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NATIONAL ASSEMBLY

ELEVENTH PARLIAMENT – THIRD SESSION

THE DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING & TRADE

REPORT ON THE CONSIDERATION OF THE EXCISE DUTY BILL, 2015

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AUGUST, 2015

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ABBREVIATIONS

CMA	-	Capital Markets Authority
EAC	-	East African Community
ICPAK	-	Institute of Certified Public Accountants of Kenya
ITA	-	Income Tax Act
KAM	-	Kenya Association of Manufacturers
KEPSA	-	Kenya Private Sector Alliance
KOGA	-	Kenya Oil and Gas Association
KRA	-	Kenya Revenue Authority
VAT	-	Value Added Tax
BAT	-	British American Tobacco

1.0 PREFACE

On behalf of the Departmental Committee on Finance, Planning & Trade and pursuant to provisions of Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of the Finance Bill, 2015. The Bill was committed to the Committee on 25th June, 2015 and it is on the basis of this that the Committee makes this report pursuant to Standing Order 127.

1.1 Mandate of the Committee

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

- (a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- (b) study the programme and policy objectives of ministries and departments and the effectiveness of the implementation.
- (c) study and review all legislation referred to it;**
- (d) study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;
- (e) investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary and as may be referred to them by the House;
- (f) vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (*Committee on Appointments*); and
- (g) reports and recommendations to the House as often as possible, including recommendation of proposed legislation.

1.2 Committee membership

The Committee was constituted by the House on Thursday 16th May, 2013 and comprises the following members:

1. The Hon. Benjamin Langat, MP (**Chairman**)
2. The Hon. Nelson Gaichuhie, MP (**Vice Chairman**)
3. The Hon. Jones M Mlolwa, MP
4. The Hon. Anyanga, Andrew Toboso, MP
5. The Hon. Timothy M .E. Bosire, MP
6. The Hon. Ahmed Shakeel Shabbir Ahmed, MP
7. The Hon. Joash Olum, MP
8. The Hon. Dr. Oburu Oginga, MP

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

1.3 Consideration of the Bill

The Excise Duty Bill, 2015 was published and read a First Time on 25th June, 2015 and thereafter committed to the Departmental Committee on Finance, Planning & Trade for consideration pursuant to Standing Order 127. The main objective of the Bill is to consolidate the provisions on the imposition and collection of excise duty into a separate law. This is necessitated by the enactment of the East African Community Customs Management Act, into which the customs duty then in force under the Customs and Excise Act (Cap.472) were incorporated. These provisions were consequently repealed from the Customs and Excise Act leaving only the provisions relating to excise duty –which this Bill proposes to repeal.

1.3.1 Key provisions of the Bill

The Excise Duty Bill, 2015 has forty five clauses and two schedules. The Bill has objectives to compensate the Government for the external costs that the Government has to bear caused by the production, supply, or consumption of goods or service; help raise revenue to support the government's expenditure programs in the least distortionary way, largely on goods and services whose demand is inelastic. In summary, the Bill contains the following:

Part II: Liability for excise duty (Clauses 5-14)

This Part deals with liability for excise duty. This includes:

- Imposition of excise duty on excisable supplies manufactured in Kenya and excisable goods imported into Kenya
- The time when liability to pay duty arises which is at the time of removal of goods from a manufacturer's factory.
- Goods and services not liable to excise which include;
 - Excisable goods and services exported
 - excisable goods destroyed with the approval of the Commissioner
 - denatured spirits for use in the manufacture of gasohol or as a heating fuel
- Remission by the Cabinet Secretary on excise duty on beer made from sorghum, millet, cassava and any other agricultural products grown in Kenya other than barley
- Variation of rate of excise duty by the Cabinet Secretary;
- Adjustment for rate of duty for inflation done by the Commissioner;
- Arm's length principle of ex-factory selling price of excisable goods;
- Place of supply of excisable services in Kenya
- Relief for raw materials through offset

Part III: Licensing (Clauses 15-22)

In this Part the activities requiring an excisable licence include:

- manufacturing of excisable goods,
- importation of excisable goods,
- supply of excisable services
- Issuance, suspension and cancellation of the licence lies with the Commissioner
- the Consequences of suspension or cancellation of licence.

Part IV: Excise control (Clauses 23-26)

On excise control the Bill provides:

- Excisable goods under excise control shall be subject to the control of the Commissioner
- Obligations to keep metering and measuring device for proper accounting of manufactured excisable goods under excise control
- Keeping or use of still
- deemed removal of excisable goods on failure to account .

Part V: Excise stamps

On excise stamp, the Bill provides for:

- the Cabinet Secretary to make regulations on the systems for management of excise stamps and excisable goods

- the types and descriptions of excise stamps to be affixed and advertised through newspapers of national circulation.
- the specification of how goods manufactured for export or exempt are to be marked.

Part VI: Refunds Part

The Bill provides the following:

- Circumstances under which a refund of excise duty paid on excisable goods is done
- Circumstances under which duty is payable on goods subject to a refund are disposed off or dealt with contrary to the refund such as exported goods offloaded for home use and inconsistent use of exempt goods;

Part VII: Excise duty procedure

The excise duty procedure provides the following:

- Application of Tax Procedures Act.
- Record keeping
- Excise duty returns for each calendar month not later than the twentieth day of the succeeding month
- Payment of excise duty not later than the twentieth day of the succeeding month.
- Provision of security for excise duty.

Part VIII: Offences and penalties

On offences and penalties the Bill provides:

- offences on manufacturing or importing into Kenya of excisable goods without being licensed,
- offences relating to licensing and excise control
- offences relating to excise stamps
- A penalty of two times of the excise duty payable if a licensed manufacturer removes the goods from excise control without the permission of the commissioner and also if the manufacturer manufactures in a premise that is not licensed by the Commissioner.
- The sanction for an offence is a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years, or to both

Part IX: Miscellaneous provisions

Miscellaneous provision includes:

- Tax avoidance scheme to obtain a tax benefit
- The power of the Cabinet Secretary to prescribe any fee or charge to be levied on excisable goods imported into, or manufactured in, Kenya
- Repealing of the Customs and Excise Act.

- Saving Railway Development Levy, Export duties on hides and skins and scrap metals, and Import Declaration fee until provided for in other legislations

Schedules

The Bill has two schedules:

- (a) **First Schedule** covers excisable goods and services, the rate of excise duty applicable on the goods and services and interpretation of certain terms used in the schedule. For excisable goods, the applicable rates are mainly specific and not ad valorem and this is a deviation from the current practice. For excisable services, the applicable rates are ad valorem. In the First Schedule, the applicable formula for adjusting the rate of excise duty for inflation is provided.
- **Second Schedule** covers goods that are exempt from excise duty i.e aircraft, goods bought by diplomats and for consular services, vehicles for persons with disability, goods purchased by Kenya Redcross, among others.

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

1.3.2 Mastermind Tobacco Limited

The Kenya Mastermind Tobacco limited submitted that the unified taxation regime of tobacco products within the Excise Duty Bill, 2015 that was introduced way back in 2011 will continue to present negative effects to the Market. This unified regime was blind to target markets and income levels of consumers and resulted in an overall reduction of the excise rate for Classes C & D and an increase of the excise rate for Classes A & B. This unified regime has had untold negative impact on Mastermind, a key player in the tobacco industry. Mastermind therefore proposed will reversion to the three tier system (ad valorem).

1.3.3 Kenya Breweries Limited (KBL)

The Kenya Breweries Limited submitted that the proposed increment of excise duty on Beer, spirits and wine by 43%, 46% and 88% respectively are way above inflationary increases and this will lead to reduction of consumption of formal alcohol. The expected drop in volume will be over 20% and this will have a myriad of multiplier effect to the entire supply chain. As a result of the high cost, majority of Kenyans may not be able to afford and therefore will revert to illicit brews. Therefore parliament was requested to review the proposed rates downwards.

1.3.4 British American Tobacco (BAT)

The BAT submitted that the proposed taxation of e-cigarettes at a rate of KShs3000 per unit is very high and goes against the government policy of reducing smoking of tobacco products. BAT maintained that electronic cigarettes only contain nicotine liquid and not tobacco product which is the subject of the proposed taxation regime. It further submitted that if at all the electronic cigarettes were to be taxed; it is the quantity of the liquid sold that should be taxed and not the device or number of puffs per device.

Best practice is that application of excise for electronic cigarettes is best managed within a clear stand-alone product category, defined independently and delineated from all other tobacco and non-tobacco (Nicotine Products). For example Romania, Italy and North Carolina, USA have specific excise systems applied on the e-liquid in the electronic cigarette.

1.3.5 Institute of Public Accountants of Kenya (ICPAK)

ICPAK reminded the Committee that the excise tax system is to collect taxes on goods and services where the demand is largely inelastic. Where the component of excise in the final consumer price is low, for example water, juices, carbonated drinks, cosmetics, services; VAT system should be used with targeted higher rates of VAT for a select list of goods and services as opposed to excise tax. In the long run, this would be the preferred approach as it simplifies the excise tax regime and saves on administrative costs - for both the taxpayer and the tax authority.

Whilst exemption for privileged persons is recognized in Schedule two of the Bill, consideration should be given for relief projects and also the Cabinet Secretary should be given powers to give remission for public interest projects (equivalent provision to e.g. in S139(1)(g) or S139(1)(h) of the Customs and Excise Act).

The Bill proposes to usurp the mandate of parliament in clause 9 in legislative powers by giving the Cabinet Secretary Powers to vary rates of excise duty without parliamentary approval. Gazettement of any variation should be given to parliament for ratification within a specified period of time i.e 30 days.

As drafted, Clause 15 means that suppliers of excisable services will not require a license UNLESS the commissioner gazettes them to do so.

The Committee, arising from the presentations of the stakeholders and its analysis of the Bill will be introducing amendments to the Bill during the Committee Stage:-

1.4 Acknowledgement

Mr. Speaker, Sir,

The Committee is grateful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee wishes to thank all the stakeholders for their participation in scrutinizing the Bill.

Finally, I wish to express my appreciation to the Honourable Members of the Committee who made useful contributions towards the preparation and production of this report.

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

Signed  Date 25-08-2015

(HON. BENJAMIN LANGAT, MP)
CHAIRPERSON, DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING &
TRADE

2.0 BACKGROUND INFORMATION

(a) Excise Act Cap 472 and Excise Duty

The Customs and Excise Act, Cap 472 legislation has been in use since 13th October 1978. However, there have been various reviews and amendments of the law with a major review done in 2010. It is this Act that has provided for the management and administration of both customs and excise; for the administration, charge and collection of customs and excise duties and for matters relating thereto and connected therewith. To operationalize the Act is the Customs and Excise Regulations.

The Annual Finance Bills have also over time introduced amendments to the Act to achieve the relevant fiscal and administrative tax policies. In 2004, Customs law became part of the East African Community Customs Management Act 2004. This therefore superseded the customs provisions of the Customs and Excise Act thereby necessitating the need to have a stand-alone Excise bill for subsequent enactment.

Excise duty contributes approximately 12% of the total ordinary revenue. According to the National Treasury, the actual excise receipts in 2013/14 was Kshs.104 billion out of the total ordinary revenue of 927, billion, in 2014/15, the revised estimates of excise duty receipts is Kshs 123 billion (out of Ksh 1.07 trillion of total ordinary revenue and the projected estimates of excise duty in 2015/16 is Kshs144 billion out of the projected total ordinary revenue of Kshs.1.3 trillion. Taxes on cigarette and alcohol contribute more than 70 percent of the total excise duty (various economic surveys). Considering the revised estimates of the FY 2014/15, this translates to approximately Kshs.86 billion

(b) The Excise Duty Bill, 2015

The principal object of the Excise Duty Bill, 2105 is to consolidate the provisions on the imposition and collection of excise duty into a separate law. This is necessitated by the enactment of the East African community Customs Management Act 2004, into which the provisions on customs duty then in force under Customs and Excise Act (cap.472) were incorporated. These provisions were consequently repealed from Customs and Excise Act, leaving only provisions relating to excise duty.

The following are some of the key observations from the Bill in its present form and content;

- i. The Bill aims to simplify the tax administration to enhance compliance at reduced costs besides optimizing the revenue collection from the excise duty.
- ii. The Bill sets out to harmonize tax legislation with other respective regional legislations like with the East African Community Customs Management Act.
- iii. The Bill proposes to substantially increase excise rates on alcoholic beverages.
- iv. The regulations to operationalize the Excise duty bill when enacted will have prescriptive provisions on the bill hence the scrutiny of the proposed regulations by the Cabinet Secretary

will be vital to strengthen the eventual Act. References to the regulations are found in several Sections like 24(1) (f) and 44(1).

- v. In the current Act, the relevant tax procedures are incorporated in the same Customs and Excise Act. Upon enactment of the bills, uniform tax procedures will be contained in a separate Tax Procedures Bill 2015. Besides being the international best practice, this is intended to simplify tax administration and as well as to reduce cost of compliance.
- vi. The Common External Tariff (CET) that uses Harmonized system which is the common international practice is not fully used in the First Schedule. Descriptions without respective tariff codes are used for fruit juices, waters, alcoholic and other non-alcoholic beverages.
- vii. There is proposed grant remission of excise duty on beer made from sorghum, millet, cassava or any other agricultural products (but not barley) grown in Kenya. *Section 7(2)*.
- viii. To safeguard the environment, all classes of fossil fuels will be taxable and excise duty on biodegradable plastic enhanced-*First Schedule*.
- ix. Taxation of motor vehicles and motorcycles into a regime based on classes of age. *First schedule*

3.0 CONSIDERATION OF THE EXCISE DUTY BILL, 2015

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

3.1 STAKEHOLDER VIEWS ON THE EXCISE DUTY BILL, 2015

The following is a summary of issues raised by the various stakeholders on the Excise Duty, Bill 2015.

3.1.1 KENYA ASSOCIATION OF MANUFACTURERS (KAM)

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

- (a) **Clause 3 (1) The open market value of excisable goods:-** The open market value of excisable goods or services at a particular time is the price that the goods or services would reasonably be expected to fetch in an arm's length transaction at that time at the wholesale level should be determined using generally accepted method of valuation

Issue:- Some value chains such as services may not have a wholesale stage/level. This clause introduces approximation and ambiguity as opposed to being concise and specific.

Proposal: - The Bill should specify method to be used so as to achieve consistency

(b) Clause 7 – Goods and services not liable to excise duty:- Clause 7 (2) The Cabinet Secretary may by notice in the Gazette, grant remission of excise duty, wholly or partially, in respect of beer or wine made from sorghum, millet or cassava or any other agricultural products, (excluding barley), grown in Kenya

Issue: - There is inconsistency with the wording of the Clause

Proposal:- Delete Clause 7(2) and replace with a new clause (2) *Notwithstanding the provision of any other law, the Cabinet Secretary responsible for finance shall grant remission of excise duty at ninety per centum with respect to beer made from sorghum, millet or cassava grown in Kenya.....*

Justification: Insert this wording in Excise Bill, 2015 to avoid future inconsistency and situations where the Cabinet Secretary grants more

(c) Clause 8 - Variation of rates of excise duty:- (1) The Cabinet Secretary may, by order in the Gazette, amend the First Schedule by increasing or decreasing any rate of excise duty on excisable goods or services from the date specified in the order by an amount not exceeding twenty-five per centum of the rate set out in the First Schedule for those excisable goods or services

Issue: -This Clause is inconsistent with Article 201 (a) of the Constitution which requires openness and accountability, including public participation in financial matters. The unilateral power of the Cabinet Secretary to amend a written law by a Ministerial Order (without need for public participation) is akin to a decree.

Proposal: -Delete the Clause

Justification: This is to remove the various inconsistencies including inconsistency with Article 209 which imposes the mandate on matters of taxation only with the Parliament. The Clause is also inconsistent with Section 15(2) (f) of the Public Financial Management Act: regarding need for predictability with respect to the level of tax rates and tax bases.

(d) Clause 23 - Excise goods under excise control: - Section provides that excisable goods may only be stored in a licensed excise factory. Imported goods can be stored in bonded warehouse pending exportation, payment of duty, and transfer to another bonded warehouse.

Issue: No similar facility is created in Excise Bill and this favors imported excisable goods over locally manufactured goods.

Proposal: *Insert new paragraph (5). The Commissioner may appoint a place outside a factory for the storage of goods under excise control subject to execution of bond.*

(e) First Schedule : Excisable Goods and rates:

Issue: The proposed rates for beer, cigarettes, water, soft drinks and plastic bags are set at levels that represent an increase of over 100% in some cases. The rates have been increasing in the past and are way above optimal taxation levels. This has resulted in stagnation of growth especially in the case of beer. It is predicted that the published rates will result in a decline of both volumes and tax revenue by over 44%.

Proposal: - *Increase current rates by 7% to cater for inflation (i.e. Kshs. 75 per litre of beer and Kshs. 145 for spirits, Kshs 3.7 for carbonated drinks.*

Trim the schedule to remove items such as water and motor cycles. Collection of excise on these items is administratively inefficient.

Justification: Manufacture of excisable goods supports other sectors such as agriculture. There is need to protect industries supported by manufacture of excisable goods e.g. agriculture from collapse.

3.1.2 INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA (ICPAK)

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

(i) **Clause 3: Definition and interpretation of terms**

Issue: The Bill does not provide for the definition and interpretation of the following:

- Arms length
- Fees
- Mobile operator
- Financial institutions

Proposal: Amend the definition of other fees in part IV of the First Schedule as follows:

- Replace the phrase “*but does not include interest*” with “*but does not include interest, premium and commissions as defined in the Insurance Act*”
- Amend the definition of Financial Institution in Part IV of the first schedule regarding person licensed under the Insurance Act; *It should state that under (a)(ii) the Insurance Act as an Insurance Company Mobile cellular service operator or wireless operator means a provider licenses as such by the Communications Authority of Kenya.*

(ii) **Clause 4: Open market value**

Issue: The open market value of excisable goods or services at a particular time is the price that the goods or services would reasonably be expected to fetch in an arm`s length transaction or the price to be determined by the commissioner based on generally accepted principles of valuation

Proposal: Amend Clause 4 to read as follows:

The open market value of excisable goods or services at a particular time is the price that the goods or services would reasonably be expected to fetch in an arm`s length transaction or the price to be determined by the commissioner based on generally accepted principles of valuation as provided for under Part I of the Fourth Schedule to EACCMA.

(iii) Clause 5:- Time of supply

Issue: The Bill does not define time of supply for imported services

Proposal: *Insert a sub-section 3 to define the time of supply for imported services to mean the earlier of consumption of the service or payment for the service.*

(iv) Clause -9(3):- Variation of rates of excise duty.

Issue: The bill to the extent of this clause is inconsistent with the normal practice and mandate given to parliament by the constitution on legislative powers. This clause gives the Executive the powers to make and pass laws to the extent that they are not challenged by parliament.

Proposal: Amend Section 9(3) to read as follows:

“Within a period of the 30days from the date the CS has gazette the changes, the CS shall present to the National assembly for debate and ratification of the changes. Failure of parliament to ratify the changes within 30 days, the rates shall revert to the original position before the proposed changes and subsequently the CS shall have 7 days to de-gazette the amendments.

(v) Clause 10 (3) (6) Excisable value.

Issue: The Bill provides that the excisable value of excisable services specified in item 4 of Part III of the First Schedule shall not include interest or an insurance premium. The provision in essence contradicts the provisions of item 4 of Part III of the First Schedule

Proposal: *For clarity this need to be amended in line with S.4.3. They have one but not both to ensure the need for equity between imports and exports*

(vi) Clause.14- Relief for raw materials.

Issue: The relief only covers imports as raw materials which are used to produce excisable finished products for instance perfumes imported as raw materials to manufacture petroleum jelly. This implies that if a manufacturer of medicaments which are not excisable using

petroleum jelly as a raw material they will not enjoy the relief which will increase the cost of the finished product – i.e. medicaments.

Proposal: *Raw materials are supposed to be charged low tax as possible to encourage local production. The cost of excise duty which is not creditable would increase the price of the final good. Furthermore charging excise duty on a raw material does not serve the intended object of the Excise Duty Bill 2015.*

(vii) Clause .15 (1) Activities requiring a license

Issue: The activities include manufacture or importation of excisable goods, use of spirit to manufacture non excisable goods and any activity the commissioner may Gazette. This implies that suppliers of excisable services will not require a license UNLESS the commissioner gazettes them to do so

Proposal: *S. 15.d- The commissioner is being given powers to legislative. This sub section should be removed S.9 contradicts S.15 on powers to license. Parliament or CS to approved. Consider excluding people who are already licensed by regulatory bodies*

(viii) Clause 21: cancellation of license

Issue: The Commissioner shall, by written notice, cancel the license of a person when:

- a) the Commissioner has received notification under section 19(2)(a);
- b) the person fails to appeal the suspension of the person's license within the time specified in section 20(4);
- c) The person fails to comply with a notice served on the person under section 20(5)(b) within the time specified in the notice or within such further time as the Commissioner may allow; or the
- d) Commissioner rejects an appeal under section 20(4)

Proposal: Introduce sub-section 21(e) as follows:

"A person who disputes the decision of the Commissioner on any matter arising from this Act may upon giving notice in writing to the Commissioner, appeal to the Tribunal."

(ix) Clause.22 (1) b Consequences of suspension or cancellation of license.

Issue: The section refers to a person licensed to supply excisable services. It implies that persons supplying excisable services require a license to supply the services. Section 15 (1) which lists activities which would require a license does not mention the supply of excisable services.

Proposal: *The Act should either add the supply of excisable services to Section 15 (1) to imply these suppliers need a license or delete section 22 (1) b to imply there is no need for a license for excisable service providers*

(x) **Clause 24: (3) Obligations of licensed manufacturer in relation to excisable goods under custom control.**

Issue: The Commissioner: may, at any time, take samples of excisable goods without payment of excise duty for such purposes of the Act as the Commissioner may deem necessary, and any such samples shall be disposed of and accounted for in such manner as the Commissioner may direct; or subject to such written conditions as the Commissioner may impose, permit the owner of excisable goods to take samples of those goods without payment of the excise duty thereon at the times the samples are taken.

Proposal: Amend Section 24(3) to read as follows:

The Commissioner may, at any time, take samples of excisable goods without payment of excise duty for such purposes of the Act as the Commissioner may deem necessary, and any such samples shall be disposed of and accounted for in such manner as the Commissioner may direct subject to the Commissioner notifying in writing the person from whom the sample is taken the reasons for taking the sample;

Amend Section 24(3)(a) to read as follows

The Commissioner subject to such written conditions as the Commissioner may impose, permit the owner of excisable goods to take samples of those goods without payment of the excise duty thereon at the times the samples are taken upon written request by the owner stating the reasons for taking the sample. Such a request should be made within a reasonable time.

(xi) **Clause .27 – Excise Stamps**

Issue: The provision to use Excise Stamps in the Bill limits the Commissioner from exploring emerging technologies and innovation. It can also lead to litigation especially if the Cabinet Secretary decides to employ a different technology.

Proposal: *Remove the requirement for excise stamps and leave it open for innovation. This should be regulated administratively*

(xii) **First Schedule**

Proposal: *Paragraphs 2 to 5 of the First Schedule should be moved from Part I to Part II so that services and goods are separated.*

3.1.3 RESPONSIBLE ALCOHOL DRINKS COMPANIES ASSOCIATION (RADCA)

The following is a summary of the issues raised by Responsible Alcohol Drinks Companies Association (RADCA) on the Excise Duty Bill, 2015:

- (i) **Industry Concern:** The average 43% increase in excise tax proposed in the Bill is unsustainable for beer business in Kenya. This will lead to negative consequence such as: closure of businesses; drops in sales volumes; illegal cross border trade; and reduced Investment.
- (ii) **Reduce the proposed tax rates to reflect the regional excise tax rates:** Regional Tax Comparative indicates that under the new Bill, Kenya tax per litre of alcohol will average US Dollars 1 compared to US Dollars 0.45 in Uganda; and US Dollars 0.35 in Tanzania

3.1.4 BRITISH AMERICAN TOBBACO (BAT) KENYA LIMITED

The following is a summary of the issues raised by British American Tobacco (BAT) Kenya Limited on the Excise Duty Bill, 2015:

(a) First Schedule, Part I – Excisable Goods.

The system ensures predictability and sustainable growth in Government excise revenues. It is easier to determine the amount of tax considering the tax is charged per quantity. It is easier to administer because it is easy to count the number of products, especially taking into account KRA's current excise management systems. The system is in line with view of public health authorities and is a progressive feature in the tax regimes of many other countries. The adoption of the system will promote simplification and acceleration of tax convergence between EAC Markets. A tax specific regime is an improvement from past regimes, which have included a tiered tax system based on product characteristics and ad valorem with a minimum collectible excise. Tiered based tax systems face a number of deficiencies:

- a) It encourages industry pricing actions to minimize tax levels. It may lead to price wars among industry players, erosion of the value of the market and Government excise revenues.
- b) They encourage the production and consumption of lower quality cigarettes at lower rates.
- c) There is the problem of determining the effective retail selling price (RSP) or the ex-factory selling price (EFSP) or CIF in the market, as this may vary from one location to another.
- d) EFSP and CIF can be manipulated to minimize tax levels.
- e) It is difficult administer as it requires the tax authorities to understand the dynamics of the prevailing RSP or EFSP or CIF.

(b) First Schedule, Part III – Interpretation of Schedule:- “Inflation”, means the average annual inflation rate in a financial year

Issue: Amend to say “*Inflation*” means the movement in Consumer Price Index number published by the Kenya National Bureau of Statistics for that month when compared to the same month in the preceding year.

Justification: To provide clarity on the inflation rate to be used for calculating the indexation.

(c) First Schedule, Part I – Excisable Goods:- B is the adjustment factor for the adjustment day calculated as one plus annual average rate of inflation of the preceding financial year

Issue: Amend to say “*B is the adjustment factor for the adjustment day calculated as one plus annual average rate of inflation of the preceding year to 30th April*”

Justification: - For practicality purposes it will not be possible to determine the CPI as at 30 June on 1st of July (adjustment day). This is because the monthly CPI is only published after month end.

(d) First Schedule, Part I – Excisable Goods:- “*Electronic Cigarettes*” at the rate of Excise Duty of “*Shs. 3000 per unit*”

Issue: Amend to read “e-liquid used in the electronic cigarette at the rate of excise duty of “***Shs. 3000 per 1000 milliliters***”.

Justification: Applying excessive levels of excise on electronic cigarettes is inconsistent with the public health agenda. When tax is to be applied to electronic cigarettes, it should be a specific tax levied on the quantity of e-liquid sold (i.e. not on the device or the number of puffs per device); it should be commensurate with the lower risk profile of electronic cigarettes vis-à-vis conventional cigarettes; and it should be simple to collect and not stifle future innovation of the category. Many different devices (disposables, rechargeable and modular refillables) are used to deliver the nicotine in the e-liquid to the consumer. Depending on consumer preference, the delivery device may or may not be re-used. In all cases the consumable element is the e-liquid. On the basis that e-liquids may not include nicotine but still be used in devices, we should ensure that tax is levied on the total volume of e-liquid and should not vary according to nicotine content. This ensures a level playing field exists for all manufacturers of different devices and liquids

Best practice: Application of excise for electronic cigarettes is best managed within a clear stand-alone product category, defined independently and delineated from all other tobacco and non-tobacco (Nicotine Products). For example Romania, Italy and North Carolina and USA have specific excise system applied on the e- liquid in the electronic cigarette.

(e) First Schedule, Part I – Excisable Goods: - “*Cartridges for use in electronic cigarettes*” at the rate of Excise Duty of “*shs. 2000 per unit*”

Proposal: Delete “Cartridges for use in electronic cigarettes – Shs. 2000 per unit

Justification: Applying excise on a cartridge to be used in electronic cigarettes would amount to applying excise on a device rather than the consumable i.e. the e-liquid. The device may be reusable/refillable. For example, it would be like applying excise on the packaging of a cigarette as opposed to applying it on the cigarettes themselves.

- (f) **First Schedule, Part I – Excisable Goods:** -“Electronic cigarettes” means electronic nicotine delivery system whether or not containing tobacco or tobacco substitutes and includes electronic cartridges.

Proposal: Amend to say “electronic cigarettes” means battery-powered electronic devices that deliver an aerosol (‘vapour’) without tobacco smoke generated from a liquid formulation (‘e-liquid’) whether or not containing nicotine and typically consists of a battery, a heating element and a storage tank for the e-liquid.

Justification: To provide the correct definition and remove ambiguity considering electronic cigarettes are not tobacco products and do not contain tobacco or tobacco substitutes.

3.1.5 PRICE WATERHOUSECOOPERS (PWC)

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

- (i) **Clause: Part III of the First Schedule:** - Premium related fees/commissions included as part of the definition of ‘other fees’ charged by insurance companies are subject to excise duty.

Proposals: Premium related fees/commissions to be excluded from the definition of ‘*other fees*’.

The definition of financial institutions should exclude insurance intermediaries such as brokers and agents.

Justification: Excise duty on premium related fees/commissions may render insurance services out of reach of the general public and result in double taxation as these fees are subject to VAT. The insurance sector heavily relies on intermediaries while Banks deal directly with clients and no intermediaries are required. Commissions are earned and not charged.

- (ii) **Clause: Part I of the First Schedule paragraph 1:-** Fixed amount of duty for all motor vehicles irrespective of use and the engine capacity.

Proposal: In addition to the age, the engine capacity of the vehicle should also be factored in arriving at the amount of excise duty payable.

Justification: The bill places a fixed amount of duty for all motor vehicles irrespective of use and the engine capacity. Vehicles with bigger engines and therefore higher emissions should attract a higher rate of duty compared to smaller vehicles.

- (iii) **Clause: Sec 10 & Part I of the First Schedule paragraph 2:-** Adjustment of the specific rate of excise duty annually to take into accounts the inflation.

Proposal: Inflation adjustment to be effected only where the change in the annual inflation rate is significant (e.g. over 5%) or to be adjusted after a longer period (e.g. 3 years)

Justification: This will create ease of tax administration and ensure the need for stability of the excise duty rate

(iv) **Clause: Section 2:-** Clarification of the definition of the term license for excisable services.

Proposal: The term license for excisable services should be clarified to mean registration by the regulator of the particular industry.

Justification: Need for clarification to ensure compliance among providers

3.1.6 MASTERMIND TOBACCO KENYA LIMITED

The following is a summary of the issues raised by Mastermind Tobacco Kenya limited on the Excise Duty Bill, 2015

(i) **The excise tax regime for cigarettes remains as per Schedule V, Part (II) of the Finance Act (2010) set out in the Cigarette Excise tax structure for 2010 as shown below:**

CATEGORY	DESCRIPTION	Excise Duty
A	Plain cigarettes or cigarettes with RSP of up to Shs. 2,500 per mille	Shs. 700 per mille
B	Soft cap cigarettes with RSP of Shs 2,501 to Shs. 3,500 per mille	Shs. 1,000 per mille
C	Soft cap cigarettes with RSP of Shs. 3,501 to Shs. 4,500 per mille	Shs. 1,500 per mille
D	Hinge lid cigarettes or cigarettes with RSP of more than Shs. 4,500 per mille	Shs. 2,500 per mille

Proposal: In the First Schedule to the Excise Duty Bill, 2015 in Part I, *delete the column on cigarettes containing tobacco or tobacco substitutes and inserting the following under Part I (Excisable Goods):*

CATEGORY	DESCRIPTION	Excise Duty
A	Plain cigarettes or cigarettes with EFSP of up to Shs. 2,750 per mille	Shs. 900 per mille

B	Soft cap cigarettes with EFSP of Shs. 2,751 to Shs. 3,750 per mille	Shs. 1,200 per mille
C	Soft cap cigarettes with EFSP of Shs. 3,751 to Shs. 4,750 per mille	Shs. 1,800 per mille
D	Hinge lid cigarettes or cigarettes with EFSP of more than Shs. 4,750 per mille	Shs. 2,800 per mille

Justification: If adopted, the proposals will: Increase the Government revenue; Create equity and encourage investment; Create employment leading to economic growth; Safeguard against revenue loss occasioned by revenue leakage through smuggling, down trading and counterfeiting which has become rampant due to high taxation on cigarettes in Kenya as compared to the neighboring countries.

3.1.7 COCA COLA EAST AFRICA LIMITED, KISII BOTTLERS LTD AND ALMASI BEVERAGES

The following is a summary of the issues raised by Coca Cola East Africa Limited, Kisii Bottlers Ltd and Almasi Beverages on the Excise Duty Bill, 2015

(i) **Clause 5 (2) –First Schedule (Excise Duty rates on Non-alcoholic beverages):** The proposed excise rate of Kshs. 10/- per litre on other non-alcoholic beverages not including fruit or vegetable juices from 7% of the ex-factory selling price or average of Kshs3.70/ Liter in the current law is punitive and bad for business and will lead to government loss of revenue o the tune of approximately Kshs. 0.5 billion per year.

Proposal: Retention of the current ad-valorem rate of 7%or Maintain the specific rate of Kshs. 3.70.

Justification:- The proposed clause will have the following negative effects: Reduced capital investments; Operation will be loss making thus wiping out expected corporation tax for 2016; Reduced VAT contributions arising from slimmer margins and lower purchasing and sales activity; Reduced import duty collections caused by reduced raw material imports to satisfy a reduced demand for finished product; Reduced work-force(PAYE reduction); and Impact the growth rate of the manufacturing sector –currently at 3.5% from 6.4%

(ii) **Clause 5 (2) –First Schedule (Excise Duty rate on bottled water):** The proposed excise rate of Kshs. 10/- per litre on bottled water from 5% of the ex-factory selling price or average of Kshs3/ litre does not augur well with provision of water for drinking which is a basic human right.

Proposal: Removal of water from the list of excisable products in the First Schedule

Justification: - The proposed clause will have adverse effect on bottled water and its provision to the consumers. It will also lead to lose of revenue b the government.

(iii) **Inflationary Adjustments:** The Bill seeks to empower the Commissioner to adjust duty rates on an annual basis due to inflation without approval from Parliament.

Proposal: Inflationary adjustment should be made after at least three years. The adjustment should be approved by Parliament in consultation with the business community.

Justification: The powers to vary rates of taxes are a Constitutional mandate of Parliament and cannot be delegated to the Commissioner.

3.1.8 KENYA BREWERIES LIMITED (KBL)

The following is a summary of the issues raised by Kenya Breweries Limited on the Excise Duty Bill, 2015.

- (i) Excise duty on beer and ready to drinks of less than 10% a.b.v; Spirits and Wines:** The proposed increases in excise duty taxes on beer and ready to drinks of less than 10% a.b.v; Spirits and Wines from Kshs. 70% or 50% to Kshs. 100 /- per litre; Kshs. 120/- per litre or 35% to Kshs. 175/- per litre; and Kshs. 80/- per litre of 50% to Kshs. Kshs. 150/- per litre on beer and ready to drinks of less than 10% a.b.v; Spirits and Wines respectively is punitive and will lead to adverse effects on the industry.

Proposal: Delete the words “ Shs. 100 per litre ” appearing in the second column of the fifth schedule as the rates of excise tax on Beer, Cider, Perry, Mead, Opaque beer and mixtures of fermented beverages with non-alcoholic beverages and spirituous beverages of alcoholic strength not exceeding 10% and insert therefore the words “ **KShs. 75 per litre. ”**

Delete the words “Shs. 175 per litre” appearing in the second column of the fifth schedule as the rates of excise tax on Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 10% and insert therefore the words “Shs 145 per litre**”**

Justification: The proposal will lead to several benefits including: Over 20,000 farmers engaged in production of barley and sorghum will benefit by earning more than Kshs 1.5 billion annually; Increased sales volumes will lead to more profitability for the retailers and this will spur economic empowerment and employment; low end market consumers will access affordable and hygienic alcoholic products; and Increased revenue to government in the form of excise, VAT and corporate tax.

4.0 SUMMARY OF CLAUSE BY CLAUSE OF THE EXCISE DUTY BILL

The following section provides clause by clause analysis and observations

CLAUSE	HIGHLIGHTS	OBSERVATIONS
PART I : PRELIMINARY		
1.	Provides for a short title and commencement of the Act	The title of the bill is appropriate and the timeline for enactment is stipulated as being not later than 3 months

CLAUSE	HIGHLIGHTS	OBSERVATIONS
		from the date of publication.
2.	Provides for interpretation of terms and phrases used in the Bill	The meanings of terms as used in the bill are clearly interpreted and properly contextualized. Notably though, there is wrong referencing made on 'open-market value.
3.	Defines the open market value of excisable goods and services at a particular time	This intends to ensure that an objective price/value is arrived at as the basis of charging the tax on excisable goods and services.
4.	Provides for the determination of the time of supply or importation	This is well exhaustively clarified to prevent any confusion on the time of supply or importation.
PART II: LIABILITY FOR EXCISE DUTY		
5.	Imposition of excise duty	This captures the incidence of the tax and specifies who is to pay the excise duty. Being an indirect tax, it implies that the impact of the excise duty is eventually transferred to the final consumer at the tail end of the supply chain.
6.	Timing of liability for excise duty	The time when the excise duty is payable is elaborated on; both for locally manufactured goods and imported commodities. For imported petroleum, the CS may determine the timing by

CLAUSE	HIGHLIGHTS	OBSERVATIONS
		notice of gazette.
7.	Goods and Services not liable to excise duty	Enlisted are goods and Services not liable to excise duty. The CS though has discretion to grant remission by notice in the Gazette. This is to prevent any confusion and uncertainty that may arise in this.
8.	Provides for the procedure and terms of variation of rates of excise duty.	Gives the CS the discretion to vary excise duty rates up to a limit of 25%. <i>This is a substantial percentage limit and the committee may consider reducing this.</i>
9.	Determination of the excisable value	This harmonizes the valuation with EACCM Act and clarifies what constitutes value to be charged excise duty. The exoneration of interest and insurance premium will encourage investments in the insurance industry.
10. *	Adjustment of excise duty for inflation	Annual indexation of taxes subject to inflation rates is prudent and will ensure that revenue's time value is correctly captured for better planning of public expenditures.
11.	Defines what constitutes ex-factory selling price of excisable goods	This is well defined both when excisable goods are sold by the manufacturer other than to a purchaser in

CLAUSE	HIGHLIGHTS	OBSERVATIONS
		arm's length transaction.
12.	Quantity of excisable goods	The determination of quantity of excisable goods is well explained.
13.	Place of Supply of excisable services	Specifies when a supply of excisable services is deemed to have been made in Kenya
14.	Provides for when to a tax relief is given on raw materials	Explains how to net off the payable excise duty on the finished goods when raw materials had initially been taxed.
PART 111: LICENSING		
15.	Enumerates the activities requiring a license to deal in excisable goods and services .The Consequences of contravention of the licensing provision are highlighted.	The penalty for contravention of the licensing is prescribed hereof.
16.	Procedure on application for a license	Application to be lodged with the commissioner at prescribed fees.
17.	Provides for issuance of a licence	Provides for issuance and refusal to issue the license to an applicant. The reasons for refusal to grant the license are well elaborated.
18.	Form of license	Specifies the forms of licences to be issued to a manufacturer of excisable goods and the scope of applicability of the licence.

CLAUSE	HIGHLIGHTS	OBSERVATIONS
19.	Provides for the obligations of the license person	It is a requirement that the licence is conspicuously displayed at the principal place of business, and that timely notifications are made in changes in details given during the licence application and any disruptions in operations in the factory.
20.	Suspension of license	Provides for reasons and procedure for suspension of the license by the Commissioner. Timely appeal is allowed.
21.	Cancellation of a license	Sets the procedure and conditions that shall lead to cancellation of a license.
22.	Gives the consequences of suspension or cancellation of license	The cessation of manufacturing of excisable goods and the treatment of already manufactured goods well elaborated.
PART IV: EXCISE CONTROL		
23.	Provides for handling of excisable goods under excise control	Outlines the implication of excise control on goods and how such goods should be restrictively handled
24.	Obligations of licensed manufacturer in relation to excise goods under excise control	The requirements of the licensed manufacturer in storage, record keeping, and metering devices to be used and timely payment of excise duty are well elaborated.

CLAUSE	HIGHLIGHTS	OBSERVATIONS
25.	Provides for prohibition of keeping or use of a still than by distiller or rectifier.	Only a licensed or by permission of the Commissioner is one allowed to keep or use a distiller.
26.	Deemed removal of excisable goods	In case of any discrepancy in accounting records and actual in the actual inventory for excisable goods manufactured, the goods shall be deemed to have been removed from excise control
PART V: EXCISE STAMPS		
27.	Provides for inscription of Excise stamps and other markings	Regulations to specify when and which excisable goods to be affixed with excise stamps or other markings.
PART VI: REFUNDS		
28.	Outlines situations when excise duty paid can be refunded	Gives the conditions for a refund of excise duty paid to be made.
29.	Prescribes the consequence of inconsistent use or disposal of excisable goods that have been refunded the duty	It spells out that such inconsistency or use of excisable goods makes the manufacturer or importer liable for payment of excise duty
30.	Provides for exemption of excisable goods liable for excise duty on re-importation or purchase	Excisable goods imported or purchased free of excise duty shall be liable for excise duty on disposal or inconsistent use.
31.	Exempt excisable goods liable for excise duty on disposal or inconsistent use	Obligates excise payment on exempt excisable goods when

CLAUSE	HIGHLIGHTS	OBSERVATIONS
		disposed or put in inconsistent use.
PART VII: EXCISE DUTY PROCEDURE		
32.	Administration of the Act(Excise duty Act,2015)	Application of the Tax Procedures Act ,2015
33.	Provides for record keeping for a person liable to pay excise duty	As is prescribed in regulations and Tax procedures Act
34.	Requirement for timely excise duty returns	The returns to be made by 20 th of every succeeding calendar month in a prescribed form. <i>Repetition of the article the before the word twentieth.</i>
35.	Provides for payment of excise duty	Prescribes times for payment of excise duty for goods manufactured, services supplied (not later than 20 th of succeeding month), imported goods (time of importation).
36.	Provision of security by a licensed manufacturer	Commissioner may require a manufacturer to provide a security for the protection of excise duty.
PART VIII: OFFENCES AND PENALTIES		
37.	Penalties for breach of excise duty legal and procedural obligations under the Act	Outlines penalties for various breaches and non-compliance with the Act
38.	Offences relating to licensing and excise control	Outlines offences relating to licensing and excise control

CLAUSE	HIGHLIGHTS	OBSERVATIONS
39.	Offences relating to excise stamps	Outlines offences relating to excise stamps
40.	Provides for the sanctions for offences	Prescribes fines that may be meted on an offender of the Act
PART IX: MISCELLANEOUS PROVISIONS		
41.	Tax Avoidance Schemes	Assessment and determination of tax benefits for consequent payment of excise duty outlined.
42.	Effect on prices of imposition, abolition or variation of excise duty	Sets out how variation on prices can be effected as a result of fluctuation of excise duty payable
43.	Provides for the application of the East African community Customs Management Act,2004	Gives effect to the application of East African community Customs Management Act 2004 and any exceptions and adoptions may be prescribed.
44.	Provides for making of regulations to operationalize the Act	The Cabinet Secretary may make the regulations for better carrying out of the provisions of the Act
45.	Repeals and transitional provisions	Provides the repealing of Customs and Excise Act and the continued application of some sections of the Act to ward off any vacuum till proper legislations are in place.

5.0 COMMITTEE RECOMMENDATION

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

CONSOLIDATED AMENDMENTS FROM STAKEHOLDERS

LONDON DISTILLERS

FIRST SCHEDULE

THAT the First Schedule to the Bill be amended by deleting “Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 10%- Shs. 175 per litre” and substituting therefor the following expression-

Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 10%	Shs. 120 per litre
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(An increase in tax by 46% will lead to an increase in prices. As a result consumers will find alcohol too expensive and shift to cheaper unregulated and untaxed alcohol which has serious health burden implications. The amendment will prevent consumers from dropping to illicit brews and also protect the shareholders wealth.)

COCA COLA

FIRST SCHEDULE

1. THAT the First Schedule to the Bill be amended by deleting “Waters and other non-alcoholic beverages not including fruit or vegetable juices- Shs. 10 per litre” and substituting therefor the following expression-

Waters and other non-alcoholic beverages not including fruit or vegetable juices	Shs. 3.9 per litre
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(The move from ad valorem rate of 7% of ex-factory selling price to a specific rate of Shs.10 per litre significantly increases the excise duty on the product. The move from Kshs3.9-10 per litre is extremely punitive and will have an impact on the overall revenue.)

2. THAT the First Schedule to the Bill be amended by deleting paragraph 2.

(The specific duty rates should not be adjusted for inflation purposes on an annual basis. Adjusting tax should be a last resort in controlling inflation. The most appropriate remedy is to bring inflation under control.)

RACADA (Responsible Alcohol Drinks Companies Association)

FIRST SCHEDULE

THAT the First Schedule to the Bill be amended by deleting “ Beer, Cider, Perry, Mead, Opaque beer and mixtures of fermented beverages and spirituous beverages of alcoholic strength not exceeding 10% - Shs. 100 per litre” and substituting therefor the following expression-

Beer, Cider, Perry, Mead, Opaque beer and	Shs.75 per litre
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mixtures of fermented beverages and spirituous beverages of alcoholic strength not exceeding 10% - Shs. 100 per litre	
---	--

(It is important to reduce the increase in excise duty rates this year from the proposed levels so as not to exacerbate further the problems associated with cross-border illicit trading, growth of illicit liquor and counterfeiting.)

CROWN BEVERAGES LTD

THAT the First Schedule to the Bill be amended by deleting “Waters and other non-alcoholic beverages not including fruit or vegetable juices- Shs. 10 per litre” and substituting therefor the following expression-

Waters and other non-alcoholic beverages not including fruit or vegetable juices	Shs. 0 per litre
--	------------------

(Recent years have seen rapid price increases, particularly larger sized bottles such as 5 litre, 10 litre and 20litre. An increase on excise from 3/=per litre to 10/= per litre would immediately force CBL to make a further significant price adjustment of around 26%. This would make bottled water from legitimate suppliers like CBL unaffordable to most of the population.)

NAIROBI BOTTLERS LIMITED

THAT the First Schedule to the Bill be amended in paragraph (1) by deleting “Waters and other non-alcoholic beverages not including fruit or vegetable juices- Shs. 10 per litre” and substituting therefor the following expression-

Waters and other non-alcoholic beverages not including fruit or vegetable juices	Shs. 0 per litre
--	------------------

(Soft drinks are price sensitive. There is proliferation of cottage industry water manufacturers who do not comply with statutory fiscal and health requirements and thereby undercut the legitimate market by offering their products below average retail prices. Another challenge is the importation of duty-not-paid ready to drink beverages from neighbouring countries. The proposed increase would force the increase in price coupled with the above challenges NBL would be making losses)

KENYA AUTO BAZAAR ASSOCIATION

THAT the First Schedule to the Bill be amended in paragraph (1) by deleting “Motor vehicles of tariff heading 87.02, 87.03 and 87.04 –less than three years old from the date of first registration Kshs. 150,000per unit- Over three years old from the date of first registration Shs.200,000 per unit” and substituting therefor the following expression-

Motor vehicles of tariff heading 87.02, 87.03 and 87.04	Upon registration an environmental levy of 1.5% of customs value in addition to 20% excise duty currently payable except hybrid vehicles.
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(All vehicles regardless of age are environment polluters and introducing a blanket fee amounts to discrimination and against the spirit of the Constitution. However an environmental levy of 1.5% of customs value to all vehicles regardless of age and capacity will help protect the environment. This will also encourage people to bring hybrid vehicles which are more environmentally friendly.)

BRITISH AMERICAN TOBACCO KENYA

FIRST SCHEDULE

1. THAT the First Schedule to the Bill be amended in Part I, paragraph (2) (2) by deleting the formula "B where- B is the adjustment factor for the adjustment day calculated as one plus annual average rate of inflation of the preceding financial year" and substituting therefor the following new formula "B where- B is the adjustment factor for the adjustment day, calculated as the average rate of monthly inflation of the preceding financial year"

(The given formula provided for computing the excise rate already takes into account inflation. Therefore to ensure consistency the following formula has been provided)

2. THAT the First Schedule to the Bill be amended in Part III by inserting the following new definition-

"rate of monthly inflation in each month" means the movement in the consumer Price index number published by the Kenya National Bureau of Statistics for that month when compared to the same month in the preceding year;"

(To ensure consistency in the in the application of the formula)

MASTERMIND TOBACCO LIMITED

CLAUSE 8

THAT clause 8 of the Bill be amended in subclause (1) by deleting the word "twenty-five" and substituting therefor the word "ten".

(To empower the cabinet secretary to vary rates of excise duty by as much as 25% change is very drastic. Many of the excisable goods, key ones being cigarettes and alcoholic drinks are quite sensitive to change in taxation and prices, as they have elastic demands)

NEW CLAUSE

THAT the Bill be amended by inserting the following new clause immediately after clause 22-

22A. (1) Where there is an intention of the Commissioner of seeking to suspend, revoke, cancel or not renewing a license under this Act, he shall give twenty one days' notice to the licensee prior to taking the intended action, giving the grounds upon which such intended action shall be taken, and requiring the licensee to remedy any circumstances which may require to be remedied.

(2) the licensee shall within twenty one days of receipt of the notice remedy the matters required of by the Commissioner, upon which the Commissioner shall within fourteen days acknowledge this satisfaction in writing or proceed to confirm the taking into effect of the intended notified action.

(3) Upon receipt of such notification of confirmation of the intended action, where the licensee is dissatisfied with the decision of the Commissioner, the licensee shall file an appeal with the Tribunal within fourteen days of receipt of notification and shall serve the Commissioner the appeal application within seven days of filing

(4) The tribunal shall hear and determine the appeal without undue delay and its decision shall be binding on the Commissioner, subject to the right of appeal to the High Court.

(To introduce some element of due process owing to the far reaching effects on the suspension, revocation or cancellation of a license, on investment. There is need to produce a notice of intention and a provision for appeal.)

CLAUSE 27

THAT clause 27 of the Bill be amended by deleting subclause (4) and substituting therefor the following new subclause –

(4) A person shall not remove excisable goods specified in subsection 1(a) from excise control unless an excise stamp is affixed on the goods or with the approval of the Commissioner where the Commissioner is satisfied that it would be not practicable to affix such excise stamps.

(It is necessary to amend the subsection to make it flexible for the Commissioner to waive the mandatory requirement for affixing of excise stamps, when circumstances of affixing excise stamps do not permit.)

CLAUSE 28

THAT clause 28 be amended in subclause (4) by inserting the following new paragraphs immediately after paragraph (b)-

“(c) approved or rejected by the Commissioner within three months of lodging the refund , and the Commissioner shall inform in writing the person claiming the refund of the approval, or rejection, with reasons for such rejection, where applicable; and

(d) ,where the Commissioner approves the refund under paragraph (c), refunded within three months from the date of approval of the refund.

(This is to provide the time within which the refund must be approved and be made. It is necessary to impose a time limit within which the government must approve or reject the refund or otherwise pay the refund.)

(e) Where an amount of refund of duty remains unpaid after the date upon which it is payable, a penalty of two per centum per month or part thereof of the unpaid amount shall forthwith be due and payable to the person claiming refund of duty.”

(The penalty for late payment of excise duty at the rate of 2 per cent ought to apply to the government in the same manner as it applies to the tax payers.)

FIRST SCHEDULE

THAT the First Schedule to the Bill be amended in paragraph 1 by deleting “Cigarettes containing tobacco or tobacco substitutes- Shs. 2500 per mille” and substituting therefor the following expression-

category	Description: ex –factory selling price	Rate of duty
A	Plain cigarettes or cigarettes with EFSP of up to Shs.2,750 per mille.	Shs. 900 per mille
B	Soft cup cigarettes with EFSP of Shs.2,751 to Shs. 3,750 per mille.	Shs.1,200 per mille
C	Soft cup cigarettes with EFSP of Shs.3,751 to 4, 750 per mille.	Shs.1,800 per mille
D	Hinge lid cigarettes or cigarettes with EFSP of more than Shs.4,750 per mille.	Shs.2,800 per mille

(It makes more economic sense for the government to reduce taxation for the lower end markets consumers. This will address both the issue of substituting legitimate tobacco products with counterfeit and cheaper dangerous alternatives.)

PWC

CLAUSE 2

THAT clause 2 be amended-

(a) in the definition “open market value” by deleting the number “4” and substituting therefor “3”;

(b) in the definition “

CLAUSE 3

THAT clause 3 of the Bill be amended in subclause (2) by deleting the words “would fetch in an arm’s length transaction, made at the time at the wholesale level as determined by the Commissioner based on generally accepted principles” and substituting therefor “according to the Fourth Schedule of the East African Community Customs Management Act.”

(This will ensure certainty in determination of value for both the tax administrators and tax payers)

CLAUSE 6

THAT clause 6 of the Bill be amended by deleting the number “34” and substituting therefor “35” *(editorial)*

CLAUSE 9

THAT clause 9 of the Bill be amended in subclause (6) by deleting the phrase “item 7 of Part III” and substituting therefor “item 4 of Part II”(editorial)

CLAUSE 10

THAT clause 10 of the Bill be amended by inserting the words “significant change in” immediately after the words “take into account”.

(Such change in inflation should only be significant to warrant the cabinet secretary to adjust the excise duty)

FIRST SCHEDULE

THAT the First Schedule to the Bill be amended-

(a) in paragraph 1 -

(i) by deleting “Fruit juices (including grape must), an(vegetable juices, unfermented and no containing added spirit whether or no containing added sugar or other sweetening matter- Shs. 10 per litre” ;

(ii) by deleting “Waters and other non-alcoholic beverages no including fruit or vegetable juices- Shs. 10 per litre”;

(During the budget the cabinet secretary promised not to tax these goods)

(ii) by deleting “Motor cycles of tariff 87.11 other than motor cycles ambulances- Shs. 10000 per unit”

(Ambulances and hearses are currently excluded from excise duty under the Customs and Excise Act (Cap 472). This is based on the essential nature of services offered by these motor vehicles.)

(b) by deleting paragraph (2)

(Such change in inflation should only be significant to warrant the cabinet secretary to adjust the excise duty)

(c) in Part III –

(i) by deleting the definition “ other fees” and substituting therefor the following new definition-

“Other fees” includes any fees, charges or commissions charged by financial institutions relating to their licensed financial institutions, but does not include interest on loan or return on loan or an insurance premium or premium based or related commissions”

KEPSA and KAM

CLAUSE 2

THAT clause 2 of the Bill be amended in the definition of “manufacture” by inserting the following paragraph immediately after paragraph (c)-

“(d) the process by which a commodity is finally produced and includes assembling, packing, bottling, repacking, mixing, blending, grinding, cutting, bending, twisting, joining or other similar activity”

CLAUSE 3

THAT clause 3 of the Bill be amended-

(a) in subclause (1) by deleting the word “wholesale level” and substituting therefor the word “ex-factory level”

(b) in subclause (2) by deleting the word “wholesale level” and substituting therefor the word “ex-factory level”

(Some value chains do not have whole sale level)

CLAUSE 4

THAT clause 4 of the Bill be amended in subclause (2) by inserting a new paragraph immediately after paragraph (d)-

“(e) The time of supply of excisable goods shall be the time of removal of the goods from the manufacturer’s factory.”

CLAUSE 6

THAT clause 6 of the Bill be amended in subclause (4) paragraph (a) by deleting the words “or such other time as may be specified by the cabinet secretary”

CLAUSE 7

THAT clause 7 of the bill be amended-

(a) in subclause (1) by inserting the following new paragraphs immediately after paragraph (f)

“(g) staple foods; and

(h) post handling machinery and equipment, value addition investments on food processing and packaging; and

(i) excisable goods that a manufacturer or importer uses for product laboratory testing within his premises.”

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

“(2A) Notwithstanding the provision of section (2), the Cabinet Secretary responsible for finance shall grant remission of excise duty at ninety per centum with respect to beer made from sorghum, millet or cassava grown in Kenya, if that licensed manufacturer-

(a) manufactures beer that has at least seventy-five per centum content of sorghum, millet or cassava, excluding sugar; and

(b) packs the beer in a pasteurized container of at least thirty litres or such other container and the quantity as the Cabinet Secretary may approve.”

CLAUSE 8

THAT clause 8 of the Bill be deleted.

(The provision is inconsistent with Article 201 of the constitution on openness and accountability including public participation in financial matters)

CLAUSE 9

THAT clause 9 of the Bill be amended in subclause (2) by deleting paragraph (b).

(charging excise tax on import duty amounts to tax on a tax and is punitive.)

CLAUSE 11

THAT clause 11 of the Bill be amended by deleting paragraph (b)

(It imposes an ambiguity and approximation and assumes that all commercial relationships will affect ex-factory prices)

CLAUSE 13

THAT clause 13 of the Bill be deleted.

(It denotes that supplier is to pay for the taxes even if the services are exported)

CLAUSE 15

THAT clause 15 of the Bill be amended-

(a) by deleting subclause (2)

(To ensure there is no legal loop hole to be exploited by unlicensed operators. Section 37(1) caters for the offence of manufacturing without a license)

(b) in subclause (3)-

(i) by inserting the words “Subject to the provisions of Section 35” immediately before the words “the excise duty”

(ii) by inserting a new paragraph immediately after paragraph (b)-

“(c) shall be in addition to any other fine or award imposed by any competent court or tribunal in respect of the goods.”

CLAUSE 18

THAT clause 18 of the Bill be amended by inserting a new subclause immediately after subclause (5)-

“(6) The provisions under this section shall not invalidate the storage of excisable goods pending their removal for consumption.”

(There is need to cover the storage of goods manufactured in the factory before removal)

CLAUSE 19

THAT clause 19 of the Bill be amended in subclause (2) by deleting paragraphs (c) and (d).

(We are of the humble view that these reporting requirements on licensed persons are well covered under the Customs and Excise (Excisable goods Management System) Regulations, 2013 which extensively regulates the production system of excisable goods and has reporting requirements.)

CLAUSE 23

THAT clause 23 be amended by inserting the following new subclause immediately after subclause (4)-

“(5) The commissioner may appoint a place outside a factory for the storage of goods under excise Control. “

(To provide for temporary storage of goods pending sale to duty free entities, export or manufacture of goods not subject to excise duty)

CLAUSE 27

THAT clause 27 of the bill be amended in subclause (4) by inserting the words “and the relevant excisable goods are for export” immediately after “with the regulation”

(It is not feasible to affix Kenyan excise stamps on goods destined for Tanzania for instance. The destination country would determine what kind of control to place on imports into their

country. Furthermore, proof of export requirements from a customs perspective would serve the purpose of tracking and tracing the goods.)

CLAUSE 28

THAT clause 28 of the Bill be amended in subclause (1) by inserting the subparagraph immediately after subparagraph (iii) in paragraph (a)-

“(iv) the manufacturer or importer has recalled the goods from the market for destruction and the destruction has been done under the supervision of an authorized officer.”

FIRST SCHEDULE

THAT the First Schedule to the Bill be amended in Part I-

(a) in paragraph (1) –

(i) by deleting-

a. Electronic cigarettes- Shs. 3000 per unit

b. Cartridge for use in electronic cigarettes Shs. 2000 per unit

(Electronic cigarettes are not tobacco products under the framework convention on tobacco control and should not be regulated or taxed as such)

(ii) by deleting “Waters and other non-alcoholic beverages not including fruit or vegetable juices- Shs. 10 per litre” and substituting therefor the following expression-

Waters and other non-alcoholic beverages not including fruit or vegetable juices	Shs. 3.9 per litre
--	--------------------

(The move from KShs 3.9 -10 Shs per litre (almost 3 times current tax) is extremely punitive and will have an impact on the overall revenue.)

(iii) by deleting “Plastic shopping bags - Shs. 120 per kg” and substituting therefor the following expression-

Plastic shopping bags	Shs. 30 per kg
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(Imported carrier bags have started finding their way into Kenya (imitation as well) through dubious routes avoiding all duties and taxes. The rate of 120 per kg is high for people who produce shopping bags using recycled material effective rate is over 100%. There are almost 6000 people employed in the recycling industry which will face job losses if manufacturers have no advantage to use recycled material.)

(iv) by deleting “Waters and other non-alcoholic beverages not including fruit or vegetable juices- Shs. 10 per litre” and substituting therefor the following expression-

Waters and other non-alcoholic beverages not including fruit or vegetable juices	Shs. 0 per litre
--	------------------

(v) by deleting motorcycles of tariff 87.11 other than motor cycles ambulances-Shs. 10,000 per unit

(Bodabodas are amongst the biggest employer in Kenya today. It gives earnings to people through ownership, operation, parts/ service staff and those in the sales channels. Bodaboda is, therefore, a source of livelihood to more than a million Kenyans. The imposition of Sh 10,000 excise tax will therefore not increase revenues but will in fact cause a decrease of revenues.)

(vi) by deleting “ Beer, Cider, Perry, Mead, Opaque beer and mixtures of fermented beverages and spirituous beverages of alcoholic strength not exceeding 10% - Shs. 100 per litre” and substituting therefor the following expression-

Beer, Cider, Perry, Mead, Opaque beer and mixtures of fermented beverages and spirituous beverages of alcoholic strength not exceeding 10% - Shs. 100 per litre	Shs.75 per litre
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(vii) by deleting “Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 10%- Shs. 175 per litre” and substituting therefor the following expression-

Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 10%	Shs. 145 per litre
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(b) THAT the First Schedule to the Bill be amended in Part III-

(i) by inserting the following new definitions in their alphabetical sequence –

“manufactured tobacco” means tobacco made up -

- a) ready for smoking in a pipe, other than tobacco made up by the grower for personal use without the use of machinery;
- b) ready for the immediate use in the making of cigarettes or cigars; or
- c) in the form of plug, roll or stick

(Definition of manufactured tobacco should be included (as was the case in the outgoing law) to avoid ambiguity and uncertainty)

“retail selling price of cigarettes” means the price that shall be recommended and published by an importer or manufacturer for the sale by retail at that time in Kenya of a packet of cigarettes of that description.

(Lack of clarity in this section has resulted in premium imported cigarettes paying excise at the lower minimum collectible rate while similar locally manufactured cigarettes pay excise

at a higher rate based on the listed Retail Selling Price. The current ambiguity in the law should be corrected to remove the inherent discrimination against locally manufactured cigarettes. The current ambiguity continues to result in loss of revenue to the Government.)

ERNST AND YOUNG

FIRST SCHEDULE

1. THAT the First Schedule to the Bill be amended in Part I-

(a) in paragraph 1-

(i) by deleting “Waters and other non-alcoholic beverages not including fruit or vegetable juices- Shs. 10 per litre” and substituting therefor the following expression-

Waters and other non-alcoholic beverages not including fruit or vegetable juices	Shs. 3.9 per litre
--	--------------------

(The move from Ksh 3.9-10 Shs per litre is extremely punitive and will have an impact on the overall revenue. The maintenance of excise duty on carbonated drinks at the current level will assist in sustaining prices of carbonated soft drinks at affordable levels than otherwise would be the case of supporting growth and consumption.)

(ii) by deleting “Waters and other non-alcoholic beverages not including fruit or vegetable juices- Shs. 10 per litre” and substituting therefor the following expression-

Non-alcoholic beverages not including fruit or vegetable juices.	Shs. 10 per litre
--	-------------------

(The increase in excise duty on a good that is very vital to the lives of citizens will not only increase its price drastically but force some citizens who can't afford to take unclean water.)

(b) in paragraph (2) by deleting the words “at the beginning of every financial year” and substituting therefor the words “ at least after every three years”

(This is important to make business environment and forces of market demand and supply more stable thus enhance transparency for tax payers.)

ICPACK

CLAUSE 4

THAT clause 4 of the Bill be amended by deleting subclause (2) and substituting therefor the following new subclause (2)-

“(2) The open market value of excisable goods or services at a particular time is the price that the goods or services would reasonably be expected to fetch in an arm’s length transaction or the price to be determined by the commissioner based on generally accepted principles of valuation as provided for under Part I of the Fourth Schedule to East African Community Customs Management Act.”

CLAUSE 8

THAT clause 8 of the bill be amended by deleting subclause (3) and substituting the following new clause –

(3) Within a period of thirty days from the date the Cabinet secretary gazettes the changes, the Cabinet Secretary shall present to the National Assembly for debate and ratification of the changes which Parliament shall ratify within thirty days, and where Parliament fails to do so, the rates shall revert to the original rates before the proposed changes.

CLAUSE 9

THAT clause 9 of the Bill be amended in subclause (6) by deleting the phrase “item 7 of Part III” and substituting therefor “item 4 of Part II”(editorial)

CLAUSE 15

THAT clause 15 of the Bill be amended in subclause (1) by deleting paragraph (d)

CLAUSE 21

THAT clause 21 of the Bill be amended by inserting the following new subclause immediately after subclause (1)-

“(1A) A person who disputes the decision of the Commissioner on any matter arising this Act may upon giving notice in writing to the Commissioner, appeal to the Tribunal.”

CLAUSE 22

THAT clause 22 of the Bill be amended in subclause (1) by deleting paragraph (b)

CLAUSE 24

THAT clause 24 of the Bill be amended in subclause (3)-

(i) in paragraph (a) by inserting the words “subject to the Commissioner notifying in writing the person from whom the sample is taken, the reasons for taking the sample”;

(ii) in paragraph (b) by deleting the words “which are of no commercial value without payment of the excise duty thereon” and substituting therefor the words “of those goods without payment of the excise duty thereon at the times the samples are taken upon written request by the owner stating the reasons for taking the sample which request shall be made within reasonable time.”

FIRST SCHEDULE

THAT the first schedule be amended-

(a) in Part III-

(i) in the definition of "Financial Institution" in paragraph (a) by deleting subparagraph (ii) and substituting therefor the following new subparagraph-

"(ii) the Insurance Act as an insurance company mobile cellular service operator or wireless operator licensed by the Communications Authority of Kenya"

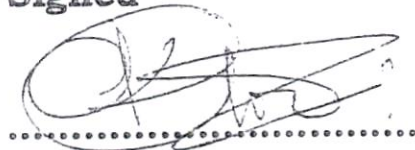
(ii) in the definition of "other fees" by deleting the words " interest on loan or return on loan or an insurance premium" and substituting therefor the words "interest, premium and commissions as defined in the Insurance Act"

8.0 RECOMMENDATIONS TO PARLIAMENT

The Parliament is requested to:

- a) Take note of the content of this Memorandum;
- b) Take note of the Cabinet approval for signing and ratification; and,
- c) Ratify the Economic Partnership Agreement in good time to meet the deadline of 1st of October, 2016.

Signed



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Dr. Chris Kiptoo

For: Cabinet Secretary

MINISTRY OF INDUSTRY, TRADE AND COOPERATIVES

Date

07/09/2016
.....

