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REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – FOURTH SESSION, 2020

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

REPORT ON THE CONSIDERATION OF THE TAX LAWS (AMENDMENT) (NO. 2) BILL (NATIONAL ASSEMBLY BILL NO. 48 OF 2020)

THE NATIONAL ASSEMBLY
PAPERS LAID
DATE: 22 DEC 2020 DAY: TUESDAY
TABLED BY: CHAIR, DC-FINANCE
CLERK-AT THE TABLE: R. K. TCAMBATI

CLERKS CHAMBERS
DIRECTORATE OF DEPARTMENTAL COMMITTEES
PARLIAMENT BUILDINGS
NAIROBI

DECEMBER, 2020

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CHAIRPERSON'S FOREWORD

This report contains the Committee's proceedings on the consideration of the Tax Laws (Amendment) (No. 2) Bill (National Assembly Bill No. 48 of 2020) which was published on 27th November, 2020.

The Bill seeks to amend provisions relating to Income Tax Act (Cap. 470) and Value Added Tax Act (No. 35 of 2013). Under the Income Tax Act (Cap. 470), the Bill proposes to amend Section 12D (1) (c) so that the Minimum Tax only applies if it is lower than instalment tax. The Minimum Tax at the rate of 1% of the gross turnover was introduced through the Finance Act of 2020. The aim was to enhance fairness in taxation, promote equity and enhance revenue yield

The Bill also seeks to increase the individual income tax rate and the corporate income tax rate on resident companies from 25% to 30%. In order to mitigate the effects of COVID-19, the Tax Law (Amendment) Act, 2020 was enacted in April, 2020 essentially reducing the individual top tax rate (P.A.Y.E.) and the Corporation Income Tax from 30% to 25 %. The measures were geared towards increasing the disposable incomes for individuals and also ensuring that companies retain their employees in their payroll by having a reduced corporation income tax. The reduction in the individual tax (personal relief and PAYE tax rate band) and corporate tax rates had a resultant revenue underperformance with the Government foregoing KSh. 122 billion.

Finally, the Bill seeks to amend the Value Added Tax Act (No. 35 of 2013) to amend the provision on Credit for input tax against output tax.

In September 2020, the Government relaxed containment measures and this subsequently led to resumption of normalcy in the economy due to increased labour productivity. As a result it has become necessary to introduce the Bill to revert back to pre- COVID -19 rates in order to improve revenue. The Bill is being prepared at a time where revenue collection has underperformed in the first quarter of 2020/21 as compared to a similar period in 2019/20 as shown in annex 1.

In order to process the Bill, the Committee was guided by the House Resolution passed on Thursday, 3rd December 2020, where it was resolved that the following procedure should apply to Bills published during the period of the long recess (December 4, 2020 – February 8, 2021).

> *"Should a Bill be published or a published Bill becomes due for First Reading during the period, the Speaker shall, upon lapse of at least three days following the publication of the Bill and following a determination that such Bill is of priority, forthwith refer such Bill to the relevant Committee for consideration pursuant to the provisions of Standing Order 127 (Committal of Bills to Committees and Public Participation) and upon resumption of the House, cause the Bill to be read a First Time and the Second Reading may be taken forthwith, or on such other day as the House Business Committee may determine".*

In view of the above Resolution, the Bill was committed to the Departmental Committee on Finance and National Planning and submitted for public participation through newspaper advertisement on **Tuesday, 8th December, 2020.**

Following the advertisement requesting for memoranda from members of the public, the Committee received memoranda from twenty four (24) stakeholders. The Committee also invited the stakeholders for a meeting on Th**ursday, 17th December, 2020**. In preparing this report, all the stakeholders' comments were put into consideration with some of the proposals forming part of the proposed

Committee's amendments.

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 Tax Laws (Amendment) (No. 2) Bill (National Assembly Bill No. 48 of 2020). The Committee is grateful to the Offices of the Speaker and Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee further wishes to thank all the stakeholders who submitted memoranda on the Bill as well as taking time to appear before the Committee for oral presentations. Their participation was instrumental in arriving into some of the decisions made by the Committee. Finally, I wish to express my appreciation to the Honorable Members of the Committee who made useful contributions towards the preparation and production of this report.

It is my pleasure to report that the Committee has considered the Tax Laws (Amendment) (No. 2) Bill (National Assembly Bill No. 48 of 2020) and have the honour to recommend to the House that the Bill be **approved with amendments** as contained in the report.

Hon. Gladys Wanga, CBS, MP
Chairperson, Departmental Committee on Finance and National Planning

1 PREFACE

1.1 ESTABLISHMENT OF THE COMMITTEE

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

1.2 MANDATE OF THE COMMITTEE

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

1.3 COMMITTEE MEMBERSHIP

4. The Departmental Committee on Finance and National Planning was reconstituted by the House on Wednesday, 15th July, 2020 and comprises of the following Members: -

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

Vice-Chairperson
Hon. Isaac W. Ndirangu
MP for Roysambu Constituency
Jubilee Party

Members

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

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

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

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

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

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

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

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

Hon. Joseph Oyula, MP
MP for Butula Constituency
ODM Party

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

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

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

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

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

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

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

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

1.4 COMMITTEE SECRETARIAT

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

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

Ms. Jennifer Ndeto **Principal Legal Counsel 1**	Ms. Laureen Wesonga **Clerk Assistant II**
Mr. Josephat Motonu **Fiscal Analyst I**	Mr. Chelang'a Maiyo **Research Officer II**

2 OVERVIEW OF THE TAX LAWS (AMENDMENT) (NO. 2) BILL (NATIONAL ASSEMBLY BILL NO. 48 OF 2020)

2.1 ANALYSIS OF THE BILL

The Tax Laws (Amendment) (No. 2) (National Assembly Bill No.48 of 2020) seeks to amend the Income Tax Act (Cap. 470) and the Value Added Tax Act (No. 35 of 2013) as follows:-

The Income Tax Act (Cap. 470)

6. **Minimum Tax:** The Bill seeks to amend the provision relating to Minimum Tax to provide that it will apply only if it is lower than instalment tax. The Minimum Tax at the rate of 1% of the gross turnover was introduced through the Finance Act of 2020. The aim was to enhance fairness in taxation, promote equity and enhance revenue yield. Nonetheless, it has hitherto been established that there was a drafting error in the law which makes the provision redundant. Among the parameters applied in the determination of the minimum tax is that it should be paid if the installment tax is ***higher*** than the minimum tax as contained in Section 12D (c) of the Income Tax Act. This provision is erroneous because Minimum Tax was intended to be payable when the installment tax is ***lower*** than the minimum tax.

7. **Individual Top Tax Rate & Resident Corporate Tax Rate:** The Bill also seeks to amend the Act to increase the individual top tax rate and resident corporate tax. It proposes to increase the top individual income tax rate and corporate income tax rate on resident companies from 25% to 30%. Specifically, the Bill proposes to increase the rate of the highest taxation band on the personal income tax (Pay-As-You-Earn) from the current 25% to 30%. It is worth noting that this tax rate was reduced from 30% to 25% in a bid to cushion employees from the adverse impact of COVID -19. This was based on the principle that this tax incentive would enhance the disposable income to the persons in payroll in both public and private sectors. On the other hand the reduced corporate tax rate was granted to the corporations to cushion them from the negative effects of the global pandemic with the understanding that the reduction of tax liability to companies would incentivize them to institute measures to keep their staff in the payroll.

Value Added Tax Act (No. 35 of 2013)

8. The Bill seeks to amend the principal Act on the provision relating to credit for input tax against output tax. Specifically, the amendment seeks to make a proviso that a registered person who is a manufacturer may make a deduction for input tax with respect to taxable supplies made to an official aid funded project as may be approved by the Cabinet Secretary in accordance with the First Schedule.

9. **Commencement**: As proposed in the Bill, the amendments relating to the Income Tax Act (Cap. 470) and the Value Added Tax Act (No. 35 of 2013) will apply from 1st January, 2021.

10. **Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms**: The Bill does not limit any fundamental rights and freedoms.

11. **Statement that the Bill does not concern county governments**: The proposed Bill does not concern county governments in terms of Article 110(1)(a) of the Constitution as it does not affect the functions and powers of county governments as set out in the Fourth Schedule.

12. **Statement that the Bill is a money Bill within the meaning of Article 114 of the Constitution**: The enactment of the Bill contains provisions dealing with taxes.

3 PUBLIC PARTICIPATION/STAKEHOLDERS CONSULTATION

13. As provided for under Article 118 of the Constitution and Standing order 127 (3) , the Committee carried out public participation by calling for public views through an advertisement placed on the newspaper on Tuesday, 8th December, 2020 inviting comments on the Tax Laws (Amendment) (No.2) (National Assembly No.48). The Committee received memoranda from the following stakeholders:-
    i. Law Society of Kenya (LSK)
    ii. Kenya Association of Manufacturers (KAM)
    iii. Kenya Private Sector Alliance (KEPSA)
    iv. Petroleum Institute of East Africa represented by Westminster Consulting; OLA Energy Kenya Limited; Texas Energy Limited; Hass Petroleum; Vivo Energy Kenya; Gulf Energy Limited; Total Kenya PLC; Rubis Energy Kenya PLC; and National Oil Corporation of Kenya
    v. Deloitte and Touché
    vi. Institute of Certified Public Accountants of Kenya (ICPAK)
    vii. PKF Taxation Services Limited
    viii. PricewaterhouseCoopers Limited (PWC)
    ix. Association of Kenya Insurers (AKI) represented by PricewaterhouseCoopers Limited
    x. E-Cart Service Kenya Limited represented by PricewaterhouseCoopers Limited
    xi. Kenya Bankers Association (KBA) represented by KPMG
    xii. Oxygène
    xiii. East African Tea Trade Association (EATTA)
    xiv. Consumer Federation of Kenya (COFEK)
    xv. Anjarwalla and Khanna LLP
    xvi. Kipkenda and Co. Advocates
    xvii. Apex Steel Limited
    xviii. Kenya Breweries Limited/UDV Kenya Limited
    xix. Federation of Pharmaceutical Manufacturers
    xx. Kenya National Chamber of Commerce and Industry (KNCCI)
    xxi. Kenya Renewable Energy Association (KEREA), GOGLA, Clean Cooking Association of Kenya (CCAK), Africa Mini-Grid Developers Association (AMDA), and Africa Clean Energy Technical Assistance Facility (ACETAF)
    xxii. Mr. Ernest Muguku Muriu
    xxiii. Ernst and Young
    xxiv. National Treasury and Planning

14. The Committee also held a participation meeting on 17th December, 2020 where the stakeholders were accorded an opportunity to make oral presentations.
15. The stakeholders their views on the Bill as follows:-

3.1 LAW SOCIETY OF KENYA (LSK)

In their written memorandum and oral presentations, LSK proposed the following:-

Minimum Tax

16. Section 12D (1) should be amended by inserting the word '*or*' at the end of paragraph (a); and deleting sub-clause (c) and replacing it with the following paragraph, '*Provided that the instalment tax payable by that person under section 12 is lower than the Minimum Tax*'.

17. Section 15(7)(e) of the Income Tax Act should be amended to make it clear that Minimum Tax only applies to business income.

18. Sections 19(5) and (6) of the Income Tax Act which provides for the manner in which gains from resident and non-resident insurance companies will be computed is unclear on whether the minimum tax provisions will apply based on gross turnover. If applied to the gross revenue, it will be punitive for insurance companies as this amount is way higher than the taxable income.

19. Newly incorporated companies should be given a grace period of five (5) years before they start paying Minimum Tax. Introduction of Minimum Tax is likely to negatively impact the competitiveness of Kenya as a business destination. The rate of 1% is higher than the rates applied in other jurisdictions. They therefore proposed that the rate should be reduced to 0.3%.

20. The introduction of Minimum Tax should be deferred to 2023 in order to allow businesses to recover from the negative impact of the COVID-19 pandemic. Companies that incurred losses as a result of the use of capital allowances will be disadvantaged because capital allowances offer tax relief on capital expenditure and allow companies to write off the cost of capital expenditure over time. Imposing Minimum Tax on such companies reverses the benefits afforded by the capital allowances. They therefore proposed that enhanced exemptions should be granted to such companies in order to allow for the reduction of the Minimum Tax liability by the Company. The companies can also be exempted from Minimum Tax.

21. Minimum Tax on oil marketing companies and retailers should be on earnings before interest and taxes and not on gross turnover because taxing their gross turnover will eat into their small margins and affect their business models.

22. The ten-year cap of tax losses should be extended in order to allow companies to utilize their losses in a manner that does not necessarily trigger minimum taxes because Minimum Tax is a sunk cost that cannot be offset against future liabilities, the net effect is that tax loss carry forwards will be rendered null and void and taxpayers will be punished for carrying forward their losses where these reduce their tax liability below the minimum tax liability. Alternatively, the ten-year cap of tax losses should be repealed since all taxpayers will be paying income tax.

23. The provisions on compensating tax should be repealed because it will be rendered redundant by the minimum tax.

24. In conclusion, LSK proposed that minimum tax should be abolished in the present time due to the reasons provided above.

Committee's Comments: The minimum tax is meant to ensure that companies that make perpetual losses also contribute towards provision of infrastructure and essential services by the Government. The rationale for this tax is that even where companies are making losses, they continue enjoying facilities, such as infrastructure, whose cost of construction continue being serviced by the Government.

Validation of Input Tax

25. They proposed that section 17(2)(b) should be deleted because it denies taxpayers VAT refunds that are rightfully due and owing to them is a violation of the taxpayers' rights to property as guaranteed by Article 40 of the Constitution.

Committee's Comments: The provision gives the condition for claiming input VAT in that documentation necessary for making the claim must be availed for it to be allowed. It is meant to ensure that the refunds do not lead to loss of revenue due to false claims.

3.2 KENYA ASSOCIATION OF MANUFACTURERS (KAM)

In their memorandum, KAM proposed the following amendments:-

Income Tax Act

26. That section 12D should either be **deleted** in its entirety or **replaced** as follows,

12D (1) Notwithstanding any other provision of this Act, a tax to be known as minimum tax shall be payable if –

'(a) that person's income is subject to tax pursuant to section 3(2)(a)(i) of this Act; and

(b) that person's income is not chargeable to tax under sections 12C, 19, 19A, 20 or 21 or the Eighth Schedule or the Ninth Schedule to this Act; and

(c) that person's income is not tax exempt from tax under this Act or under any applicable law; and

(d) that person if newly incorporated is at least in the fifth year since commencement of business provided that such person is a subsidiary (within the meaning of the Companies Act) of an incorporated person in Kenya that has been conducting business in Kenya and which is at least in the fifth year since commencement of business, then such person even though newly incorporated does not need to be in at least the third year since commencement of business; and

(e) in addition:

(i) the aggregate instalment tax that would be payable by that person in a year of income under section 12 would be lower than the minimum tax that would be payable by such person pursuant to this section, in which event only the minimum tax and not the instalment tax will be payable; or

(ii) If that person's computation of chargeable gains or profits under section 3(2)(a)(i) for the year of income would result in loss, that person's computation of chargeable gains or profits under section 3(2)(a)(i) for the two (2) previous years has resulted in a loss in each of the two (2) previous years of income.

(2) The tax payable under this section shall be paid in instalments which shall be due on the twentieth day of each period ending on the fourth, sixth, ninth and twelfth month of the year of income.

(3) Where a person who qualifies for an allowance under the Second Schedule of this Act, shall deduct the taxable benefit resulting from such allowance from the tax payable under this section to determine the actual tax payable in the year of income.

(4) The tax payable under this section shall be applicable for set off against future tax payable.

(5) Public and export companies shall be eligible to make an application for exemption from the requirements of section 12D.
(6) Regulations shall be developed for the better carrying out of these provisions'.

Committee's comment: The minimum tax which shall apply to all persons whether they are making profits or incurring losses seeks to expand the tax base and also ensure that companies that make perpetual losses contribute towards enabling the Government in the provision of services. The rationale for this tax is that even where companies are making losses, they continue enjoying facilities, such as infrastructure, whose cost of construction continue being serviced by the Government.

However, income exempt from tax under the First Schedule of the Income Tax Act, employment income, residential rental income, income under turnover tax regime, capital gains and extractive industries shall not be subject to the minimum tax.

27. Amend Paragraph 11 of Head B of the Third Schedule to the Income Tax Act by deleting the words '*one percent*' and replacing with the words '*zero-point two five percent*'. This is because the proposed percentage is extremely high and will affect businesses in the country.

    Committee's comment: The rates provided are only minimum percentage of the gross turnover hence the prevailing rates should remain at 1% to ensure that companies that make perpetual losses pay this minimum rates to contribute to growth of tax revenue.

28. Amend Head B of the Third Schedule to the Income Tax Act by deleting the proposed clause and retaining the current rates. This is because the economy is yet to recover from the effects of the COVID-19 pandemic and the extra income is still necessary to cushion and sustain household needs.

29. Amend the Bill by deleting the amendments proposed to Item 2(a) and Item 5(d)(i) because corporate taxpayers are dealing with huge losses and general impact of the COVID-19 pandemic, any additional taxes will impact negatively and will have a ripple effect on the economy.
    Committee's Comment: The Government has relaxed the containment measures which has subsequently led to resumption of relative normalcy in the economy. It is on these grounds that it has become necessary that the rates be revised in order to enhance revenue collection.

30. Amend Paragraph 3(d) of the Third Schedule to the Income Tax Act by replacing the rate of tax on dividends for non-residents from 15% to 10%. This is to help spur international investment in the country.
    Committee's Comment: The proposal to reduce rate of tax on dividends paid out on non-residents to 10% will erode revenue targets. The proposal is therefore rejected.

Value Added Tax Act

31. Proposed the deferment of effective year of implementation of the proposed 14% Value Added Tax to January 2022 as opposed to January 2021 because prices of key raw materials have increased between 50% and 70% due to overall global impact of COVID-19 and distorted supply chains which has created shortages of many such raw materials.

Committee's Comments: The proposal is to be handled under delegated legislation and not through the Bill.

3.3 KENYA PRIVATE SECTOR ALLIANCE (KEPSA)

In their memorandum, KEPSA proposed the following amendments:-

32. They proposed that minimum tax should be abolished because it ignores the complexity, sensitivity and dynamics of various economic sectors. They argue that the tax will be use as a blanket tool to punish a few culprits who manipulate their books to pay little or no tax.

33. Amendment of Section 12D of the ITA to include the following paragraphs, '*(1)(d) that person has three years' consecutive tax losses; (2) The tax payable under this Section shall be paid by the last day of the fourth month following the end of the year of income; and (3) The tax payable shall be an advance tax.* This is because imposition of the tax in its current form negates the spirit of the COVID-19 tax concession effectively reducing tax for profit making companies while punishing companies which are facing economic distress.

34. Amend section 15(4) of the Income Tax Act by deleting the word '*nine*'. This will ensure that companies in tax losses as a result of difficult operating environment or start-ups which are struggling to build market share are not exposed to double taxation through capping of losses and through the minimum tax.

    Committee's Comment: The minimum tax is meant to ensure that companies that make perpetual losses contribute towards provision of infrastructure by the Government. The rationale for this tax is that even where companies are making losses, they continue enjoying facilities, such as infrastructure, whose cost of construction continue being serviced by the Government.

35. Inclusion of the following transitional provision under Section 133 of the ITA, '*(7) Notwithstanding the repeal of the Second Schedule, the capital allowances under the repealed Schedule shall continue to apply to assets purchased prior to the 2020 year of income.* The proposal will allow for seamless transition from the old Second Schedule to the current Schedule and ensure that persons who invested under the old regime are not disenfranchised.

36. Amend paragraph 3(d) of the Third Schedule by deleting the word '*fifteen*' and substituting therefor the word '*ten*'. The increase of corporation tax rate to 30% coupled with the increase in withholding tax rate on dividends from 10% to 15%, changes Kenya's effective tax rate from 37% before COVID-19 to 36.25% during COVID-19 to 40.5% if the corporation rate increases without a corresponding reduction of the withholding tax on dividends.
    Committee's Comment: The proposal in paragraphs 34 and 35 will be at a later date. The National Treasury has already done revenue projections hence any change in the rate will impact the forecasted government revenues.

37. Amend sub-paragraph (viii) of 2(a) of the third schedule to Income Tax Act by excluding the proviso to the applicability of 25% corporation tax rate. This proviso will introduce challenges during the computation of annual tax review and filing of tax returns given that it is expected that

resident companies will be required to apportion their income prior to determining the annual tax position.

38. They were opposed to the increase in the PAYE tax rate from 25% to 30% because the proposed increase will reverse the gains made by the Government to cushion its citizens from increased cost of living and the cash disposable for consumption. In the context of prevailing conditions due to Covid-19 challenges, the Government should extend the relief to its working citizens until such a time that the economy stabilizes or shows signs of recovery.

Committee's Comment: The Tax Laws (Amendment) Act, 2020 reduced the individual top tax rate from 30 % to 25% and the reduction was meant to cushion employees from the effects of COVID -19 and to ensure that there had more disposable income. Due to the relaxation of the COVID -19 containment measures and subsequent resumption of normalcy in the economy, it is necessary to revert to the pre-COVID- 19 tax rates in order to improve tax revenue.

39. They supported the introduction of a new sub-section for input tax credit against output tax for registered manufacturers on taxable supplies made to official aid funded project because it will save the manufacturers cash flow wise by reduction of output tax payable with the input tax on such supplies or by claim of refund on input tax paid where supplies to the official aid funded project is zero rated.

3.4 PETROLEUM INSTITUTE OF EAST AFRICA (THROUGH WESTIMINSTER CONSULTING), OLA ENERGY KENYA LIMITED, TEXAS ENERGY LIMITED, HASS PETROLEUM, VIVO ENERGY KENYA LIMITED, GULF ENERGY LIMITED, TOTAL KENYA PLC, RUBIS ENERGY KENYA LIMITED AND NATIONAL OIL CORPORATION OF KENYA

40. In their memoranda, they submitted that section 12 of the Income Tax Act should be amended in order to exempt the income of Oil Marketing Companies (OMCs) from payment of the Minimum tax. This is because prices of petroleum products in Kenya are regulated by the government vide the Energy Petroleum Regulatory Authority (EPRA) and OMCs have no role to play in determining the prices. The prices of petroleum products are not based on market forces and the margins are predetermined by EPRA. Imposing minimum tax will erode the predetermined single digit margins and render OMC's business untenable.

41. Additionally, petroleum products' turnover constitutes of cost of products, taxes and levies and operational costs with taxes and levies making up about 60% of the turnover. It will be punitive for the same turnover to be subjected to additional taxes. Imposing Minimum Tax will amount to tax on tax which contravenes the acceptable taxation principles, canons and best practices.

42. Finally, OMC's that participate in the Open Tender System (OTS) have very low margins ranging between 0.5% to 0.8%. Imposition of Minimum Tax will cause importers of petroleum products to withdraw from OTS. This will lead to loss of revenue to the government and higher prices of petroleum products thereby negating the benefits of the OTS.

Committee's Comments: The Committee agreed to their proposal for exemption of OMCs from the application of Minimum Tax noting that the industry is already highly regulated by EPRA in terms of price control. Therefore, there is no little or no room to increase price arbitrarily. Given the nature of operations of petroleum industry, particularly the fact that the pricing is controlled by the Government, it will be fair to base their tax on their income before deduction of depreciation, interest and tax on income.

3.5 DELOITTE AND TOUCHE

In their memorandum Ref: FK/NA/151220 dated 15th December, 2020, Deloitte proposed the following amendments:-

Minimum Tax

Amend section 12D (1) (c) as follows:-

43. Inserting the following new sub-section immediately after sub-section 12(D) (1) (c), *'(d) that person's net profit margin is above four percent of the gross turnover'*. This is to shield low margin businesses since the minimum tax may turn to be a direct cost to such businesses.

44. Inserting the following new sub-section immediately after sub-section 12(D) (1) (d), *'(e) that person is in the insurance or agricultural sector'*. This is because the insurance sector is taxed under a specified tax regime under the Income Tax Act.

45. Inserting the following new sub-section immediately after sub-section 12(D) (1) (e), *'(f) that person is in a net tax loss position for more than three consecutive years of income'*. This is to avoid subjecting persons who incur losses in a given period due to circumstances beyond them. The three-year period offers a reasonable period of recovery to such businesses.

46. Inserting the following new sub-section immediately after sub-section 12(D) (1)(f), *'(g) that person has been in operation for a minimum period of three years since the date of incorporation'*. This is necessary to shield start-up businesses which may be unprofitable in the initial years but have immense potential in future years particularly capital-intensive projects.

47. Amending section 12D of the Income Tax Act by inserting the following sub-section 3A, *'(3A) the amount of tax determined under section 12(D)(1) shall be reduced by the aggregate of tax paid under sections 12(2)(a) or 12(2)(b) or 12A or 35 or 37'*. This is to avoid the complexities that arise from estimation of gross turnover and avoid a scenario where a person is in a minimum tax regime and instalment tax regime on different due dates but within the same year.

48. Amending the proposed section 12(D)(2) by introducing the following proviso, *'provided that a person shall be allowed to take a deduction of the Minimum Tax paid during the year where the total tax payable during the year exceeds the Minimum Tax paid'*. This will give the Commissioner a leeway to provide guidelines to address any grey areas given that this is a new tax in Kenya.

49. Introduction of the following new section 12(D) (3), *'(3) The Commissioner may prescribe the conditions and procedures governing the Minimum Tax'*. This is to ensure that tax benefits entitled to the taxpayers are not clawed back abruptly.

50. Amendment of section 133 of the Income Tax Act by inserting the following new sub-section immediately after sub-section 6, *'(7) Notwithstanding the introduction of section 12D, this tax shall only be applicable where the accumulated tax losses as at 31st December, 2020 are fully exhausted or expired*'. This is to ensure clarity of the base for computing Minimum Tax.

51. Introduction of the following proviso under paragraph 11 of the Third Schedule of the Income Tax Act, '*For purposes of Minimum Tax, gross turnover shall be equal to the turnover as determined under the International Financial Reporting Standards. For avoidance of doubt, gross turnover shall exclude output VAT, excise duty, other form of levies and any credit notes*'. This is to ensure that gross turnover is clear to the taxpayers as the same needs to be determined with certainty for the taxpayers.

Committee's Comments: The Committee agreed with the proposal to exempt Insurance Companies from the application of Minimum Tax. The Committee noted that the minimum tax shall apply to all persons whether they are making profits or incurring losses in order to expand the tax base and to also ensure that companies that make perennial losses contribute towards provision of infrastructure by the Government. The rationale for this tax is that even where companies are making losses, they continue enjoying facilities, such as infrastructure, whose cost of construction continue being serviced by the Government.

However, income exempt from tax under the First Schedule of the Income Tax Act, employment income, residential rental income, income under turnover tax regime, capital gains and extractive industries shall not be subject to the minimum tax.

Resident Corporate Income Tax Rate

52. They proposed that provisos requiring that the rate should be applied depending on the date that the income was earned should be deleted or a clear apportionment criterion is adopted where taxpayers are clear on how the appointment will be done with consideration of some businesses such as tourism which have oscillating levels of activity/income depending on the time of the year. This is because the amendment proposed in the Bill will require an entity to prepare more than one tax computation in a given year of income and apply the different rates of tax on each of the tax computations.

Committee's Comment: Tax Laws (Amendment) Act, 2020 came into force on 25th April, 2020. The rates in the Tax Laws (Amendment) Act therefore applies only to income that is earned from 25th April, 2020 and not the whole year's income. This is the same case with employment income where employees only enjoyed the reduced rates from 25th April, 2020 and will have to account for such income charged at different rates. Considering that taxes cannot apply retrospectively, the proposal to delete the proposed proviso is therefore not supported.

3.6 INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA (ICPAK)

In their letter Ref: ICPAK/CE-PPR/12-1/2020 dated 15th December, 2020, the Institute proposed the following amendments:-

Minimum Tax

53. Opposed the introduction of Minimum Tax and instead proposed collection of additional revenue through the increase in VAT rate from 14% to 16% because this has less distortionary effect in the economy.

Committee's Comments: The minimum tax is meant to ensure that companies that make perpetual losses contribute towards provision of infrastructure by the Government. The rationale for this tax is that even where companies are making losses, they continue enjoying facilities, such as infrastructure, whose cost of construction continue being serviced by the Government.

Third Schedule, Item 2A of the Income Tax Act

54. Delete the proposed proviso to sub-paragraph (viii) which reads, '*Provided that this provision shall apply to the income earned from 1st January, 2021*' because it will complicate tax compliance for companies since they will be required to prepare at least two or more tax computations i.e. for companies whose year-end is March, they will be required to prepare three sets of tax computations. Tax law should be easy to implement and comply with. The proviso in the Bill will make tax compliance difficult and likely result in lower rates of full compliance.

55. Delete the proposed proviso '*Provided that this provision shall apply to the income earned from 25th April, 2020*' and replace with '*Provided that this provision shall apply for the year of income commencing on or after 1st January, 2020*'. Introduction of the proviso implies that taxpayers only enjoy the benefit for eight (8) months.

    Committee's Comment: Tax Laws (Amendment) Act, 2020 came into force on 25th April, 2020. The rates in the Tax Laws (Amendment) Act therefore applies to only income that is earned from 25th April, 2020 and not the whole year's income. This is the same case with employment income where employees only enjoyed the reduced rates from 25th April, 2020 and will have to account for such income charged at different rates.

    Considering that taxes cannot apply retrospectively, the proposal to delete the proposed proviso is therefore is not supported.

VAT Act

56. Amend section 17 (8) by deleting the words '*who is a manufacturer*'. This is because the right to claim input VAT should not be restricted only for manufacturers especially because other traders may exist in the value chain between manufacturers and the users of the products in the official aid funded projects.

    Committee's Comment: The amendment as contained in the Bill is meant to encourage local manufacturing in support of the Big Four Agenda and hence the claiming of input VAT is only meant to cover manufacturers. The claiming of input VAT shall be with the approval of the Cabinet Secretary upon fulfillment of certain requisite requirements to be provided under regulations.

57. Section 17(2)(b) should be deleted because it is punitive to the purchaser/supplier by unconstitutionally putting the onus on the taxpayers to provide full details of sales invoices for the buyer to be allowed to claim the input against their output VAT. KRA should enhance linkages between the electronic tax registers and the iTax platform to allow for automatic offsetting of input and output VAT for enhanced compliance and reduced claims.

Committee's Comment: It is only through the production of sales invoices can a purchaser claim input VAT. The provision is meant to ensure that before input VAT can only be claimed where suppliers of goods eligible VAT refund.

3.7 PKF TAXATION SERVICES LIMITED

In their letter Ref: PKFTAX/NA-3/2020/mkm/jm dated 16th December, 2020, PKF proposed the following amendments:-

Minimum Tax

58. They proposed that the following amendments should be made to the Minimum Tax to make it effective: the rate of the tax should be lowered; list of exclusions should be widened to include businesses that are already subjected to the withholding tax regime; businesses that are in loss making positions arising from capital allowances and other tax incentives be excluded from these requirements for a reasonable period following the date of such allowances; the definition of gross turnover should be clarified; and the Minimum Tax should be calculated at the end of the accounting period as parallel to the final tax calculation wherein the higher of the two is payable at one time as part of final taxes (which also resets the base for the next year instalments) and significantly eases the administration.

    Committee's Comments: The minimum tax is meant to ensure that companies that are on perpetual losses contribute towards provision of infrastructure by the Government. The rationale for this tax is that even where companies are making losses, they continue enjoying facilities, such as infrastructure, whose cost of construction continue being serviced by the Government.

Corporate Income Tax Rate

59. No resident person has enjoyed the lower rate of 25% due to ambiguity on which period the rate is to be applied and iTax is still not configured to allow for use of the 25% rate. The Bill provides that the rate of 25% will apply to income earned from 25th April, 2020 to 31st December, 2020. This position needs to be clarified so that it is clear to all taxpayers how the 25% corporate income tax rate will be applied.

    Committee's Comments: Tax Laws (Amendment) Act, 2020 came into force on 25th April, 2020. The rates in the Tax Laws (Amendment) Act therefore applies to only income that is earned from 25th April, 2020 and not the whole year's income.

Section 17 of the VAT Act

60. The proposal for registered manufacturers to claim input tax in respect of taxable supplies made to an official aid funded project as may be approved by the Cabinet Secretary will increase the liquidity of manufacturers because they will be in a position to claim input VAT on exempt projects. However, not all suppliers to official aid funded projects are manufacturers and therefore there is need to consider all sectors in order to promote businesses.

    Committee's Comment: The amendment as contained in the Bill is meant to encourage local manufacturing in support of the Big Four Agenda and hence the claiming of input VAT is only meant to cover manufacturers. The claiming of input VAT shall be with the approval of the

Cabinet Secretary upon fulfillment of certain requisite requirements to be provided under regulations.

3.8 PRICEWATERHOUSECOOPERS LIMITED (PWC)

In their memorandum Ref: TAX/TM/AR dated 15th December, 2020, PWC proposed the following amendments:-

Withholding tax

61. That Paragraph 3(d) of Head B of the Third Schedule is amended to read as follows, *'(d) In respect of a dividend, ten percent of the amount payable'*. This is because the reversal of the corporate tax rate without a similar reduction in WHT rate will result in an increase in the effective tax rate of companies owned by non-residents from 37% to 40.5%.

The effective date for corporate tax

62. That Paragraph 2(a) (viii) of Head B of the Third Schedule to the Income Tax Act by deleting the proviso to (viii) and inserting the following sub-paragraph immediately after sub-paragraph (viii), *'(ix) For the year of income 2021 and each subsequent year of income shs. 6.00'*. This is because the paragraph as was would create significant administrative and accounting challenges for taxpayers.

Value Added Tax Act

63. In addition to manufacturers, service providers should be allowed deduction of input tax with respect to taxable supplies made to official aid funded projects. This is because the proposal to only allow manufacturers is discriminatory as it does not consider service providers and therefore contravenes the key principals of taxation.

64. Supplies to official aid funded projects should be excluded from the apportionment formula. This is the case for input tax incurred on expenses such as overheads which may not be directly attributable to supplies to official aid funded projects and will need to be apportioned accordingly.

3.9 ASSOCIATION OF KENYA INSURERS (AKI)

In their memorandum dated 15th December 2020 submitted by PWC, the Association of Kenya Insurers (AKI) proposed the following amendments to the Bill: -

Minimum Tax

65. Section 12D(2) of the Income Tax Act should be amended to read as follows, '*That person's income is not chargeable to tax under sections 5, 6A, 19, the Eighth Schedule and the Ninth Schedule'*. This is because during enactment of the minimum tax provisions, the Government appreciated that there are sectors which are taxed differently and therefore application of minimum tax to them would not yield the desired results.

66. Additionally, insurance companies are already paying 1% insurance premium levy on their gross direct premiums written. Introduction of minimum tax at 1% of gross premium will amount to tax on the insurance premium levy.

67. In conclusion, insurance sector is experiencing financial constraints and insurance companies are already struggling to settle claims. Introducing minimum tax on their gross premiums will exacerbate the already dire cash-flow constraint being experienced industry wide.

Committee's Comments: The Committee agreed to support the exemption of Insurance Companies from the application of Minimum tax as they are already covered under a different taxation system. The taxation of insurance companies is ringfenced under Section 19 of the Act and therefore the minimum tax should not apply to them

3.10 E-CART SERVICE KENYA LIMITED

In their memorandum dated 15th December 2020 submitted by PWC, E-cart Services Kenya Limited proposed the following amendments to the Bill: -

Minimum Tax

68. Amend section 12D of the Income Tax Act by amending sub-section 2 to read as follows, '*That person's income is not chargeable to tax under section 5, 6A, the Eighth Schedule, Ninth Schedule or if that person is an e-commerce business*'. Exempting resident e-commerce businesses from minimum tax will go a long way in equaling the playing field and thereby encouraging local e-commerce start-ups.

69. Amend Section 2 of the Income Tax Act by inserting the following definition, '*E-commerce business means a resident person who acts as a digital marketplace*'. Kenya's e-commerce sector is at the infancy growth stage characterized by tax losses. Consequently, saddling this sector with minimum tax, which is a sunk cost, will increase the break-even period which is already long.

70. Amend the Third Schedule to the Income Tax Act in Heading B by amending Paragraph 11 to read as follows, '*The rate of tax in respect of minimum tax under section 12D shall be **zero-point five** percent of the gross turnover*'. This is because other comparable jurisdictions such as Nigeria, Tanzania and Ivory Coast have minimum tax rates which are less than or equal to 0.5%.

71. Amend the Third Schedule to the Income Tax Act in Heading B by amending Paragraph 11 to read as follows, '*The rate of tax in respect of minimum tax under section 12D shall be zero-point five percent of the Earnings Before Interest and Tax*'. This is because the transition from turnover based taxes to net income-based taxes in the twentieth century is a clear indication that turnover based taxes do not yield the desired income in the long run.

72. Amend Section 12D of the Income Tax Act by inserting the following sub-section 3, '*For entities in tax losses, minimum tax will be advance corporate tax payments and shall be used to reduced taxes due in subsequent periods*'. This is because minimum tax should be treated as an advance tax.

Committee's Comments: The minimum tax is meant to ensure that companies that make perennial losses are brought on the tax base to ensure that there is also contribute to revenue growth. Likewise, some companies understate their profits and as such pay CIT hence the introduction of Minimum Tax.

Digital Service Tax (DST)

73. Amend Section 12E (1) of the Income Tax Act to read as follows, '*Notwithstanding any other provisions of this Act, a tax to be known as digital service tax shall be payable by a non-resident person who sources payments from Kenya'*. This is because resident e-commerce entities are already paying their fair share of taxes in Kenya including Corporate Income Tax, Minimum Tax, Value Added Tax and now DST. Consequently, the playing field for resident and non-resident entities is not at par given the above obligations and as illustrated earlier.

74. Amend Section 12E of the Income Tax Act by introducing the following new sub-clause (3), '*Notwithstanding the above, digital service tax shall not be charged on any service whose payment is subject to withholding tax under section 35 of the Act'*. This is because charging DST on services subject to WHT amounts to double taxation. This further exacerbates cash flow challenges occasioned by DST and minimum tax payment.

    Committee's Comment: The proposal will be re-looked into at a later date.

3.11 KENYA BANKERS ASSOCIATION (KBA)

In their memorandum dated 15th December, 2020 and oral presentation made on behalf of KBA by KPMG, they proposed the following amendments relating to Corporation Income Tax (CIT) and Minimum Tax:-

Corporation Tax Rate

75. They proposed that the proviso to sub-paragraph 2(a) (viii) of the Third Schedule to the Income Tax Act on the applicability of the 25% corporation tax rate should be deleted because it is unconstitutional, unlawful and the proposed retrospective change in Corporate Tax rate from 25% to 30% will introduce compliance challenges in terms of tax computation and filing of tax returns given that it is expected that companies will be required to come up with two to three sets of tax computations for one year of income.

    Committee's Comments: The Tax Laws (Amendment) Act, 2020 reduced the CIT from 30 % to 25% and the reduction was meant to cushion companies from the effects of COVID -19 since most businesses were closed. Due to the relaxation of the COVID -19 containment measures and subsequent resumption of normalcy in the economy, it is necessary to revert back to the pre-COVID- 19 tax rates in order to improve revenue collection.

Minimum Tax

76. They proposed that the proposed amendment to section 12D in the Bill should be deleted because the tax is regressive and anti-business because it claws back existing tax incentives such as capital allowances and seeks to tax turnover as opposed to taxing profits. Alternatively, they proposed the following amendments to section 12D:-
77. Introduce the following new paragraph, '*(d) That person has three-years consecutive tax losses*'. This is to address the retrogressive nature and challenges posed by imposition of Minimum Tax in its current form. The proposed amendment aligns the tax to international best practice and seeks to protect newly established businesses.

78. Introduce the following new paragraph, *'(e) That person has been in business for more than three years since commencement of a given business'*. This will address the National Treasury's concerns on companies in perpetual tax losses without punishing companies facing economic strains such as those associated with start-ups and COVID-19.

79. Introduce the following new paragraph 3, *'(3) The tax payable under this section shall be paid by the last day of the fourth month following the end of the year of income'*. Introduce the following new paragraph 4, *'(4) The tax payable shall be an advance tax'*. This is because imposition of tax in its current form negates the spirit of the COVID-19 tax concession effectively reducing tax for profit making companies while punishing companies that are facing economic distress.

80. Delete paragraph 11, Head B of the Third Schedule to the Income Tax Act and replace it with the following paragraph, '11. The rate of tax in respect of Minimum Tax under section 12D shall be zero-point five percent of the gross turnover.

Section 15 of the Income Tax Act

81. Amend section 15(4) as follows, *'(4) Where the ascertainment of the total income of a person results in a deficit for a year of income, the amount of that deficit shall be an allowable deduction in ascertaining the total income of such person for that year and the succeeding years of income'*. This will ensure that companies in tax losses as a result of significant capital investments, difficult operating environment or start-ups which are struggling to build the market share are not exposed to double taxation through capping of losses and through the Minimum Tax.

Section 133 of the Income Tax Act

82. Include the following transitional provisions under section 133 of the Income Tax Act, *'(7) Notwithstanding the repeal of the Second Schedule, the capital allowances under the repealed Schedule shall continue to apply to assets purchased prior to the 2020 year of income'*. This will allow for seamless transition from the old Second Schedule to the current schedule and ensure that persons who invested under the old regime are not disenfranchised.

Paragraph 3 of the Third Schedule

83. Amend paragraph 3(d) of the Third Schedule by deleting the word '*fifteen*' and replacing with the word '*ten*'. This is to make Kenya attractive to investors.

Committee's Comment: The proposal will be considered at a later date to avoid distortion of revenue projections.

3.12 OXYGÈNE

In their memorandum, they proposed the following amendments:-

84. The corporate tax rate of 30% should be reinstated in May 2021 as opposed to January, 2021 because the proposal as written seeks to amend the law retrospectively which makes it void in law as the law can only be applied prospectively.

    Committee's Comment: This will be addressed through guidelines.

85. Withholding tax rate on dividends paid to non-residents should be reinstated to 10% because the tax rate for non-resident shareholders will increase from 36.25% to 40% from 1st January, 2021. This will potentially harm the country's reputation as a foreign investment hub.

Minimum Tax

86. It is not clear how turnover is defined. The proposed definition should only include trading and not investment based turnover as this is already taxed at source. Corporates especially MSMEs have already predicted losses owing to the prevailing environment. Implementation of minimum tax should be postponed for at least two (2) years because introduction of minimum tax at the time when businesses are struggling and hoping for a quick economic recovery appears ill timed.

    Committee's Comment: The definition of the term and how this tax will be calculated will be addressed through guidelines.

87. Taxes based on turnover are retrogressive and have adverse effects on the economy. Earnings before interest and taxes (EBIT) is an appropriate base since it allows a company to pay tax based on its income as opposed to turnover and it is therefore in line with the equity canon of taxation.

88. Minimum Tax paid should be available for offset against future tax liabilities. This is to avoid minimum tax becoming a consumption tax and to cushion the economy against reduced foreign direct investments, minimum tax should be utilized against future taxable profits as some companies pay tax.

89. Tax loss carry forward period should not be restricted with minimum tax in place. Introduction of minimum tax means that all qualifying corporates will pay income tax through minimum tax. Enhanced exemptions from minimum tax – low margin businesses such as e-commerce platforms and retailers as well as capital intensive entities such as power companies and agricultural companies should be exempted from minimum tax. Newly registered/established businesses should be exempt from minimum tax in the first five years of incorporation. Newly established businesses need a few years to establish a foundation and more often than not, these first few years are usually loss-making years.

3.13 EAST AFRICAN TEA TRADE ASSOCIATION (EATTA)

90. In their letter dated 15th December, 2020 and oral presentation, EATTA submitted that imposition of the Minimum Tax should either be halted until the economy recovers from the effects of COVID-19 or provide that Minimum Tax will apply where an entity reports losses for three (3) consecutive years or there should be a moratorium of one year to allow for the sensitization of companies on the implications of Minimum Tax as enshrined in the Constitution or incentives on investment and depreciation schedules should be retained in order to boost investment in the tea sector.

    Committee's Comment: The Minimum Tax is meant to apply at a rate of 1% on the gross turnover so as to ensure that the companies that are perpetually declaring losses are also contributing to revenue growth as they are also enjoying infrastructure such as roads, and other such facilities provided using taxpayers monies.

3.14 CONSUMER FEDERATION OF KENYA (COFEK)

In their memorandum, COFEK submitted that:-

91. The Bill provides that corporate tax rate should be reverted to the pre-COVID-19 rate of 30% effective 1st January 2021. This is not a good proposal because consumers are still in the in the middle of the COVID-19 period and are struggling to adjust considering higher unemployment, higher food prices, higher transport costs and higher energy costs. Due to the above reasons, the review of the corporate tax should be suspended and introduced in the Finance Bill of the FY 2021/2022.
Committee's Comment: In September, the Government relaxed the containment measures which subsequently led to resumption of normalcy in the economy. It is on this ground that it has become necessary that the rates be reversed in order to improve revenue collection.

92. The Bill further seeks to provide clarity by including a provision that states that the reduced rate will apply to the income earned from 25th April 2020. COFEK stated that it will be difficult for Kenya Revenue Authority (KRA) to apportion incomes earned in different periods and charge different tax rates i.e. as from January to March 2020 at 30% and from April to December 2020 at 25% (in the case of a December year-end). More importantly, it is not possible to apply law retrogressively in Kenya.

93. Pay As You Earn (PAYE) tax rates have been returned to the high pre-COVID-19 rate of 30%. This is not good because consumers are still affected by COVID-19. It is therefore premature, ill-advised, irrational and unacceptable to revert to higher taxes.
Committee's Comment: In September, the Government relaxed the containment measures which subsequently led to resumption of normalcy in the economy. It is on this ground that it has become necessary that the P.A.Y.E rates be reversed in order to improve revenue collection

3.15 ANJARWALLA & KHANA LLP

In their memorandum Ref: DNG/KKN/GEN dated 17th December, 2020, they proposed the following amendments to the Bill:-

Minimum Tax

94. Companies in a tax loss position due to capital allowances should be exempt from the application of minimum tax because capital allowances apply as tax incentives to investments as they offer tax relief to the relevant company for the costs of investment incurred.

95. Minimum tax should only be applied to companies that have perennial tax losses as a tax avoidance tool. Companies that have genuinely incurred tax losses in their ordinary course of business should not be subjected to the unfair burden of incurring further expenditure in the form of minimum tax.

96. Newly incorporated companies should be exempt from minimum tax in the initial years of operation because most start-ups incur huge expenditure when setting up and in the initial stages of operations before the business and flow of revenue stabilizes.

97. As currently drafted, the provisions relating to minimum tax do not allow a taxpayer to claim tax credit in respect of minimum tax. Furthermore, under the provisions of the Income Tax Act, a tax is not a deductible expense when computing the taxable income of a company. This is punitive to companies in a loss-making position as these companies cannot offset the minimum tax paid even when the company becomes profit making.

98. The country is currently grappling with the adverse economic effects of the COVID-19 pandemic which include closure of businesses, job cuts, unemployment, profit warnings and shrinking of the economy. Introducing minimum tax at this time when majority of businesses are expected to report tax losses places the businesses at a worse position.

99. In conclusion, they proposed that the introduction of minimum tax should be shelved and therefore paragraph 12D of the Income Tax Act should be deleted until such a time when the above issues are considered and resolved.

Committee's Comment: Minimum Tax is based on the gross turnover and not the accounting profit. The objective of introducing minimum tax is to cure the perennial challenge where taxpayers are perpetually declaring losses while ironically still able to meet other financial obligations and continue operating as a going concern. Therefore, this proposal is not supported.

3.16 KIPKENDA AND CO. ADVOCATES

In their memorandum Ref: SK/18/PAL/4099 dated 14th December, 2020, they submitted that:-

100. Payment of Minimum Tax should not commence on 1st January, 2021 because taxpayers have been affected by the COVID-19 pandemic and need time to recover. Additionally, start-ups that are unprofitable should be exempted from minimum tax for two (2) to three (3) years.

101. KRA should be given discretion to exempt deserving businesses i.e. businesses that have a huge turnover but make losses with an option of delayed payment when the business picks up or profits are declared.

102. They also proposed that there should be clarity on whether payment of Minimum Tax is an advance tax such that it can be used to offset future tax liabilities as was in the case of instalment tax. Finally, they stated that the workings of Minimum Tax are contrary to the provisions of section 3 of the Income Tax Act which stipulates that an income tax shall be levied on gains/profit.

103. The re-introduction of the thirty percent (30%) tax rate is too soon because of the negative impact of the COVID-19 pandemic on the Kenyan economy. they proposed that the effective date for the re-introduction of the tax should be gazetted by the Cabinet Secretary once the economy recovers.
Committee's Comment: In September, the Government relaxed the containment measures which subsequently led to resumption of normalcy in the economy. It is on these grounds that it the Minimum Tax should be implemented as envisaged under the Finance Act, 2020 in order to net the companies that are in a perpetual loss position so at to improve tax revenue.

Minimum Tax is based on the gross turnover and not the accounting profit. The objective of introducing minimum tax is to cure the perennial challenge where taxpayers are perpetually declaring losses while ironically still able to meet other financial obligations and continue operating as a going concern.

3.17 APEX STEEL LIMITED

104. In their letter dated 14th December, 2020, the Company supported the proposed amendment that a registered manufacturer may make a deduction for input tax with respect to taxable supplies made to an official aid funded project as may be approved by the Cabinet Secretary in accordance with the First Schedule because it will create an enabling environment that will ensure the development and nurturing of a globally competitive private sector.

3.18 KENYA BREWERIES LIMITED/UDV KENYA LIMITED

105. In their letter dated 15th December, 2020, the Companies submitted that the lower tax rates of 25% for corporate and individual income should remain in place for six more months in order to allow for medium term recovery of household income and the manufacturing sector. Increase in income tax rates will undermine alcohol manufacturers' capacity for production and distribution of alcohol beverages. The proposed increase will also humper the industry's ability to prevent massive job losses where several people previously employed in bars, resorts and restaurants will lose their jobs.

Committee's Comment: The containment measures COVID -19 have been relaxed and the economy has resumed normalcy. It is on this ground that it has become necessary that the rates be reversed in order to improve revenue collection.

3.19 FEDERATION OF KENYA PHARMACEUTICAL MANUFACTURERS (FKPM)

106. In their letter ref: FKPM/119/12/2020/CNA dated 9th December, 2020 the Federation submitted that the Tax Laws (Amendment) Act, 2020 removed medicaments and vaccines from the zero-rate schedule of the Value Added Tax (VAT) Act, 2013 and included them on the Exempt Schedule of the Act.

107. They requested the Committee to remove locally manufactured medicaments and vaccines (HS Codes 3003 and 3004) from the Exempt Schedule of the VAT Act and include them on the Zero Rate Schedule or introduce a standard of not more than 4% VAT rate for all medicaments and vaccines (HS Codes 3003 and 3004).

108. They also requested for the harmonization of HS Codes across the Tax Laws (Amendment) Acts to reflect the HS Codes under Chapter 30 in the CET 2017 specifically for medicaments falling under headings 3003 and 3004.

Committee's Comment: To be addressed at a later date.

3.20 KENYA NATIONAL CHAMBER OF COMMERCE AND INDUSTRY (KNCCI)

In their memorandum dated 15th December 2020, the Kenya National Chamber of Commerce and Industry proposed the following amendments: -

Minimum Tax 12D

109. Suspend the Minimum Tax for 12 months to allow for more consultations on the impact of the tax on the economy, including the reduction of the minimum tax rate; provide clarity on whether the Minimum Tax will be applicable to taxpayers whose instalment taxes are lower than the minimum tax; KRA should issues administration guidelines for the operationalization and address the administrative uncertainties; and KRA should continue using the audit process to determine the accuracy of the losses as reported by companies. More than 50% of all the sectors in the economy are projected to make losses and thus they will be denied the ability to carry forward losses through the introduction of Minimum Tax.

Committee's Comment: The minimum tax is meant to ensure that companies that are on perpetual losses contribute towards provision of infrastructure by the Government. The rationale for this tax is that even where companies are making losses, they continue enjoying facilities, such as infrastructure, whose cost of construction continue being serviced by the Government.

Guidelines on Minimum Tax shall be issued to guide operationalization of Minimum Tax.

3.21 KENYA RENEWABLE ENERGY ASSOCIATION (KEREA), GOGLA, THE CLEAN COOKING ASSOCIATION OF KENYA (CCAK), AFRICA MINI-GRID DEVELOPERS ASSOCIATION (AMDA) AND THE AFRICA CLEAN ENERGY TECHNICAL ASSISTANCE FACILITY (ACETAF)

In their memorandum dated 15th December 2020, these organizations proposed the following amendments to the Bill: -

Proposed Clauses

110. Amend the section A of Part 1 of the First Schedule to the Value Added Tax Act, 2013 by inserting the following new paragraphs immediately after paragraph 110,

   a. *'111. Specialized equipment for generation and utilization of Solar and Wind Energy which included Photovoltaic (PV) Modules, Direct Current Change Controllers, Direct Current Inverters and Inverter chargers, Solar deep cycle batteries, Solar home systems and Solar Lanterns;*
   b. *112. Taxable goods local purchased or imported by manufacturers or importers of clean cooking stoves or direct an exclusive use in the assembly, manufacture and repair of clean cook stoves;*
   c. *113. Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating), barbeques, braziers, gas-rings, plate warmers and similar non-electric domestic appliances, and parts thereof, or iron or steel of tariff numbers 7321.11.00, 7321.19.00, 7321.82.00, 7321.83.00 and 7321.90.00;*
   d. *114. Plastic bag biogas digesters;*
   e. *115. Biogas; and*
   f. *116. Leasing of biogas producing equipment*'.

111. Amend Part II of the First Schedule to the Value Added Tax Act, 2013 by inserting the following new paragraph immediately after paragraph 30, '*31. Installation of solar panels and wind turbines*'. This is to reduce the cost of off-grid solar and wind home systems, as well as clean cooking products.

Committee's Comment: The Committee observed that exemption from VAT on goods and services specified in paragraph 108 and 109 of the report would make renewable energy affordable to most Kenyans especially those that are off the national grid. However, the proposal to exempt these goods and services will be considered at a later date to avoid distortion of projected revenue.

112. Amend Part A of the Second Schedule to the Value Added Tax, 2013 by inserting the following new paragraphs immediately after paragraph 20,
    a. '*21. Denatured bioethanol of tariff number 2207.20.00; and 22. Sustainable fuel briquettes*'. This is because denatured bioethanol is ultra clean and delivers same health and environmental impact as LPG gas. VAT collections on denatured bioethanol are minimal. The effect of the imposition of VAT is therefore disproportionate. Sustainable fuel briquettes replace the unsustainable produced charcoal and fuel wood thereby protecting the forest cover through reduced deforestation.

Committee's Comment: The Committee observed that zero rating of the above items will be considered at a later date to avoid further distortion of projected revenue.

3.22 MR. ERNEST MUGUKU MURIU

113. In his memorandum dated 13th December, 2020, Mr. Muriu proposed that the Proviso to sub-paragraph (viii), Item 2(a) Head B should be deleted because the proposed proviso will have a retroactive effect of imposing income tax on income earned in the period between 1st January, 2020 to 24th April, 2020 at the rate of 30%. It was expected from the earlier amendment which was enacted on 25th April 2020 that all the income for the year 2020 was to be taxed at the rate of 25%.

114. He also proposed that the new sub-section 8 of section 17 should be amended by deleting the words '*who is a manufacturer*' because it will be unfair to avail the proposed advantage only to manufacturers and it will also contradict Article 201(b) (i) of the Constitution.

Committee's Comment: The amendment as contained in the Bill is meant to encourage local manufacturing in support of the Big Four Agenda and hence the claiming of input VAT is only meant to cover manufacturers. The claiming of input VAT shall be with the approval of the Cabinet Secretary upon fulfillment of certain requisite requirements to be provided under regulations

3.23 ERNST AND YOUNG LLP

In their memorandum Ref: 99999/45/am/2656 dated 15th December, 2020, E&Y LLP submitted that:-

115. The proposal to reinstate the corporation tax rate to 30% on income earned from 1stJanuary, 2021 would not fit well into many taxpayers' business circumstances and in essence fails to appreciate the principle of revenue recognition, presentation and reporting of financial performance of an entity. The revenue recognition and matching principles are a cornerstones of accrual accounting and both determine the accounting period in which revenues and expenses are recognized. As such, the proposal to have tax rates take effect on a specific date without due regard to the accounting year end of the taxpayers is both impractical and would result in unwarranted complexities.

116. Based on the above argument, they proposed the following proviso *paragraph(viii) "provided that this provision shall apply to the income earned for year of income ending on or after 25th April, 2020" ; paragraph (ix) "provided that this provision shall apply to the income earned for the year of income ending on or after 25th April, 2020.*

117. The above-mentioned will give a chance to all taxpayers to apply the lower rate before resuming to the higher rate of 30 % in order to ensure there is certainty, simplicity, harmony and equity on all taxpayers.

Committee's Comment: Tax Laws (Amendment) Act, 2020 came into force on 25th April, 2020. The rates in the Tax Laws (Amendment) Act therefore applies to only income that is earned from 25th April, 2020 and not the whole year's income. This is the same case with employment income where employees only enjoyed the reduced rates from 25th April, 2020 and will have to account for such income charged at different rates. Considering that taxes cannot apply retrospectively, the proposal to delete the proposed proviso is therefore is not supported.

3.24 RETAIL TRADE ASSOCIATION OF KENYA (RETRAK)

118. RETRAK submitted that businesses in retail, wholesale and general trade sectors are characterized by high volumes and low margins and therefore the businesses under this category should be exempt from minimum tax. They cited that the provision if it will be applicable, there should be a mechanism of utilization of minimum tax paid against a future tax payable.

119. **Committee's Comment: Minimum tax is targeted on companies / businesses that are on perpetual loss hence the exemption of the businesses in retail, wholesale and general trade sectors is rejected.**

3.25 NATIONAL TREASURY AND PLANNING

The Cabinet Secretary for National Treasury and Planning, Hon. (Amb.) Ukur Yatani, EGH appeared before the Committee on 17th December, 2020 and submitted that:-

120. The tax measures implemented in April 2020, had affected the implementation of Government's priority programmes under the Big Four Agenda through reduced exchequer revenue. Following the relaxation of containment measures and subsequent resumption of normalcy in the economy, it had become necessary to revert to the pre-COVID-19 tax rates in order to improve revenue collection. It is on this ground that the Tax Laws (Amendment)(No.2) Bill, 2020 was submitted to the House.

121. The Finance Act, 2020 introduced a minimum tax on gross turnover to ensure that all companies earning or deriving income from Kenya contribute to the Exchequer. However, at the drafting stage, an error was made to indicate that the tax will be payable when the instalment tax payable is 'higher' instead of when it is 'lower'. This has made the provision redundant and the proposed amendment in the Bill is meant to correct this error. The Minimum tax is estimated to raise KSh. 5.7 billion to the exchequer.

122. The Bill further proposes to revert the top income tax rate for individuals (PAYE) and resident corporate tax rate to 30% where it was before the implementation of the Covid-19 tax measures.

The proposed reversal of the top individual income tax rate to 30% from 25% and corporate income tax rate for non-resident to 30% from 25% will generate over KSh. 28 billion as additional revenue to the Exchequer. However, the Government expects to get more revenue from these changes if the economy improves. This will help the Government to finance some of the priority projects that are being affected by revenue shortfall.

123. The National Treasury had requested for an amendment to the VAT Act, 2013 to amend the Value Added Tax Act, 2013 to allow manufacturers registered for Value Added Tax (VAT) to deduct input tax with respect to taxable supplies made to official aid funded projects upon approval by the Cabinet Secretary. The amendment to the VAT Act, 2013 was incorporated in the Bill to be part of the Tax Laws (Amendment) (No.2) Bill, 2020. However, after analyzing the proposal, the National Treasury noted the proposal will lead to a loss of KSh. 12.6 billion per year in revenues to the Government. Further, the amendment will complicate the administration of Value Added Tax regime as it will be against the VAT principle which allows VAT input deduction on taxable goods only. The National Treasury has therefore requested that the amendment be dropped.

4 COMMITTEE OBSERVATIONS

In considering the Bill, the Committee observed that:-

124. In order to cushion Kenyans against the adverse impact of the COVID -19 and to further increase liquidity in the economy, the Government through Tax Laws (Amendment) Act, 2020 lowered tax rates for corporate and personal incomes, turnover tax, value added tax and provided tax relief to low income earners and employees. Specifically, individual income tax rate and the resident corporate tax rate were reduced from 30% to 25%. These measures were estimated to cost the exchequer Ksh 172.0 billion in revenue foregone by the Government in one financial year. In effect, the taxation measures have affected the implementation of Government priority programmes under the Big Four agenda.

125. On the one hand, the lowered tax rates for personal incomes and personal relief have had a positive impact in increased disposable income. However, a critical review of the VAT rate reduction from 16% to 14 % show that consumers have not benefitted through commensurate reduction in the cost of goods and services.

126. In September 2020, the Government relaxed the containment measures including extension of curfew hours, removal of intercountry travel ban and re-opening of borders for international trade. These recovery measures have led to subsequent increased economic activities and most businesses have resumed operations and hence the need to revert to the pre-COVID tax rates in order to mobilise revenue for post COVID Economic Recovery Strategy.

127. The National Government's cumulative revenue collection including A-I-A for the period between July 2020-September 2020 amounted to KSh. 378.7 billion (3.4 percent of GDP) against a target of KSh. 428.9 billion. The revenue was below target by KSh. 50.2 billion mainly due to underperformance in Pay As You Earn, Value Added Taxes (both domestic and imports), Excise duty, Import duty and the ministerial A-I-A.

128. The Bill is being prepared when revenue has underperformed in the first quarter of 2020/21 compared to the corresponding quarter period in 2019/20.

129. The proposed reversal of the top individual income tax rate to 30% from 25% and corporate income tax rate for non-resident to 30% from 25% will generate over KSh. 28 billion as additional revenue to the Exchequer.

5 COMMITTEE RECOMMENDATIONS

130. The Committee having considered the Tax Laws (Amendment) (No. 2) Bill (National Assembly Bill No. 48 of 2020) recommends that the House approves the Bill with amendments as proposed below:-

131. Clause 1 – The Committee agreed to the Commencement date being 1st January, 2021

132. Clause 2

a) The Committee agreed to further amend Section 12D (1) to exempt businesses whose price is controlled by the Government. the proposed amendment on the Minimum Tax and proposed a further amendment as follows:-

b) The Committee resolved to amend the amendment under the Third Schedule Head B in line with further Recommendations as proposed by the National Treasury.

c) Further, the Committee resolved to delete the proposed proviso to Item 2 (a) paragraph (iii).

SIGNED.. **DATE**......21 | 12 | 2020......

HON. GLADYS WANGA, CBS, MP
CHAIRPERSON
DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

THE NATIONAL ASSEMBLY
PAPERS LAID
DATE: 22 DEC 2020 DAY.
TABLED BY:
CLERK-AT THE-TABLE:

ANNEXTURES

i. **Minutes**
ii. **Adoption Schedule**
iii. **Public Participation - List of Participants**

Annex 1: Revenue Performance for Q1 of 2020/21 (KSh. Millions)

	2019/20 Q1	2020/21 First Quarter		[illegible]
	Actual	Actual	Target	
1. Ordinary Revenue	384,351	342,580	384,327	(41,747)
PAYE	98,199	71,556	90,712	(19,156)
Other Income Tax	82,522	79,692	76,642	3,050
VAT Local	59,462	41,151	61,180	(20,029)
VAT Imports	46,317	41,911	52,901	(10,990)
Import Duty	25,729	23,167	26,344	(3,177)
Excise Duty	49,725	47,354	56,947	(9,593)
Other taxes	22,397	37,749	19,601	18,148
2. A-i-A	36,808	36,097	44,571	(8,474)
o/w RDL	5,538	6,279	6,901	(622)
Total Revenue	**421,159**	**378,677**	**428,898**	**(50,221)**

Source: QEBR

Annex 2: Public Participation - List of Participants

Name	Institution
Hon (Amb) Ukur Yatani	National Treasury and Planning
Musa Kathanje	National Treasury and Planning
A Mwenda	National Treasury and Planning
Joseph Ngugi	National Treasury and Planning
Isabella Kogei	National Treasury and Planning
Sheila Aduvagah	Kenya Revenue Authority
Maurice O.	Kenya Revenue Authority
Joyner Okonjo	Kenya Private Sector Alliance (KEPSA)
Gaitho Ng'ang'a	Kenya Private Sector Alliance (KEPSA)
Christopher Kirathe	Ernst & Young LLP
Ann Magondu	Ernst & Young LLP
Nancy Ng'etich	Ernst & Young LLP
Alex Kanyi	KPMG
James Kimani	KPMG
Paul Waga	Law Society of Kenya
Edward Mudibo	East African Tea Trade Association (EATTA)
Job Wanjohi M.	Kenya Association of Manufacturers (KAM)
Ruth L. K	Kenya Association of Manufacturers (KAM)
Ayuma Likhanga	Petroleum Institute of East Africa
Arwinder Sandhu	Westminster Consulting Ltd
Hadi Abdullahi	Westminster Consulting Ltd
Mucai Kunyiha	Kenya Association of Manufacturers (KAM)
Phyllis Wakiaga	Kenya Association of Manufacturers (KAM)
Hillary Wangai	Petroleum Institute of East Africa / Hass Petroleum K. Ltd
Genesio Mugo	Kenya Association of Manufacturers (KAM) / Vivo Energy
Dorothy Obuodha	Petroleum Institute of East Africa / Vivo Energy
Miriam Bomett	Kenya Association of Manufacturers (KAM
FCPA Phillip Muema	ICPAK
Christine Katana	ICPAK
Wambui Mbarire	Retail Trade Association of Kenya (RETRAK)
Samuel Njoroge	Kapa Oil Refineries / KAM

The meeting was called to order at 10:00 a.m and a prayer was said. The Chairperson then welcomed the meeting to deliberate on the day's agenda.

MIN.NO.NA/F&NP/2020/301: CLAUSE BY CLAUSE CONSIDERATION AND ADOPTION OF THE REPORT ON THE TAX LAWS (AMENDMENT) (NO. 2) BILL, 2020

The Committee considered the Tax Laws (Amendment) (No.2) , Bill, 2020 clause by clause and agreed as follows:-

1. Clause 1 – The Committee agreed to the Commencement date being 1st January, 2021
2. Clause 2
   a) The Committee agreed to further amend Section 12D (1) to exempt businesses whose price is controlled by the Government. the proposed amendment on the Minimum Tax and proposed a further amendment as follows:-
   b) The Committee resolved to amend the amendment under the Third Schedule Head B in line with further Recommendations as proposed by the National Treasury.
   c) Further, the Committee resolved to delete the proposed proviso to Item 2 (a) paragraph (iii).

MIN.NO.NA/F&NP/2020/302: ADOPTION OF THE REPORT ON THE TAX LAWS (AMENDMENT) (NO. 2) BILL, 2020

Following clause by clause consideration of the Bill, the Report was adopted by the Committee having been proposed and seconded by Hon. Jimmy Angwenyi, MGH, M.P and Hon. James Gichuhi Mwangi, MP respectively.

MIN.NO.NA/F&NP/2020/303: ADJOURNMENT / DATE OF THE NEXT MEETING

There being no other business to deliberate on, the meeting was adjourned at 12.30 p.m.

HON. GLADYS WANGA, CBS, MP
(CHAIRPERSON)

SIGNED.......................................**DATE** 21/12/20..............................

MINUTES OF THE 63RD SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING HELD IN MINI CHAMBER, COUNTY HALL ON THURSDAY, 17TH DECEMBER, 2020 AT 3: 00 PM

PRESENT

1. Hon. Gladys Wanga, MP - **Chairperson**
2. Hon. Isaac W. Ndirangu, MP - **Vice Chairperson**
3. Hon. Jimmy O. Angwenyi, MGH, MP
4. Hon. Christopher Omulele, CBS MP
5. Hon. Shakeel Shabbir Ahmed, CBS, MP
6. Hon. David M. Mboni, MP
7. Hon. Joshua C. Kandie, MP
8. Hon. Joseph M. Oyula, MP
9. Hon. James Gichuhi Mwangi, MP
10. Hon. Qalicha Gufu Wario, MP
11. Hon. Francis Kuria Kimani, MP

ABSENT WITH APOLOGY

1. Hon. Daniel E. Nanok, MP
2. Hon. (Dr.) Christine Ombaka, MP
3. Hon. Stanley M. Muthama, MP
4. Hon. Peter Lochakapong, MP
5. Hon. Edith Nyenze, MP
6. Hon. Catherine Waruguru, MP

INATTENDANCE

SECRETARIAT

1. Ms. Leah Mwaura - Senior Clerk Assistant/Head of Secretariat
2. Ms. Jennifer Ndeto - Principal Legal Officer I
3. Mr. John Njoro - Serjeant-At-Arms
4. Ms. Euridice Nzioka - Audio Officer
5. Ms. Sharon Jeruto - Intern

NATIONAL TREASURY AND PLANNING

1. Hon (Amb) Ukur Yatani - Cabinet Secretary
2. Mr. Albert Mwenda - Director General, Budget, Fiscal and Economic Affairs
3. Mr. Musa Kathanje - Director , Fiscal & Macro Affairs
4. Mr. Maurice Oray . - Deputy Commissioner Tax Policy
5. Mr. Joseph Ngugi - Senior Deputy Director, Directorate of Budget, Fiscal &Economic Affairs
6. Ms. Isabella Kogei - Parliamentary Liaison Officer
7. Ms. Sheila Aduvagah - Kenya Revenue Authority

AGENDA

1. Prayers
2. Communication from the Chairperson
3. Confirmation of Minutes
4. Matters Arising
5. **Discussion on the Tax Laws (Amendment) (No.2) (National Assembly Bill No.48 of 2020) with the National Treasury and KRA.**
6. Adjournment/Date of the next meeting

MIN.NO.NA/F&NP/2020/297: COMMUNICATION FROM CHAIRPERSON

The meeting was called to order at 3:00 pm and a prayer was said. The Chairperson then welcomed the meeting to deliberate on the day's agenda.

MIN.NO.NA/F&NP/2020/298: DISCUSSION ON THE TAX LAWS (AMENDMENT) (NO.2) (NATIONAL ASSEMBLY BILL NO.48 OF 2020)

The Chairperson invited the Cabinet Secretary, Hon (Amb.) Ukur Yatani, EGH to submit the views of the National Treasury on the Tax Laws (Amendment) (No.2) (National Assembly Bill No.48 of 2020).

A summary of the discussion is detailed below:

1. The measures introduced in April, 2020 which were meant to cushion Kenyans and the economy against the negative effects of the COVID-19 Pandemic included the following:

    i) Reduction in the rate of Value Added Tax from 16% to 14%;
    ii) Reduction of resident corporation tax rate and top individual tax rates from 30% to 25%; and
    iii) Exemption of individuals earning up to Ksh. 24000 per month from income tax.
    iv) Reduction of turnover tax rate from 3% to 1%.

2. Central Bank of Kenya lowered the Central Bank Rate from 8.25% to 7.0% and cash reserve ratio from 5.25% to 4.25%. This provided an additional Ksh 35 billion in liquidity to the banking sector.

3. The government rolled out Ksh 58.1 billion Economic Stimulus Programme through labor-based activities in the areas of infrastructure, education, business liquidity, health, manufacturing, tourism, sanitation, food and agriculture.

4. Tax measures implemented in April 2020 have affected the implementation of Government's priority programmes under the Big Four Agenda through reduced exchequer revenue.

5. The Finance Act, 2020 introduced a minimum tax on gross turnover to ensure all companies earning or deriving income from Kenya contribute to the Exchequer. The minimum tax is estimated to raise Ksh 5.7 billion to the exchequer.

6. The proposed reversal of the top individual income tax rate to 30% from 25% and corporate income tax rate for non-resident to 30% from 25% will generate over Ksh 28 billion as additional revenue to the Exchequer.

7. The proposal to keep the expanded tax bands as they are currently in the Tax Laws (Amendment) Act, 2020 will result in a huge revenue gap. Therefore, to ensure the Government capacity to fund critical services is not affected and considering that we shall also continue exempting lower income earners (upto Ksh 24, 000 per month) from paying tax, we have noted the need to review the tax bands so as to minimize the revenue gap.

8. The proposal to amend the VAT Act, 2013 to allow manufacturers registered for VAT to deduct input tax with respect to taxable supplies made to official aid funded projects upon approval by the Cabinet Secretary will lead to a loss of Ksh 12.6 billion per year in revenues to the Government if enacted. It will complicate the administration of VAT regime as it will be against the VAT principle which allows VAT input deduction on taxable goods only Therefore, the National Treasury does not support the proposed amendments to the VAT Act, 2013 to allow manufacturers registered for VAT to deduct input tax with respect to taxable supplies made to official aid funded projects.

MIN.NO.NA/F&NP/2020/299: ADJOURNMENT/DATE OF NEXT MEETING

There being no other business to deliberate on, the meeting was adjourned at 5:00 p.m.

HON. GLADYS WANGA, CBS, MP
(CHAIRPERSON)

SIGNED.......................................**DATE** 21/12/20.......................................

MINUTES OF THE 62ND SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING HELD IN MINI CHAMBER, COUNTY HALL ON THURSDAY, 17TH DECEMBER, 2020 AT 9: 00 AM

PRESENT

1. Hon. Gladys Wanga, MP - **Chairperson**
2. Hon. Isaac W. Ndirangu, MP - **Vice Chairperson**
3. Hon. Jimmy O. Angwenyi, MGH, MP
4. Hon. Christopher Omulele, CBS MP
5. Hon. Shakeel Shabbir Ahmed, CBS, MP
6. Hon. David M. Mboni, MP
7. Hon. Joshua C. Kandie, MP
8. Hon. Joseph M. Oyula, MP
9. Hon. Andrew A. Okuome, MP
10. Hon. James Gichuhi Mwangi, MP
11. Hon. Qalicha Gufu Wario, MP
12. Hon. (Prof.) Mohamud Sheikh Mohamed, MP

ABSENT WITH APOLOGY

1. Hon. (Dr.) Christine Ombaka, MP
2. Hon. Stanley M. Muthama, MP
3. Hon. Peter Lochakapong, MP
4. Hon. Edith Nyenze, MP
5. Hon. Catherine Waruguru, MP
6. Hon. Daniel E. Nanok, MP
7. Hon. Andrew A. Okuome, MP
8. Hon. Francis K. Kimani, MP

INATTENDANCE

SECRETARIAT

1. Ms. Leah Mwaura - Senior Clerk Assistant/Head of Secretariat
2. Ms. Jennifer Ndeto - Principal Legal Officer I
3. Mr. John Njoro - Serjeant-At-Arms
4. Ms. Euridice Nzioka - Audio Officer
5. Ms. Jeruto Kosgey - Intern

STAKEHOLDERS

1. Joyner Okonjo - Kenya Private Sector Alliance (KEPSA)
2. Gaitho Ng'ang'a - Kenya Private Sector Alliance (KEPSA)
3. Christopher Kirathe - Ernst & Young LLP
4. Ann Magondu - Ernst & Young LLP
5. Nancy Ng'etich - Ernst & Young LLP
6. Alex Kanyi - KPMG
7. James Kimani - KPMG
8. Paul Waga - Law Society of Kenya
9. Edward Mudibo - East African Tea Trade Association (EATTA)
10. Ayuma Likhanga - Petroleum Institute of East Africa
11. Arwinder Sandhu - Westminster Consulting Ltd
12. Hadi Abdullahi - Westminster Consulting Ltd
13. Mucai Kunyiha - Kenya Association of Manufacturers (KAM)

14. Phyllis Wakiaga - Kenya Association of Manufacturers (KAM)
15. Bharat Shah - Kenya Association of Manufacturers (KAM)
16. Job Wanjohi M. - Kenya Association of Manufacturers (KAM)
17. Ruth L. K - Kenya Association of Manufacturers (KAM)
18. Miriam Bomett - Kenya Association of Manufacturers (KAM
19. Hillary Wangai - PIEA / Hass Petroleum K. Ltd
20. Genesio Mugo - KAM / Vivo Energy
21. Dorothy Obuodha - Petroleum Institute of East Africa / Vivo Energy
22. FCPA Phillip Muema - ICPAK
23. Christine Katana - ICPAK
24. Wambui Mbarire - Retail Trade Association of Kenya (RETRAK)
25. Samuel Njoroge - Kapa Oil Refineries / KAM
26. Elias Wakhisi - ICPAK
27. FCPA Robert Waruiru - ICPAK / KPMG
28. FCPA Edna Gitathu - ICPAK / PWC
29. CPA Edwin Makori - ICPAK
30. Victor Gilo - COFEK
31. Henry Ochieng - COFEK
32. John Nguni - Petroleum Institute of East Africa / NOC
33. Joseph Mwaniki - Petroleum Institute of East Africa / TOTAL
34. Daniel Ngumy - Anjarwalla & Khanna
35. Dennis Chiruba - Anjarwalla & Khanna
36. Dr. Rohin Vora - Federation of Kenya Pharmaceutical Manufacturers
37. Dr. Robert Miano - Federation of Kenya Pharmaceutical Manufacturers
38. Ms. Loise Wanja - Federation of Kenya Pharmaceutical Manufacturers
39. Kenneth Mutisya - Kenya Bankers Association
40. Peter Mungai - Kenya Bankers Association
41. Andrew Ragui - PwC
42. Maurice Mwaniki - PwC
43. Rahab Kagwanja - Kenya Renewable Energy Association
44. Mary Githinji - East African Tea Trade Association

AGENDA

1. Prayers
2. Communication from the Chairperson
3. Confirmation of Minutes
4. Matters Arising
5. **Public Participation – Tax Laws (Amendment) (No.2) (National Assembly Bill No.48 of 2020)**
6. Adjournment/Date of the next meeting

MIN.NO.NA/F&NP/2020/294: COMMUNICATION FROM CHAIRPERSON

The meeting was called to order at 9.00 a.m. and a prayer was said. The Chairperson then welcomed the meeting to deliberate on the day's agenda.

MIN.NO.NA/F&NP/2020/295: PUBLIC PARTICIPATION – TAX LAWS (AMENDMENT) (NO.2) (NATIONAL ASSEMBLY BILL NO.48 OF 2020)

The Chairperson invited the following stakeholders to submit their views on the Tax Laws (Amendment) (No.2) (National Assembly Bill No.48 of 2020).

i. Law Society of Kenya (LSK)
ii. Kenya Association of Manufacturers (KAM)
iii. Kenya Private Sector Alliance (KEPSA)
iv. Petroleum Institute of East Africa represented by Westminster Consulting; OLA Energy Kenya Limited; Texas Energy Limited; Hass Petroleum; Vivo Energy Kenya; Gulf Energy Limited; Total Kenya PLC; Rubis Energy Kenya PLC; and National Oil Corporation of Kenya
v. Deloitte and Touché
vi. Institute of Certified Public Accountants of Kenya (ICPAK)
vii. PKF Taxation Services Limited
viii. PricewaterhouseCoopers Limited (PWC)
ix. Association of Kenya Insurers (AKI) represented by PricewaterhouseCoopers Limited
x. E-Cart Service Kenya Limited represented by PricewaterhouseCoopers Limited
xi. Kenya Bankers Association (KBA) represented by KPMG
xii. Oxygène
xiii. East African Tea Trade Association (EATTA)
xiv. Consumer Federation of Kenya (COFEK)
xv. Anjarwalla and Khanna LLP
xvi. Kipkenda and Co. Advocates
xvii. Apex Steel Limited
xviii. Kenya Breweries Limited/UDV Kenya Limited
xix. Federation of Pharmaceutical Manufacturers
xx. Kenya National Chamber of Commerce and Industry (KNCCI)
xxi. Kenya Renewable Energy Association (KEREA), GOGLA, Clean Cooking Association of Kenya (CCAK), Africa Mini-Grid Developers Association (AMDA), and Africa Clean Energy Technical Assistance Facility (ACETAF)
xxii. Mr. Ernest Muguku Muriu
xxiii. National Treasury and Planning

Details of each of their presentations are contained in the main body of the report. A summary of their submissions are as follows: -

Law Society of Kenya (LSK)

The key proposed amendments relating to Minimum Tax and input VAT refund are as follows: -

1. Newly incorporated companies should be given a grace period of five (5) years before they start paying Minimum Tax. Introduction of Minimum Tax is likely to negatively impact the competitiveness of Kenya as a business destination. The rate of 1% is higher than the rates applied in other jurisdictions. They therefore proposed that the rate should be reduced to 0.3%.

2. The introduction of Minimum Tax should be deferred to 2023 in order to allow businesses to recover from the negative impact of the COVID-19 pandemic. Companies that incurred losses as a result of the use of capital allowances will be disadvantaged because capital allowances offer tax relief on capital expenditure and allow companies to write off the cost of capital expenditure over time. Imposing Minimum Tax on such companies reverses the benefits afforded by the capital allowances. They therefore proposed that enhanced exemptions should be granted to such companies in order to allow for the reduction of the

Minimum Tax liability by the Company. The companies can also be exempted from Minimum Tax.

3. The ten year cap of tax losses should be extended in order to allow companies to utilize their losses in a manner that does not necessarily trigger minimum taxes because Minimum Tax is a sunk cost that cannot be offset against future liabilities.
4. The provisions on compensating tax should be repealed because it will be rendered redundant by the minimum tax.
5. In conclusion, LSK proposed that minimum tax should be abolished in the present time due to the reasons provided above.

Kenya Association of Manufacturers (KAM)

6. KAM proposed amendments relating to the minimum tax where they proposed deletion of section 12D of the ITA

They also provided a counter proposal for the for the provision to be replaced as follows: -

12D (1) Notwithstanding any other provision of this Act, a tax to be known as minimum tax shall be payable if–

'(a) that person's income is subject to tax pursuant to section 3(2)(a)(i) of this Act; and (b) that person's income is not chargeable to tax under sections 12C, 19, 19A, 20 or 21 or the Eighth Schedule or the Ninth Schedule to this Act; and

(c) that person's income is not tax exempt from tax under this Act or under any applicable law; and

(d) that person if newly incorporated is at least in the fifth year since commencement of business provided that such person is a subsidiary (within the meaning of the Companies Act) of an incorporated person in Kenya that has been conducting business in Kenya and which is at least in the fifth year since commencement of business, then such person even though newly incorporated does not need to be in at least the third year since commencement of business; and

(e) in addition:

(i) the aggregate instalment tax that would be payable by that person in a year of income under section 12 would be lower than the minimum tax that would be payable by such person pursuant to this section, in which event only the minimum tax and not the instalment tax will be payable; or

(ii) If that person's computation of chargeable gains or profits under section 3(2)(a)(i) for the year of income would result in loss, that person's computation of chargeable gains or profits under section 3(2)(a)(i) for the two (2) previous years has resulted in a loss in each of the two (2) previous years of income.

(2) The tax payable under this section shall be paid in instalments which shall be due on the twentieth day of each period ending on the fourth, sixth, ninth and twelfth month of the year of income.

(3) Where a person who qualifies for an allowance under the Second Schedule of this Act, shall deduct the taxable benefit resulting from such allowance from the tax payable under this section to determine the actual tax payable in the year of income.

(4) The tax payable under this section shall be applicable for set off against future tax payable.

(5) Public and export companies shall be eligible to make an application for exemption from the requirements of section 12D.

(6) Regulations shall be developed for the better carrying out of these provisions'.

7. In addition to the above proposal, KAM proposed that:-
   (i) Paragraph 11 of Head B of the Third Schedule to the Income Tax Act be amended by deleting the words '*one percent*' and replacing with the words '*zero-point two five percent*'.
   (ii) Head B of the Third Schedule to the Income Tax Act be amended by deleting the proposed clause and retaining the current rates. This is because the economy is yet to recover from the effects of the COVID-19 pandemic and the extra income is still necessary to cushion and sustain household needs.
   (iii) The Bill be amended by deleting the amendments proposed to Item 2(a) and Item 5(d)(i) because corporate taxpayers are dealing with huge losses and general impact of the COVID-19 pandemic, any additional taxes will impact negatively and will have a ripple effect on the economy.
   (iv) Paragraph 3(d) of the Third Schedule to the Income Tax Act be amended by replacing the rate of tax on dividends for non-residents from 15% to 10%. This is to help spur international investment in the country.
   (v) The effective year of implementation of the proposed 14% Value Added Tax be deferred to January 2022 as opposed to January 2021 because prices of key raw materials have increased between 50% and 70% due to overall global impact of COVID-19 and distorted supply chains which has created shortages of many such raw materials.

Kenya Private Sector Alliance (KEPSA)

KEPSA proposed the following amendments: -

8. Minimum tax should be abolished because it ignores the complexity, sensitivity and dynamics of various economic sectors.
9. Amendment of Section 12D of the ITA to include the following paragraphs, '*(1)(d) that person has three years' consecutive tax losses; (2) The tax payable under this Section shall be paid by the last day of the fourth month following the end of the year of income; and (3) The tax payable shall be an advance tax.* This is because imposition of the tax in its current form negates the spirit of the COVID-19 tax concession effectively reducing tax for profit making companies while punishing companies which are facing economic distress.
10. Amend sub-paragraph (viii) of 2(a) of the third schedule to Income Tax Act by excluding the proviso to the applicability of 25% corporation tax rate. This proviso will introduce challenges during the computation of annual tax review and filing of tax returns given that it is expected that resident companies will be required to apportion their income prior to determining the annual tax position.
11. They were opposed to the increase in the PAYE tax rate from 25% to 30% because the proposed increase will reverse the gains made by the Government to cushion its citizens from increased cost of living and the cash disposable for consumption. In the context of prevailing conditions due to Covid-19 challenges, the Government should extend the relief to its working citizens until such a time that the economy stabilizes or shows signs of recovery.
12. They supported the introduction of a new sub-section for input tax credit against output tax for registered manufacturers on taxable supplies made to official aid funded project because it will save the manufacturers cash flow wise by reduction of output tax payable with the input tax on such supplies or by claim of refund on input tax paid where supplies to the official aid funded project is zero rated.

PETROLEUM INSTITUTE OF EAST AFRICA (THROUGH WESTIMINSTER CONSULTING); OLA ENERGY KENYA LIMITED; TEXAS ENERGY LIMITED; HASS PETROLEUM; VIVO ENERGY KENYA LIMITED; GULF ENERGY LIMITED; TOTAL KENYA PLC; RUBIS ENERGY KENYA LIMITED; AND NATIONAL OIL CORPORATION OF KENYA

13. They proposed that Oil Marketing Companies (OMCs) be exempted from payment of the Minimum tax. This is because prices of petroleum products in Kenya are regulated by the government vide the Energy Petroleum Regulatory Authority (EPRA) and OMCs have no role to play in determining the prices. Imposing minimum tax will erode the predetermined single digit margins and render OMC's business untenable.
14. Additionally, petroleum products' turnover constitutes of cost of products, taxes and levies and operational costs with taxes and levies making up about 60% of the turnover. It will be punitive for the same turnover to be subjected to additional taxes. Imposing Minimum Tax will amount to tax on tax which contravenes the acceptable taxation principles, canons and best practices.
15. Finally, OMC's that participate in the Open Tender System (OTS) have very low margins ranging between 0.5% to 0.8%. Imposition of Minimum Tax will cause importers of petroleum products to withdraw from OTS. This will lead to loss of revenue to the government and higher prices of petroleum products thereby negating the benefits of the OTS.

DELOITTE AND TOUCHÉ

Deloitte proposed the following amendments: -

Minimum Tax

Amend section 12D (1)(c) as follows: -

16. Inserting the following new sub-section immediately after sub-section 12(D)(1)(c), *'(d) that person's net profit margin is above four percent of the gross turnover'*. This is to shield low margin businesses since the minimum tax may turn to be a direct cost to such businesses.
17. Inserting the following new sub-section immediately after sub-section 12(D)(1)(e), *'(f) that person is in a net tax loss position for more than three consecutive years of income'*. This is to avoid subjecting persons who incur losses in a given period due to circumstances beyond them. The three-year period offers a reasonable period of recovery to such businesses.
18. Inserting the following new sub-section immediately after sub-section 12(D)(1)(f), *'(g) that person has been in operation for a minimum period of three years since the date of incorporation'*. This is necessary to shield start-up businesses which may be unprofitable in the initial years but have immense potential in future years particularly capital-intensive projects.
19. Introduction of the following proviso under paragraph 11 of the Third Schedule of the Income Tax Act, *'For purposes of Minimum Tax, gross turnover shall be equal to the turnover as determined under the International Financial Reporting Standards. For avoidance of doubt, gross turnover shall exclude output VAT, excise duty, other form of levies and any credit notes'*. This is to ensure that gross turnover is clear to the taxpayers as the same needs to be determined with certainty for the taxpayers.
20. They proposed that provisos requiring that the rate should be applied depending on the date that the income was earned should be deleted **OR** a clear apportionment criterion is adopted where taxpayers are clear on how the appointment will be done with consideration of some businesses such as tourism which have oscillating levels of activity/income depending on the

time of the year. This is because the amendment proposed in the Bill will require an entity to prepare more than one tax computation in a given year of income and apply the different rates of tax on each of the tax computations.

INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA (ICPAK)

21. ICPAK was against the introduction of Minimum Tax and instead proposed collection of additional revenue through the increase in VAT rate from 14% to 16% because this has less distortionary effect in the economy. They also submitted further amendments relating to Third Schedule, Item 2A of the Income Tax Act and proposed an Amendment to section 17 (8)of the VAT Act by deleting the words '*who is a manufacturer*'.
22. Finally, ICPAK proposed that Section 17(2)(b) should be deleted because it is punitive to the purchaser/supplier by unconstitutionally putting the onus on the taxpayers to provide full details of sales invoices for the buyer to be allowed to claim the input against their output VAT. KRA should enhance linkages between the electronic tax registers and the iTax platform to allow for automatic offsetting of input and output VAT for enhanced compliance and reduced claims.

PKF TAXATION SERVICES LIMITED

23. PKF proposed an amendment to the minimum tax so as to make it effective. They proposed that: -
    (i) the rate of the tax should be lowered;
    (ii) list of exclusions should be widened to include businesses that are already subjected to the withholding tax regime; businesses that are in loss making positions arising from capital allowances and other tax incentives be excluded from these requirements for a reasonable period following the date of such allowances;
    (iii)the definition of gross turnover should be clarified; and
    (iv)the Minimum Tax should be calculated at the end of the accounting period as parallel to the final tax calculation wherein the higher of the two is payable at one time as part of final taxes (which also resets the base for the next year instalments) and significantly eases the administration.
24. In addition to the minimum tax, PKF also proposed an amendment to the corporate income tax. They stated that no resident person has enjoyed the lower rate of 25% due to ambiguity on which period the rate is to be applied and iTax is still not configured to allow for use of the 25% rate.
25. Finally, they stated that the proposal for registered manufacturers to claim input tax in respect of taxable supplies made to an official aid funded does not all cover suppliers to official aid funded projects and hence the need to all sectors in order to promote businesses.

PRICEWATERHOUSECOOPERS LIMITED (PWC)

26. PWC proposed that Paragraph 3(d) of Head B of the Third Schedule is amended to read as follows, '*(d) In respect of a dividend, ten percent of the amount payable*'. This is because the reversal of the corporate tax rate without a similar reduction in WHT rate will result in an increase in the effective tax rate of companies owned by non-residents from 37% to 40.5%.
27. They also proposed that Paragraph 2(a) (viii) of Head B of the Third Schedule to the Income Tax Act by deleting the proviso to (viii) and inserting the following sub-paragraph immediately after sub-paragraph (viii), '*(ix) For the year of income 2021 and each subsequent year of income shs. 6.00*'. This is because the paragraph as was would create significant administrative and accounting challenges for taxpayers.

28. In addition to manufacturers, service providers should be allowed deduction of input tax with respect to taxable supplies made to official aid funded projects.
29. Supplies to official aid funded projects should be excluded from the apportionment formula. This is the case for input tax incurred on expenses such as overheads which may not be directly attributable to supplies to official aid funded projects and will need to be apportioned accordingly.

ASSOCIATION OF KENYA INSURERS (AKI)

The Association of Kenya Insurers (AKI) through PWC proposed the following amendments to the Bill: -

30. Section 12D (2) of the Income Tax Act should be amended to read as follows, '*That person's income is not chargeable to tax under sections 5, 6A, 19, the Eighth Schedule and the Ninth Schedule*'. This is because during enactment of the minimum tax provisions, the Government appreciated that there are sectors which are taxed differently and therefore application of minimum tax to them would not yield the desired results.
31. Additionally, insurance companies are already paying 1% insurance premium levy on their gross direct premiums written. Introduction of minimum tax at 1% of gross premium will amount to tax on the insurance premium levy.
32. In conclusion, insurance sector is experiencing financial constraints and insurance companies are already struggling to settle claims. Introducing minimum tax on their gross premiums will exacerbate the already dire cash-flow constraint being experienced industry wide.

E-CART SERVICE KENYA LIMITED

E-cart Services Kenya Limited through PWC proposed the following amendments to the Bill: -

33. Amend section 12D of the Income Tax Act by amending sub-section 2 to read as follows, '*That person's income is not chargeable to tax under section 5, 6A, the Eighth Schedule, Ninth Schedule or if that person is an e-commerce business*'. Exempting resident e-commerce businesses from minimum tax will go a long way in equaling the playing field and thereby encouraging local e-commerce start-ups.
34. Amend Section 2 of the Income Tax Act by inserting the following definition, '*E-commerce business means a resident person who acts as a digital marketplace*'. Kenya's e-commerce sector is at the infancy growth stage characterized by tax losses. Consequently, saddling this sector with minimum tax, which is a sunk cost, will increase the break-even period which is already long.
35. Amend the Third Schedule to the Income Tax Act in Heading B by amending Paragraph 11 to read as follows, '*The rate of tax in respect of minimum tax under section 12D shall be **zero-point five** percent of the gross turnover*'. This is because other comparable jurisdictions such as Nigeria, Tanzania and Ivory Coast have minimum tax rates which are less than or equal to 0.5%.
36. Amend the Third Schedule to the Income Tax Act in Heading B by amending Paragraph 11 to read as follows, '*The rate of tax in respect of minimum tax under section 12D shall be zero-point five percent of the Earnings Before Interest and Tax*'. This is because the transition from turnover based taxes to net income-based taxes in the twentieth century is a clear indication that turnover based taxes do not yield the desired income in the long run.
37. Amend Section 12D of the Income Tax Act by inserting the following sub-section 3, '*For entities in tax losses, minimum tax will be advance corporate tax payments and shall be used to reduced taxes due in subsequent periods*'. This is because minimum tax should be treated as an advance tax.
38. Amend Section 12E (1) of the Income Tax Act to read as follows, '*Notwithstanding any other provisions of this Act, a tax to be known as digital service tax shall be payable by a*

non-resident person who sources payments from Kenya'. This is because resident e-commerce entities are already paying their fair share of taxes in Kenya including Corporate Income Tax, Minimum Tax, Value Added Tax and now DST. Consequently, the playing field for resident and non-resident entities is not at par given the above obligations and as illustrated earlier.

39. Amend Section 12E of the Income Tax Act by introducing the following new sub-clause (3), '*Notwithstanding the above, digital service tax shall not be charged on any service whose payment is subject to withholding tax under section 35 of the Act'.* This is because charging DST on services subject to WHT amounts to double taxation. This further exacerbates cash flow challenges occasioned by DST and minimum tax payment.

KENYA BANKERS ASSOCIATION(KBA)

KBA through KPMG proposed the following amendments relating to Corporation Income Tax (CIT) and Minimum Tax:-

40. They proposed that the proviso to sub-paragraph 2(a) (viii) of the Third Schedule to the Income Tax Act on the applicability of the 25% corporation tax rate should be deleted because it is unconstitutional, unlawful and the proposed retrospective change in Corporate Tax rate from 25% to 30% will introduce compliance challenges in terms of tax computation and filing of tax returns given that it is expected that companies will be required to come up with two to three sets of tax computations for one year of income.
41. They proposed that the proposed amendment to section 12D in the Bill should be deleted because the tax is regressive and anti-business because it claws back existing tax incentives such as capital allowances and seeks to tax turnover as opposed to taxing profits. Alternatively, they proposed the following amendments to section 12D:-
42. Introduce the following new paragraph, *'(d) That person has three-years consecutive tax losses'*. This is to address the retrogressive nature and challenges posed by imposition of Minimum Tax in its current form. The proposed amendment aligns the tax to international best practice and seeks to protect newly established businesses.
43. Introduce the following new paragraph, *'(e) That person has been in business for more than three years since commencement of a given business'*. This will address the National Treasury's concerns on companies in perpetual tax losses without punishing companies facing economic strains such as those associated with start-ups and COVID-19.
44. Introduce the following new paragraph 3, *'(3) The tax payable under this section shall be paid by the last day of the fourth month following the end of the year of income'*. Introduce the following new paragraph 4, *'(4) The tax payable shall be an advance tax'*. This is because imposition of tax in its current form negates the spirit of the COVID-19 tax concession effectively reducing tax for profit making companies while punishing companies that are facing economic distress.

45. Delete paragraph 11, Head B of the Third Schedule to the Income Tax Act and replace it with the following paragraph, '11. The rate of tax in respect of Minimum Tax under section 12D shall be zero-point five percent of the gross turnover.
46. Amend section 15(4) as follows, *'(4) Where the ascertainment of the total income of a person results in a deficit for a year of income, the amount of that deficit shall be an allowable deduction in ascertaining the total income of such person for that year and the succeeding years of income'*. This will ensure that companies in tax losses as a result of significant capital investments, difficult operating environment or start-ups which are struggling to build the market share are not exposed to double taxation through capping of losses and through the Minimum Tax.

47. Include the following transitional provisions under section 133 of the Income Tax Act, *'(7) Notwithstanding the repeal of the Second Schedule, the capital allowances under the repealed Schedule shall continue to apply to assets purchased prior to the 2020 year of income'*. This will allow for seamless transition from the old Second Schedule to the current schedule and ensure that persons who invested under the old regime are not disenfranchised.
48. Amend paragraph 3(d) of the Third Schedule by deleting the word '*fifteen*' and replacing with the word '*ten*'. This is to make Kenya attractive to investors.

OXYGÈNE

Oxygène proposed the following amendments: -

49. The corporate tax rate of 30% should be reinstated in May 2021 as opposed to January, 2021 because the proposal as written seeks to amend the law retrospectively which makes it void in law as the law can only be applied prospectively.
50. Withholding tax rate on dividends paid to non-residents should be reinstated to 10% because the tax rate for non-resident shareholders will increase from 36.25% to 40% from 1st January, 2021. This will potentially harm the country's reputation as a foreign investment hub.
51. It is not clear how turnover is defined. The proposed definition should only include trading and not investment based turnover as this is already taxed at source. Implementation of minimum tax should be postponed for at least two (2) years because introduction of minimum tax at the time when businesses are struggling and hoping for a quick economic recovery appears ill timed.
52. Taxes based on turnover are retrogressive and have adverse effects on the economy. Earnings before interest and taxes (EBIT) is an appropriate base since it allows a company to pay tax based on its income as opposed to turnover and it is therefore in line with the equity canon of taxation.
53. Minimum Tax paid should be available for offset against future tax liabilities. This is to avoid minimum tax becoming a consumption tax and to cushion the economy against reduced foreign direct investments, minimum tax should be utilized against future taxable profits as some companies pay tax.
54. Tax loss carry forward period should not be restricted with minimum tax in place. Introduction of minimum tax means that all qualifying corporates will pay income tax through minimum tax. Enhanced exemptions from minimum tax – low margin businesses such as e-commerce platforms and retailers as well as capital intensive entities such as power companies and agricultural companies should be exempted from minimum tax. Newly registered/established businesses should be exempt from minimum tax in the first five years of incorporation. Newly established businesses need a few years to establish a foundation and more often than not, these first few years are usually loss-making years.

EAST AFRICAN TEA TRADE ASSOCIATION (EATTA)

55. EATTA submitted that imposition of the Minimum Tax should either be halted until the economy recovers from the effects of COVID-19 or provide that Minimum Tax will apply where an entity reports losses for three (3) consecutive years or there should be a moratorium of one year to allow for the sensitization of companies on the implications of Minimum Tax as enshrined in the Constitution or incentives on investment and depreciation schedules should be retained in order to boost investment in the tea sector.

CONSUMER FEDERATION OF KENYA (COFEK)

COFEK submitted that:-

56. The Bill provides that corporate tax rate should be reverted to the pre-COVID-19 rate of 30% effective 1st January 2021. This is not a good proposal because consumers are still in the in

the middle of the COVID-19 period and are struggling to adjust considering higher unemployment, higher food prices, higher transport costs and higher energy costs. Due to the above reasons, the review of the corporate tax should be suspended and introduced in the Finance Bill of the FY 2021/2022.

57. The Bill further seeks to provide clarity by including a provision that states that the reduced rate will apply to the income earned from 25th April 2020. COFEK stated that it will be difficult for Kenya Revenue Authority (KRA) to apportion incomes earned in different periods and charge different tax rates i.e. as from January to March 2020 at 30% and from April to December 2020 at 25% (in the case of a December year-end). More importantly, it is not possible to apply law retrogressively in Kenya.
58. Pay As You Earn (PAYE) tax rates have been returned to the high pre-COVID-19 rate of 30%. This is not good because consumers are still affected by COVID-19. It is therefore premature, ill-advised, irrational and unacceptable to revert to higher taxes.

ANJARWALLA & KHANNA LLP

Anjarwalla & Khanna proposed the following amendments to the Bill: -

59. Companies in a tax loss position due to capital allowances should be exempt from the application of minimum tax because capital allowances apply as tax incentives to investments as they offer tax relief to the relevant company for the costs of investment incurred.
60. Minimum tax should only be applied to companies that have perennial tax losses as a tax avoidance tool. Companies that have genuinely incurred tax losses in their ordinary course of business should not be subjected to the unfair burden of incurring further expenditure in the form of minimum tax.
61. Newly incorporated companies should be exempt from minimum tax in the initial years of operation because most start-ups incur huge expenditure when setting up and in the initial stages of operations before the business and flow of revenue stabilizes.
62. In conclusion, they proposed that the introduction of minimum tax should be shelved and therefore paragraph 12D of the Income Tax Act should be deleted until such a time when the above issues are considered and resolved.

KIPKENDA AND CO. ADVOCATES

In Kipkenda and Co. Advocates submitted that:-

63. Payment of Minimum Tax should not commence on 1st January, 2021 because taxpayers have been affected by the COVID-19 pandemic and need time to recover. Additionally, start-ups that are unprofitable should be exempted from minimum tax for two (2) to three (3) years.
64. KRA should be given discretion to exempt deserving businesses i.e. businesses that have a huge turnover but make losses with an option of delayed payment when the business picks up or profits are declared.
65. They also proposed that there should be clarity on whether payment of Minimum Tax is an advance tax such that it can be used to offset future tax liabilities as was in the case of instalment tax. Finally, they stated that the workings of Minimum Tax are contrary to the provisions of section 3 of the Income Tax Act which stipulates that an income tax shall be levied on gains/profit.
66. The re-introduction of the thirty percent (30%) tax rate is too soon because of the negative impact of the COVID-19 pandemic on the Kenyan economy. they proposed that the effective date for the re-introduction of the tax should be gazetted by the Cabinet Secretary once the economy recovers.

APEX STEEL LIMITED

67. In their letter dated 14th December, 2020, the Company supported the proposed amendment that a registered manufacturer may make a deduction for input tax with respect to taxable supplies made to an official aid funded project as may be approved by the Cabinet Secretary in accordance with the First Schedule because it will create an enabling environment that will ensure the development and nurturing of a globally competitive private sector.

KENYA BREWERIES LIMITED/UDV KENYA LIMITED

68. EABL submitted that the lower tax rates of 25% for corporate and individual income should remain in place for six more months in order to allow for medium term recovery of household income and the manufacturing sector. Increase in income tax rates will undermine alcohol manufacturers' capacity for production and distribution of alcohol beverages. The proposed increase will also humper the industry's ability to prevent massive job losses where several people previously employed in bars, resorts and restaurants will lose their jobs.

FEDERATION OF KENYA PHARMACEUTICAL MANUFACTURERS (FKPM)

69. Federation of Kenya Pharmaceutical manufacturers submitted that the Tax Laws (Amendment) Act, 2020 removed medicaments and vaccines from the zero-rate schedule of the Value Added Tax (VAT) Act, 2013 and included them on the Exempt Schedule of the Act.
70. They requested the Committee to remove locally manufactured medicaments and vaccines (HS Codes 3003 and 3004) from the Exempt Schedule of the VAT Act and include them on the Zero Rate Schedule or introduce a standard of not more than 4% VAT rate for all medicaments and vaccines (HS Codes 3003 and 3004).
71. They also requested for the harmonization of HS Codes across the Tax Laws (Amendment) Acts to reflect the HS Codes under Chapter 30 in the CET 2017 specifically for medicaments falling under headings 3003 and 3004.

KENYA NATIONAL CHAMBER OF COMMERCE AND INDUSTRY (KNCCI)

The Kenya National Chamber of Commerce and Industry proposed the following amendments: -

72. Suspend the Minimum Tax for 12 months to allow for more consultations on the impact of the tax on the economy, including the reduction of the minimum tax rate; provide clarity on whether the Minimum Tax will be applicable to taxpayers whose instalment taxes are lower than the minimum tax; KRA should issues administration guidelines for the operationalization and address the administrative uncertainties; and KRA should continue using the audit process to determine the accuracy of the losses as reported by companies. More than 50% of all the sectors in the economy are projected to make losses and thus they will be denied the ability to carry forward losses through the introduction of Minimum Tax.

KENYA RENEWABLE ENERGY ASSOCIATION (KEREA), GOGLA, THE CLEAN COOKING ASSOCIATION OF KENYA (CCAK), AFRICA MINI-GRID DEVELOPERS ASSOCIATION (AMDA) AND THE AFRICA CLEAN ENERGY TECHNICAL ASSISTANCE FACILITY (ACETAF)

Their joint presentation contained the following amendments to the Bill: -

73. Amend the section A of Part 1 of the First Schedule to the Value Added Tax Act, 2013 by inserting the following new paragraphs immediately after paragraph 110,
    a. *'111. Specialized equipment for generation and utilization of Solar and Wind Energy which included Photovoltaic (PV) Modules, Direct Current Change Controllers, Direct Current Inverters and Inverter chargers, Solar deep cycle batteries, Solar home systems and Solar Lanterns;*

b. *112. Taxable goods local purchased or imported by manufacturers or importers of clean cooking stoves or direct an exclusive use in the assembly, manufacture and repair of clean cook stoves;*
c. *113. Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating), barbeques, braziers, gas-rings, plate warmers and similar non-electric domestic appliances, and parts thereof, or iron or steel of tariff numbers 7321.11.00, 7321.19.00, 7321.82.00, 7321.83.00 and 7321.90.00;*
d. *114. Plastic bag biogas digesters;*
e. *115. Biogas; and*
f. *116. Leasing of biogas producing equipment*'.

74. Amend Part II of the First Schedule to the Value Added Tax Act, 2013 by inserting the following new paragraph immediately after paragraph 30, '*31. Installation of solar panels and wind turbines*'. This is to reduce the cost of off-grid solar and wind home systems, as well as clean cooking products.

MR. ERNEST MUGUKU MURIU

75. Mr. Muriu proposed that the Proviso to sub-paragraph (viii), Item 2(a) Head B should be deleted because the proposed proviso will have a retroactive effect of imposing income tax on income earned in the period between 1st January, 2020 to 24th April, 2020 at the rate of 30%. It was expected from the earlier amendment which was enacted on 25th April 2020 that all the income for the year 2020 was to be taxed at the rate of 25%.
76. He also proposed that the new sub-section 8 of section 17 should be amended by deleting the words '*who is a manufacturer*' because it will be unfair to avail the proposed advantage only to manufacturers and it will also contradict Article 201(b)(i) of the Constitution.

ERNST AND YOUNG LLP

E&Y submitted that: -

77. The proposal to reinstate the corporation tax rate to 30% on income earned from 1st January, 2021 would not fit well into many taxpayers' business circumstances and in essence fails to appreciate the principle of revenue recognition, presentation and reporting of financial performance of an entity. The revenue recognition and matching principles are a cornerstones of accrual accounting and both determine the accounting period in which revenues and expenses are recognized. As such, the proposal to have tax rates take effect on as specific dare without due regard to the accounting year end of the taxpayers is both impractical and would result in unwarranted complexity.
78. Based on the above argument, they proposed the following proviso *paragraph (viii) "provided that this provision shall apply to the income earned for year of income ending on or after 25th April, 2020"; paragraph (ix) "provided that this provision shall apply to the income earned for the year of income ending on or after 25th April, 2020.*
79. The above-mentioned will give a chance to all taxpayers to apply the lower rate before resuming to the higher rate of 30 % in order to ensure there is certainty, simplicity, harmony and equity on all taxpayers.

MIN.NO.NA/F&NP/2020/296: ADJOURNMENT/DATE OF NEXT MEETING

There being no other business to deliberate on, the meeting was adjourned at 1.30 p.m.

HON. GLADYS WANGA, CBS, MP
(CHAIRPERSON)

SIGNED...**DATE**......21/12/20......................................

REPUBLIC OF KENYA

NATIONAL ASSEMBLY

DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING

ADOPTION SCHEDULE

On...Friday 18th December, 2020...the following Members adopted the Report of the Committee on its consideration of the Tax Laws (Amendment) (No.2) Bill (National Assembly Bill No.48 of 2020.

NAME	SIGNATURE
1. **HON. GLADYS WANGA, CBS, MP - CHAIRPERSON**	
2. HON. ISAAC W. NDIRANGU, MP – VICE-CHAIRPERSON	Virtual
3. HON. JIMMY N. O. ANGWENYI, MGH, MP	
4. HON. CHRISTOPHER OMULELE, MP	
5. HON. SHAKEEL SHABBIR AHMED, CBS, MP	Virtual.
6. HON. DANIEL EPUYO NANOK, MP	
7. HON. DR. CHRISTINE OMBAKA, MP	
8. HON. DAVID MWALIKA MBONI, MP	
9. HON. FRANCIS KURIA KIMANI, MP	
10. HON. ANDREW ADIPO OKUOME, M.P	
11. HON. STANLEY MUIRURI MUTHAMA, MP	
12. HON. JOSHUA KANDIE, MP	
13. HON. JOSEPH M. OYULA, MP	
14. HON. EDITH NYENZE, MP	
15. HON. CATHERINE WARUGURU, MP	
16. HON. JAMES GICHUHI MWANGI, MP	
17. HON. (PROF.) MOHAMUD SHEIKH MOHAMED, MP	Virtual.
18. HON. PETER LOCHAKAPONG, MP	
19. HON. QALICHA GUFU WARIO, MP	

TUESDAY 8 DECEMBER, 2020

REPUBLIC OF KENYA

TWELFTH PARLIAMENT (FOURTH SESSION)
THE NATIONAL ASSEMBLY

INVITATION FOR PUBLIC PARTICIPATION & SUBMISSION OF MEMORANDA
SUBJECT: THE TAX LAWS (AMENDMENT)(NO.2) BILL, 2020
(NATIONAL ASSEMBLY BILL NO. 48 OF 2020)

(Article 118 (1)(b) of the Constitution and Standing Order 127(3) of the National Assembly Standing Orders

In the matter of consideration by the National Assembly: The Tax Laws (Amendment) (No.2) Bill, 2020 (National Assembly Bill No. 48 of 2020)

WHEREAS the National Assembly on Thursday, 3rd December 2020, resolved that the following procedure shall apply to Bills published during the period of the long recess (4th December 2020 – 8th February, 2021) -

"Should a Bill be published or a published Bill becomes due for First Reading during the period, the Speaker shall, upon lapse of at least three days following the publication of the Bill and following a determination that such Bill is of priority, forthwith refer such Bill to the relevant Committee for consideration pursuant to the provisions of Standing Order 127 (Committal of Bills to Committees and Public Participation) and upon resumption of the House, cause the Bill to be read a First Time and the Second Reading may be taken forthwith or on such other day as the House Business Committee may determine"

WHEREAS the Tax Laws (Amendment) (No 2) Bill 2020 (National Assembly Bill No. 48 of 2020), which was published on 27th November 2020 proposes to amend The Income Tax Act (Cap. 470) and The Value Added Tax Act, 2013(No. 35 of 2013) as follows-

The Income Tax Act (Cap. 470)

1. The Bill seeks to amend the provision on minimum tax to provide that it will apply only if it is lower than instalment tax. The Bill also seeks to amend the Income Tax Act to increase the individual top tax rate and resident corporate tax rate. It is proposed to increase the top individual income tax rate and corporate income tax rate on resident companies from 25% to 30% respectively. (See comprehensive list of personal relief and tax bands from the Bill.)

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

2. The Bill seeks to amend the Value Added Tax Act on the provision relating to credit for input tax against output tax. Specifically, the amendment seeks to make a proviso that a registered person who is a manufacturer may make a deduction for input tax with respect to taxable supplies made to an official aid funded project as may be approved by the Cabinet Secretary in accordance with the First Schedule.

3. Commencement

As proposed in the Bill, the amendments relating to the Income Tax Act, Cap 490 and Value Added Tax, 2013 will apply from 1st January 2021.

WHEREAS the Bill No. 48 of 2020, has been determined to be of priority and now stands committed to the Departmental Committee on Finance and National Planning in accordance with the said resolution.

NOW THEREFORE, pursuant to the provisions of Article 118(1)(b) of the Constitution and National Assembly Standing Order 127(3) respectively, the Clerk of the National Assembly invites interested members of the public and organizations to submit any views or make representations regarding the Bill.

The views, representations or memoranda may be forwarded to the **Clerk of the National Assembly, in writing through the post office; P.O. Box 41842-00100, Nairobi;** hand-delivered to the **Office of the Clerk, Main Parliament Building, Nairobi;** or emailed to **clerkparliament.go.ke;** to be received **on or before, Tuesday 15th December 2020 at 5:00 pm.**
The Bill may be accessed on the Parliament website at **http://www.parliament.go.ke** or **http://www.kenyalaw.org**

MICHAEL SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY,
8th December, 2020

"For the Welfare of Society and the Just Government of the People"
"The National Assembly speaks for you, Our results speak for themselves"