“(1) When a tax payer (referred to as the “transferor”) has a tax liability or tax asset, including tax losses in relation to a business carried on by the tax payer and the tax payer has transferred all or some of the assets and or liabilities of the business to a related person (referred to as the “transferee”), the transferee shall be liable for the tax liability (referred to as the “transferred liability”) of the transferor and the transferor shall have the benefit of the tax assts, including tax losses so transferred.

*(To include the aspect of a tax liability and tax asset)*

(b) by deleting subclause (2)

*(This clause negates the very basic canon of taxation referred to as certainty. it is not clear whether the commissioner will recover tax from transferor or transferee)*

#### **CLAUSE 47**

THAT clause 47 of the Bill be amended by inserting the following new subclause immediately after subclause (4)-

“(5) Where a tax refund under subsection (4) is contemplated, the Commissioner shall-

(a) notify the tax payer of the refund due within ninety days of the tax payer filing the claim for refund;

(b) pay the taxpayers refund claim within ninety days after the date he notifies the tax payer of the tax payer refund being due under paragraph (a);

(c) payment of the refund is not done as contemplated under paragraph (b), pay the taxpayer interest on such outstanding refunds based on the Kenya Bankers Reference Rate as published from time to time and to accrue from the sixth month after the taxpayer filed the tax refund claim until the claim is paid.

*(To introduce an interest on the Commissioner when he delays on payment of the tax refund.)*

#### **CLAUSE 48**

THAT clause 47 of the Bill be amended by inserting the following new subclause immediately after subclause (4)-

“(5) Where a tax payer has made an erroneous tax payment that results in a tax overpayment, the commissioner shall, on the application in writing by the tax payer, refund such erroneous overpayment to the tax payer within a reasonable time provided that such reasonable time does not exceed thirty days from the date of the tax payers application for refund of overpaid tax.

For purposes of this section, an erroneous tax payment that results in a tax overpayment is one which on the face of it, patently erroneous and in excess of the tax that ought to have been paid, taking into consideration the tax return supporting the tax payment and the average tax paid in the proceeding period or periods.”

*( this clause is one sided since it looks at erroneous tax refunds only rather than the entire spectrum that includes erroneous tax payments made by the tax payer)*

#### **CLAUSE 52**

THAT clause 52 of the Bill be amended by deleting subclause (2)

*(This clause conflicts with the rules of natural justice where a person is innocent until proven otherwise. The tax payer should not pay a penny in relation to tax in dispute until all avenues of justice are exhausted)*

**CLAUSE 84**

THAT clause 84 of the Bill be amended by inserting the following new subclause immediately after subclause (4)-

(5) The Cabinet Secretary shall make rules for the better carrying out of this section.

