

Approved for taking.

REPUBLIC OF KENYA



BA
SNA
13/5/2021

THE NATIONAL ASSEMBLY


TWELFTH PARLIAMENT- FIFTH SESSION (2021)

COMMITTEE ON DELEGATED LEGISLATION

**REPORT ON THE CONSIDERATION OF THE EXEMPTION
FROM INCOME TAX FOR AN AIRLINE IN WHICH THE
GOVERNMENT OF KENYA OWNS AT LEAST FORTY-FIVE
PER CENT OF ITS SHARES AND THE SUBSIDIARIES OF
THAT AIRLINE**

(Legal Notice No. 27 of 2021)

MAY, 2021

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 13 MAY 2021	
DAY:	
TABLED BY:	
CLERK-AT THE-TABLE:	

*The Directorate of Audit, Appropriations
And Other Select Committees
The National Assembly
Parliament Buildings
NAIROBI.*

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CHAIRPERSON'S FOREWORD

Section 13(2) of the Income Tax Act (Cap 470) empowers the Cabinet Secretary responsible for the National Treasury, by Notice in the Gazette, to provide that any income or class of income which accrued in or was derived from Kenya be exempted from tax to the extent specified in such a Notice and that any such exemption shall cease to have effect either generally or to the extent specified in the Notice.

Legal Notice No. 27 of 2021 seeking to exempt an airline in which the Government of Kenya owns at least forty-five (45%) of its shares, and the subsidiaries of that airline was published on 17th March, 2021 submitted to the Clerk of the National Assembly on 30th March, 2021 and laid before the House on 28th April, 2021 in accordance with section 11 of the Statutory Instruments Act, 2013. It was then referred to the Committee on Delegated Legislation for consideration, pursuant to section 12 of the SI Act and Standing Order 210 of the National Assembly.

The airline in question is Kenya Airways Ltd and its subsidiaries, namely, Kenya Airfreight Handling Limited, Jambojet Limited, African Cargo Handling Limited, Kencargo Airlines International Limited and Fahari Aviation Limited (Pride Oil Limited).

The request for exemption from paying minimum tax is premised on the following grounds –

- i) the COVID-19 pandemic affected the operation of airlines worldwide and thus worsened the financial position of the already ailing company which has been making losses in the recent past;
- ii) considering its financial operations, the minimum tax will render the Company's operations unsustainable;
- iii) the Airline continued to pay lease expenses even during suspension of all international operations occasioned by the COVID-19 pandemic, this in addition to other costs such as regular inspection of aircrafts in compliance with international regulations thus increasing the likelihood of making losses; and
- iv) Kenya Airways Limited as the national carrier plays a pivotal role in the economy through marketing Kenya as a tourism destination, trade facilitation, job creation among others. It is because of its important role in the economy that the Government as a majority shareholder, has continued to provide tax incentives and bail it out to finance its operations despite making losses over time.

It was therefore considered prudent to grant the exemption from minimum tax to support the company continue its operations until it returns to profitability.

Having examined Legal Notice No. 27 of 2021 in accordance with the Constitution of Kenya, the Interpretations and General Provisions Act (Cap. 2), the Income Tax Act (Cap 470) and the Statutory Instruments Act (No. 23 of 2013), the Committee was satisfied that the Legal Notice was submitted to the National Assembly without unreasonable delay as contemplated in section 13 (2) of the Income Tax Act.

Committee on Delegated Legislation: Report on the Consideration of the Exemption from Income Tax for an Airline in which the Government of Kenya owns at least 45% of its shares and the subsidiaries of that Airline (L.N. No. 27 of 2021)

On public participation, the regulation making authority informed the Committee that after the enactment of the Finance Act, 2020 that introduced minimum tax, the National Treasury received various presentations from stakeholders on the impact of the new tax on several classes of businesses including public entities that are facing challenges. The Committee was satisfied with this justification.

With the foregoing, therefore, the Committee **approved** the exemption in accordance with section 13 (2) of the Income Tax Act (Cap 470) which requires the approval of the National Assembly.

In conclusion, I wish to most sincerely thank the Speaker and the Office of the Clerk of the National Assembly for the invaluable support accorded to the Committee in the discharge of its mandate.

On behalf of the Members of the Select Committee on Delegated Legislation and pursuant to section 13(2) of the Income Tax Act (*Cap 470*) and Standing Order No. 199, it is my pleasure and duty to present to the House for approval, the Committee's **Report on the Consideration of the Exemption from Income Tax for an Airline in which the Government of Kenya owns at least forty-five (45%) of its shares and the subsidiaries of that Airline (L.N. No. 27 of 2021)**

HON. WILLIAM KASSAIT KAMKET, M.P.

1.0 PREFACE

1.1 Establishment and Mandate of the Committee

1. The Select Committee on Delegated Legislation is established pursuant to *Standing Order No. 210* and is mandated to consider statutory instruments submitted to Parliament for consideration. The Committee is expected to consider in respect of any statutory instrument, whether it is in accordance with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written laws.
2. The Committee is mandated to consider in respect of any statutory instrument, whether it:
 - a) is in accordance with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written laws;
 - b) infringes on fundamental rights and freedoms of the public;
 - c) contains a matter which in the option of the Committee should more properly be dealt with in an Act of the Parliament;
 - d) contains imposition of taxation;
 - e) directly or indirectly bars the jurisdiction of the court;
 - f) gives retrospective effect to any of the provision in respect to which the Constitution does not expressly give any such power;
 - g) it involves expenditure from the consolidated fund or other public revenues;
 - h) is defective in its drafting or for any reason form or part of the statutory instrument calls for any elucidation;
 - i) appears to make some unusual or unexpected use of the power conferred by the Constitution or the Act pursuant to which it is made;
 - j) appears to have had unjustifiable delay in its publication or laying before Parliament;
 - k) makes rights, liberties or obligations unduly dependent upon non-renewable decisions;
 - l) makes rights, liberties or obligations unduly dependent insufficiently defined administrative powers;
 - m) inappropriately delegates legislative powers;
 - n) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
 - o) appears for any reason to infringe on the rule of law;
 - p) inadequately subjects the exercise of legislative power to Parliamentary scrutiny; and
 - q) accords to any other reason that the Committee considers fit to examine.

1.2 Committee Membership

3. The Committee membership comprises –

The Hon. William Kassait Kamket, M.P. (Chairperson)

Tiaty Constituency

KANU

The Hon. Muriuki Njagagua, M.P. (Vice Chairperson)

Mbeere North Constituency

Jubilee Party

COMMITTEE MEMBERS

The Hon. Waihenya Ndirangu, M.P.

Roysambu Constituency

Jubilee Party

The Hon. Ronald Tonui, M.P.

Bomet Central Constituency

Jubilee Party

The Hon. William Cheptumo, M.P.

Baringo North Constituency

Jubilee Party

The Hon. William Kamoti, M.P.

Rabai Constituency

Orange Democratic Movement

The Hon. Cecily Mbarire, MGH, M.P.

Nominated

Jubilee Party

The Hon. Martha Wangari, M.P.

Gilgil Constituency

Jubilee Party

The Hon. Alice Wahome, M.P.

Kandara Constituency

Jubilee Party

The Hon. Gideon Mulyungi, M.P.

Mwingi Constituency

Wiper Democratic Movement – Kenya

The Hon. Robert Mbui, M.P.

Kathiani Constituency

Wiper Democratic Movement -Kenya

The Hon. (Dr.) Wilberforce Oundo, M.P.

Funyula Constituency

Orange Democratic Movement

The Hon. Daniel Maanzo, M.P.

Makueni Constituency

Wiper Democratic Movement -Kenya

The Hon. George G. Murugara, M.P.

Tharaka Constituency

Democratic Party

The Hon. Timothy Wanyonyi, M.P.

Westlands Constituency

Orange Democratic Movement

The Hon. Jennifer Shamalla, M.P.

Nominated

Jubilee Party

The Hon. Munene Wambugu, M.P.
Kirinyaga Central Constituency
Jubilee Party

The Hon. Patrick Mariru, M.P.
Laikipia West Constituency
Jubilee Party

The Hon. Sammy Seroney, M.P.
Nominated
Wiper Democratic Movement – Kenya

The Hon. Tindi Mwale, M.P.
Butere Constituency
Amani National Congress

The Hon. Edith Nyenze, M.P.
Kitui West Constituency
Wiper Democratic Movement – Kenya

The Hon. Abdi Koropu Tepo, M.P.
Isiolo South Constituency
Kenya Patriots Party

The Hon. Robert Gichimu, M.P.
Gichugu Constituency
Jubilee Party

1.3 Committee Secretariat

4. The secretariat facilitating the Committee comprises -

Ms. Cherotich Maritim
Senior Clerk Assistant (Team Leader)

Mr. Mohamed Jimale
Clerk Assistant II

Mr. Wilson Dima Dima
Principal Legal Counsel

Mr. Josphat Motonu
Fiscal Analyst I

Ms. Noelle Chelagat
Media Relations Officer II

Mr. Anthony Wamae
Assistant Serjeant at Arms

Mr. Charles Ayari
Superintendent of Electronics

Ms. Mary Otieno
Office Superintendent

2.0 CONSIDERATION OF THE EXEMPTION FROM INCOME TAX AN AIRLINE IN WHICH THE GOVERNMENT OF KENYA OWNS AT LEAST 45% OF ITS SHARES AND SUBSIDIARIES OF THAT AIRLINE

2.1 Introduction

5. The legal basis for granting an exemption as contained in Legal Notice No. 27 of 2021 is stipulated in section 13(2) of the Income Tax Act, Cap 470 which empowers the Cabinet Secretary to exempt certain income tax.
6. Section 13(2) of the Income Tax Act (Cap 470) empowers the Cabinet Secretary responsible for the National Treasury, by Notice in the Gazette, to provide that any income or class of income which accrued in or was derived from Kenya be exempted from tax to the extent specified in such a Notice and that any such exemption shall cease to have effect either generally or to the extent specified in the Notice.
7. Further, that where the Cabinet Secretary issues such a Notice, it has to be laid before the National Assembly without unreasonable delay.
8. *The Act also provides that if a resolution is passed by the Assembly within twenty days on which it next sits after the notice is so laid that the notice be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the issuing of a new notice.*
9. The House, therefore, has to pronounce itself within the statutory timelines and if the Notice is expressly approved or (is not annulled) then it shall be deemed to have been impliedly approved.
10. Legal Notice No. 27 of 2021 seeking to exempt an airline in which the Government of Kenya owns at least forty-five (45%) of its shares, and the subsidiaries of that airline was published on 17th March, 2021 submitted to the Clerk of the National Assembly on 30th March, 2021 and laid before the House on 28th April, 2021 in accordance with section 11 of the Statutory Instruments Act, 2013. It was then referred to the Committee on Delegated Legislation for consideration, pursuant to section 12 of the SI Act and Standing Order 210 of the National Assembly.

2.2 Purpose of the Exemption

11. Legal Notice No. 27 of 2021 seeks to exempt an airline including its subsidiaries where the government owns at least forty-five per cent of its shares, from **minimum tax imposed under Section 12(d) of Income Tax Act.**

2.3 Legislative Context

12. The Legal Notice seeks to exempt from income tax the income derived from or accrued in Kenya from the provisions of section 12D of the Income Tax Act (Cap 470) which introduces minimum tax payable by all entities regardless of whether they are in a profit making position or not.

2.4 Policy Background

13. The Finance Act, 2020 amended the Income Tax Act (Cap 470) to introduce minimum tax to be charged on all business enterprises whether they are in a profit position or not. This was meant to discourage tax planning, where some companies perpetually declare losses to avoid paying tax in Kenya, while others may not be paying the correct amount of tax.
14. The said amendment to the Income Tax Act (Cap 470) did not take into consideration specific sectors of the economy that are strategic to any government for purposes of operations of governments e.g., the aviation industry which is strategic to any government for purposes of security and even trade. Many governments such as Ethiopia, South Africa among others has significant shareholding to allow competing effectively at international level.
15. The introduction of minimum tax will significantly affect the stability of the operations of the aviation industry particularly on those airlines that are partially or indirectly owned by the Government. To ensure that this tax does not significantly compromise the operations of these airlines, it was deemed necessary and in line with practice by other Governments to cushion these airlines from the impact of paying minimum tax as it is clearly known that the company's financial position has been on a downward trend.

2.5 Grounds for Exemption

16. The Kenya Airways Ltd requested to be exempted from paying minimum tax citing the following grounds –
 - i) the COVID-19 pandemic affected the operation of airlines worldwide and thus worsened the financial position of the already ailing company which has been making losses in the recent past;
 - ii) considering its financial operations, the minimum tax will render the Company's operations unsustainable;
 - iii) the Airline continued to pay lease expenses even during suspension of all international operations occasioned by the COVID-19 pandemic, this in addition to other costs such as regular inspection of aircrafts in compliance with international regulations thus increasing the likelihood of making losses; and
 - iv) Kenya Airways Limited as the national carrier plays a pivotal role in the economy through marketing Kenya as a tourism destination, trade facilitation, job creation among others. It is because of its important role in the economy that the Government as a majority shareholder, has continued to provide tax incentives and bail it out to finance its operations despite making losses over time.
17. It was therefore considered prudent to grant the exemption from minimum tax to help the company continue its operations until it returns to profitability.
18. Kenya Airways subsidiaries are as follows –

Subsidiary	Principle Activity	KQ Shareholding
Kenya Airfreight Handling Limited	Cargo Handling for perishable products	51%
Jambojet Limited	Local passenger air transport	100%
African Cargo Handling Limited	Cargo Handling	100%
Kencargo Airlines International Limited	Dormant	100%
Fahari Aviation Limited (Pride Oil Limited)	Drone and emerging technologies in aviation	100%

19. Some of the measures other governments have taken to support the aviation industry in the wake of the pandemic are as follows –

- i) Senegal announced USD 128 million in relief for the Tourism and Air Transport Sector;
- ii) Seychelles has waived all landing and parking fees from April to December, 2020;
- iii) Cote D’Voire waived its Tourism Tax for transit passengers;
- iv) Lufthansa agreed to a €9 billion bailout with the German government;
- v) South Africa is deferring payroll, income and carbon taxes across all industries, which will also benefit airlines domiciled in that country;
- vi) The Tanzania Civil Aviation Authority has proposed the following measures –
 - postponement without penalties of payments related to charges for services offered by the Authority to all airlines that made official requests;
 - cessation of arrangements for increasing charges to operators during or till immediately after the COVID-19 pandemic; and
 - implementation of a cost reduction strategy in order to ensure that the little revenue generated covers the Authority’s key operational activities, critical in ensuring aviation business continuity.
- vii) The International Air Transport Association (IATA) has further received a formal confirmation from the African Development Bank (AFDB) that it would be providing financial support in the fight against COVID-19 through the following interventions –
 - Indirect support to the aviation industry through budget support to national governments in Africa;

- Direct assistance to aviation private sector companies including airlines through debt deferrals and liquidity of facilities; and
- Technical assistance to help the aviation industry recover from the impact of COVID-19 and support regional preparedness to prevent the spread of communicable diseases through travel.

2.6 Conferring with the Regulation Making Authority

20. In accordance with section 16 of the Statutory Instruments Act, 2013, the Committee held a virtual meeting with the regulation making authority, i.e. the Cabinet Secretary for the National Treasury & Planning on 15th April, 2021.
21. The Committee raised the following concerns following the submissions by the Cabinet Secretary –
- i) exempting Kenya Airways and its subsidiaries alone will discriminate other airlines operating domestically and also other companies especially those affected by the COVID-19 pandemic;
 - ii) Justification for exemption of Kenya Airways yet it has been experiencing financial challenges for several years even before the COVID-19 pandemic and has been bailed out before. The Cabinet Secretary responded that Kenya Airways is a national carrier with strategic trade/business and tourism interests including the host of UNEP HQs and therefore needs support. In addition, Government guaranteed the company a loan of approximately Kshs. 75billion which is yet to be fully repaid. In addition, other countries have also injected funds to protect their national carrier during the pandemic.
 - iii) The Cabinet Secretary further informed the Committee that Kenya Airways is not exempted from Corporate Tax and other taxes, only the minimum tax.
 - iv) On the matter of possible political and personal interests in exemption of Kenya Airways whose majority shareholding is in private hands, the Cabinet Secretary responded that he was not aware about political interests in exempting Kenya Airways and that the exemption is for business interests to save the national carrier.
 - v) On how the exemption will affect partners e.g. KLM and Air France , the Committee was informed that KLM is a shareholder of Kenya Airways APLC with a shareholding of 7.76%. Since Kenya Airways has made losses, no benefit will be derived by KLM.

3.0 COMMITTEE OBSERVATIONS

22. Having examined Legal Notice No. 15 of 2021 in accordance with the Constitution of Kenya, the Interpretations and General Provisions Act (*Cap. 2*), the Income Tax Act (*Cap. 470*) and the Statutory Instruments Act (*No. 23 of 2013*), the Committee made the following observations –

3.1 Statutory Timelines

- 1) Legal Notice No. 27 of 2021 was published on 17th March, 2021, submitted to the Clerk of the National Assembly on 30th March, 2021 and laid before the House on 28th April,

2021 in accordance with section 11 of the Statutory Instruments Act, 2013. This was done without unreasonable delay as contemplated in section 13 (2) of the Income Tax Act.

3.2 Public Participation

- 2) On public participation, the regulation making authority informed the Committee that after the enactment of the Finance Act, 2020 that introduced minimum tax, the National Treasury received various presentations from stakeholders on the impact of the new tax on several classes of businesses including public entities that are facing challenges. The Committee was satisfied with this justification.

3.3 Regulatory Impact Statement

- 3) The Exemption does not require a Regulatory Impact Statement within the meaning of sections 6, 7 and 8 of the Statutory Instruments Act as it is not likely to impose significant costs on the community.

3.4 Constitutional Petitions relating to Minimum Tax

- 4) The attention of the Committee was brought to **Constitutional Petitions No. E001 of 2021 and E005 OF 2021** filed in the High Court of Kenya in Machakos in respect to the validity and constitutionality of section 12(D) of the Income Tax Act (Cap 470).
- 5) The Petitions are instituted by separate Petitioners namely: registered officials of the Isinya **Sub**-County Bar Owners Association being the Petitioners of Petition E005 of 2021 and the Kenya Association of Manufacturers, the Retail Trade Association of Kenya and the Kenya Flower Council being the Petitioners in petition No. E001 of 2021 (formally Pet. No. E079 of 2021)
- 6) The National Assembly, the Commissioner General of the Kenya Revenue Authority and the Attorney General are joined in both Petitions as 1st, 2nd and 3rd Respondents, respectively. The Institute of Certified Public Accountants, the Law Society of Kenya and Robert Kamwara are joined as interested parties in the matters.
- 7) The Petitioners contend that the amendments introduced into the Income Tax Act (Cap 470) in 2020, through the Tax Laws (Amendment) (No. 2) Act, 2020 introduces the minimum tax chargeable at the rate of 1% of the gross revenue, does not amount to Value Added Tax, custom duties nor excise tax and should therefore not be included in the Income Tax Act. The Petitioners, therefore, argue that the imposition of this tax is unlawful, unconstitutional and unreasonable, therefore should be declared as such by the constitutional court.
- 8) The Committee was further informed that the Court issued Conservatory Orders in an interlocutory ruling, pending the hearing and determination of the matter. The Ruling issued restrains the Commissioner General of Kenya Revenue Authority from implementing section 12(D) of the Income Tax Act which is the subject matter of Legal Notice No. 27 of 2021, under consideration by the Committee.

- 9) The Committee received legal opinions from the Directorate of Legal Services of the National Assembly and the Directorate of Litigation and Compliance Services on the effect of considering the matter in view of the court cases and Standing Order No. 89 on *sub judice*.
- 10) Initially, the Committee suspended further consideration of the matter on the basis of being *sub judice* owing to the fact that the National Assembly is party to the suit, being the 1st Respondent and the conservatory orders issued being at the core and touches on the substantive aspect of the suit. However, a further legal opinion presented to the Committee by the Directorate of Litigation and Compliance, who are representing the National Assembly in the matter in court, indicated that there would be no prejudice suffered by the National Assembly if the Committee proceeded to consider the matter, despite the conservatory orders issued by the court.
- 11) The Committee, therefore, proceeded to consider the said Legal Notice and made its determination.


4.0 COMMITTEE RECOMMENDATION

23. Having examined Legal Notice No. 27 of 2021 in accordance with the Constitution of Kenya, the Interpretations and General Provisions Act (*Cap. 2*), the Income Tax Act (*Cap 470*) and the Statutory Instruments Act (*No. 23 of 2013*), **the Committee recommends that the House approves the said statutory instrument in accordance with section 13(2) of the Income Tax Act (*Cap 470*).**

Signed.....

Date.....13/5/2021.....

THE HON. WILLIAM KASSAIT KAMKET, M.P.
(CHAIRPERSON)

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 13 MAY 2021	
DAY:	
TABLED BY:	
CLERK-AT THE-TABLE:	

ANNEXURES

- 1. Adoption Schedule**
- 2. Legal Notice No. 27 of 2021 and the Explanatory Memorandum**
- 3. Legal Briefs on Constitutional Petitions No. E001 of 2021 and E005 OF 2021**
- 4. Committee Minutes**


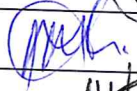
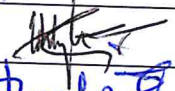
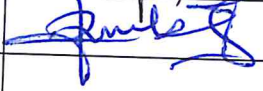
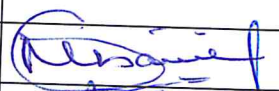
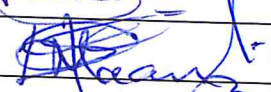

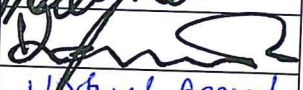
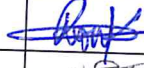
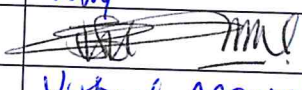
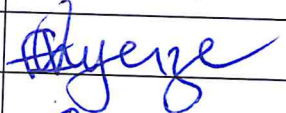
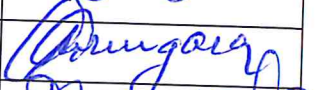
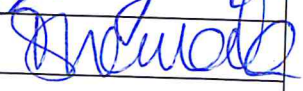
COMMITTEE ON DELEGATED LEGISLATION

ADOPTION SCHEDULE

Report on the Consideration of the Exemption from Income Tax for Airlines with Government of Kenya Shareholding of at least 45% and its subsidiaries (LN 27 of 2021)

We, the undersigned, hereby affix our signatures to this Report to affirm our approval:

DATE: 13 May 2021

	HON. MEMBER	SIGNATURE
1.	Hon. Kassait Kamket, MP (Chairperson)	
2.	Hon. Muriuki Njagagua, MP (Vice Chairperson)	
3.	Hon. Waihenya Ndirangu, MP	
4.	Hon. Robert Mbui, MP	
5.	Hon. Alice Wahome, MP	
6.	Hon. Cecily Mbarire, MGH, MP	
7.	Hon. Daniel Maanzo, MP	
8.	Hon. William Cheptumo, MP	
9.	Hon. Martha Wangari, MP	Virtual Approval
10.	Hon. Timothy Wanyonyi, MP	
11.	Hon. William Kamoti, MP	
12.	Hon. Patrick Kariuki Mariru, MP	Virtual Approval
13.	Hon. Ronald Tonui, MP	
14.	Hon. Munene Wambugu, MP	
15.	Hon. Gideon Mulyungi, MP	Virtual Approval
16.	Hon. Edith Nyenze, MP	
17.	Hon. Abdi Tepo, MP	
18.	Hon. George Murugara, MP	
19.	Hon. Jennifer Shamalla, MP	
20.	Hon. (Dr.) Wilberforce Oundo, MP	
21.	Hon. Robert Gichimu, MP	
22.	Hon. Sammy Seroney, MP	Virtual Approval
23.	Hon. Tindi Mwale, MP	

**MINUTES OF THE 22ND SITTING OF THE COMMITTEE ON DELEGATED
LEGISLATION HELD VIRTUALLY ON WEDNESDAY, 12TH MAY, 2021 AT 10.30 A.M.**

PRESENT

- | | | |
|---------------------------------------|---|------------------|
| 1. The Hon. Kassait Kamket, M.P. | - | Chairperson |
| 2. The Hon. Muriuki Njagagua, M.P. | - | Vice Chairperson |
| 3. The Hon. Waihenya Ndirangu, M.P. | | |
| 4. The Hon. Cecily Mbarire, MGH, M.P. | | |
| 5. The Hon. Kamoti Mwamkale, M.P. | | |
| 6. The Hon. Ronald Tonui, M.P. | | |
| 7. The Hon. Daniel Maanzo, M.P. | | |
| 8. The Hon. Martha Wangari, M.P. | | |
| 9. The Hon. Gideon Mulyungi, M.P. | | |
| 10. The Hon. Abdi Tepo, M.P. | | |
| 11. The Hon. Edith Nyenze, M.P. | | |
| 12. The Hon. George Murugara, M.P. | | |
| 13. The Hon. Jennifer Shamalla, M.P. | | |
| 14. The Hon. Munene Wambugu, M.P. | | |
| 15. The Hon. Robert Gichimu, M.P. | | |
| 16. The Hon. Sammy Seroney, M.P. | | |

ABSENT WITH APOLOGY

1. The Hon. Alice Wahome, M.P.
2. The Hon. William Cheptumo, M.P
3. The Hon. Robert Mbui, M.P.
4. The Hon. Timothy Wanyonyi, M.P.
5. The Hon. (Dr.) Wilberforce Oundo, M.P.
6. The Hon. Patrick Mariru, M.P.
7. The Hon. Nicholas Tindi Mwale, M.P.

IN-ATTENDANCE

National Assembly Secretariat

- | | | |
|-------------------------|---|--|
| 1. Ms. Susan Maritim | - | Senior Clerk Assistant |
| 2. Mr. Mohamed Jimale | - | Clerk Assistant II |
| 3. Mr. Wilson Dima Dima | - | Principal Legal Counsel |
| 4. Ms. Sophie Otieno | - | Senior Legal Counsel (Litigation & Compliance) |
| 5. Mr. Charles Ayari | - | Superintendent of Electronics (Audio)\ |
| 6. Ms. Peris Kaburi | - | Serjeant-at-Arms |

MIN.NO. /NA/CDL/2021/111

PRAYERS AND PRELIMINARIES

The Chairman the meeting to order at half past ten o'clock with Prayer by Hon Martha Wangari, MP.

MIN.NO. /NA/CDL/2021/112

ADOPTION OF THE AGENDA

The Committee unanimously adopted the Agenda as presented having been proposed by Hon. Muriuki Njagagua, MP and seconded by Hon. Martha Wangari, MP.

MIN.NO. /NA/CDL/2021/113

CONFIRMATION OF MINUTES OF THE PREVIOUS SITTINGS

Minutes of the previous sittings were read and confirmed as follows –

- i. Minutes of the 20th Sitting held on 27th April, 2021 were confirmed as a true record of the proceedings having been proposed by Hon. George Murugara, M.P. and seconded by Hon. Jennifer Shamalla, M.P.
- ii. Minutes of the 21st Sitting held on 4th May, 2021 were confirmed as a true record of the proceedings having been proposed by Hon. Muriuki Njagagua, M.P. and seconded by Hon. Cecily Mbarire, MGH,MP.

MIN.NO. /NA/CDL/2021/114

MATTERS ARISING

No matter arose.

MIN.NO. /NA/CDL/2021/115

ADOPTION OF THE PUBLIC FINANCE MANAGEMENT (NATIONAL DROUGHT EMERGENCY FUND) REGULATIONS, 2021

The Committee Members unanimously adopted the Report on the Consideration of the Public Finance Management (National Drought Emergency Fund) Regulations, 2021 (Legal Notice No. of 27 of 2021) as proposed and seconded by Hon. Martha Wangari, M.P and Hon. Gideon Mulyungi, M.P., respectively.

MIN.NO. /NA/CDL/2021/116

CONSIDERATION OF EXEMPTION FROM INCOME TAX FOR JAPANESE COMPANIES, CONSULTANTS & EMPLOYEES (L.N. NO. 15 OF 2021)

The Committee Members unanimously adopted the Report on the Consideration of the Exemption From Income Tax For Japanese Companies, Consultants & Employees (L.N. No. 15 of 2021) as proposed and seconded by Hon. Muriuki Njagagua, M.P and Hon. George Murugara, M.P., respectively.

**CONSIDERATION OF EXEMPTION FROM
INCOME TAX BY AN AIRLINE IN WHICH THE
GOVERNMENT OF KENYA OWNS AT LEAST 45%
OF ITS SHARES AND ITS SUBSIDIARIES (L.N. NO.
27 OF 2021)**

- i. The Directorate of Litigation and Compliance Services informed the Committee about Constitutional Petitions No. E001 of 2021 and E005 OF 2021 filed in the High Court of Kenya in Machakos in respect to the validity and constitutionality of section 12(D) of the Income Tax Act (Cap 470).
- ii. The Petitions are instituted by separate Petitioners namely: registered officials of the Isinya Sub-County Bar Owners Association being the Petitioners of Petition E005 of 2021 and the Kenya Association of Manufacturers, the Retail Trade Association of Kenya and the Kenya Flower Council being the Petitioners in petition No. E001 of 2021 (formally Pet. No. E079 of 2021)
- iii. The National Assembly, the Commissioner General of the Kenya Revenue Authority and the Attorney General are joined in both Petitions as 1st, 2nd and 3rd Respondents, respectively. The Institute of Certified Public Accountants, the Law Society of Kenya and Robert Kamwara are joined as interested parties in the matters.
- iv. The Petitioners contend that the amendments introduced into the Income Tax Act (Cap 470) in 2020, through the Tax Laws (Amendment) (No. 2) Act, 2020 introduces the minimum tax chargeable at the rate of 1% of the gross revenue, does not amount to Value Added Tax, custom duties nor excise tax and should therefore not be included in the Income Tax Act. The Petitioners, therefore, argue that the imposition of this tax is unlawful, unconstitutional and unreasonable, therefore should be declared as such by the constitutional court.
- v. The Committee was further informed that the Court issued Conservatory Orders in an interlocutory ruling, pending the hearing and determination of the matter. The Ruling issued restrains the Commissioner General of Kenya Revenue Authority from implementing section 12(D) of the Income Tax Act which is the subject matter of Legal Notice No. 27 of 2021, under consideration by the Committee.

Way Forward

On the matter of Standing Order No. 89 on sub judice and its implications on considering the matter in view of the court cases, the Committee in the last meeting suspended further consideration of the matter owing to the fact that the National Assembly is party to the suit, being

the 1st Respondent and the conservatory orders issued being at the core and touches on the substantive aspect of the suit.

However, a further legal opinion presented to the Committee by the Directorate of Litigation and Compliance, who are representing the National Assembly in the matter in court, indicated that there would be no prejudice suffered by the National Assembly if the Committee proceeded to consider the matter, despite the conservatory orders issued by the court.

The Committee, therefore, proceeded to consider the said Legal Notice and made its determination.

Committee Observations

i. Statutory Timelines

Legal Notice No. 27 of 2021 was published on 17th March, 2021, submitted to the Clerk of the National Assembly on 30th March, 2021 and laid before the House on 28th April, 2021 in accordance with section 11 of the Statutory Instruments Act, 2013. This was done without unreasonable delay as contemplated in section 13 (2) of the Income Tax Act.

ii. Public Participation

On public participation, the regulation making authority informed the Committee that after the enactment of the Finance Act, 2020 that introduced minimum tax, the National Treasury received various presentations from stakeholders on the impact of the new tax on several classes of businesses including public entities that are facing challenges. The Committee was satisfied with this justification.

iii. Regulatory Impact Statement

The Exemption does not require a Regulatory Impact Statement within the meaning of sections 6, 7 and 8 of the Statutory Instruments Act as it is not likely to impose significant costs on the community.

Committee Recommendation

Having examined Legal Notice No. 27 of 2021 in accordance with the Constitution of Kenya, the Interpretations and General Provisions Act (Cap. 2), the Income Tax Act (Cap 470) and the Statutory Instruments Act (No. 23 of 2013), the Committee resolved to **approve** it as proposed by Hon. George Murugara, M.P and seconded by Hon. Munene Wambugu, M.P.

MIN.NO. /NA/CDL/2021/118 ANY OTHER BUSINESS

- 1) **Consultative retreat with regulation making authorities - Thursday, 27th May to Monday, 31st May, 2021, Diani:** The Committee was informed that logistical arrangements for the retreat are on course and Members would be updated on the progress accordingly.
- 2) **Foreign travel:** The secretariat reported that progress on foreign travel would be availed in the next meeting.

MIN.NO. /NA/CDL/2021/119

ADJOURNMENT

There being no other meeting, the meeting was adjourned at 11.30 a.m. The next meeting will be called on notice.

Signed:.....

Date.....13 May, 2021.....

HON. KASSAIT KAMKET, M.P.

(CHAIRPERSON)

**MINUTES OF THE 21ST SITTING OF THE COMMITTEE ON DELEGATED
LEGISLATION HELD VIRTUALLY ON TUESDAY, 4TH MAY, 2021 AT 11.50 A.M.**

PRESENT

- | | | | |
|-----|--|---|-------------------------|
| 1) | The Hon. Kassait Kamket, M.P. | - | Chairperson |
| 2) | The Hon. Muriuki Njagagua, M.P. | - | Vice Chairperson |
| 3) | The Hon. Alice Wahome, M.P. | | |
| 4) | The Hon. Cecily Mbarire, MGH, M.P. | | |
| 5) | The Hon. Kamoti Mwamkale, M.P. | | |
| 6) | The Hon. Daniel Maanzo, M.P. | | |
| 7) | The Hon. Ronald Tonui, M.P. | | |
| 8) | The Hon. Cecily Mbarire, MGH, M.P. | | |
| 9) | The Hon. Alice Wahome, M.P. | | |
| 10) | The Hon. Daniel Maanzo, M.P. | | |
| 11) | The Hon. Abdi Tepo, M.P. | | |
| 12) | The Hon. Edith Nyenze, M.P. | | |
| 13) | The Hon. George Murugara, M.P. | | |
| 14) | The Hon. Jennifer Shamalla, M.P. | | |
| 15) | The Hon. Munene Wambugu, M.P. | | |
| 16) | The Hon. Patrick Mariru, M.P. | | |
| 17) | The Hon. Robert Gichimu, M.P. | | |
| 18) | The Hon. Sammy Seroney, M.P. | | |

ABSENT WITH APOLOGY

- 1) The Hon. Waihenya Ndirangu, M.P.
- 2) The Hon. William Cheptumo, M.P.
- 3) The Hon. Martha Wangari, M.P.
- 4) The Hon. Robert Mbui, M.P.
- 5) The Hon. Timothy Wanyonyi, M.P.
- 6) The Hon. (Dr.) Wilberforce Oundo, M.P.
- 7) The Hon. Gideon Mulyungi, M.P.
- 8) The Hon. Nicholas Tindi Mwale, M.P.

IN-ATTENDANCE

National Assembly Secretariat

- | | | | |
|----|----------------------|---|---------------------------------------|
| 1) | Ms. Susan Maritim | - | Senior Clerk Assistant |
| 2) | Mr. Mohamed Jimale | - | Clerk Assistant II |
| 3) | Mr. Wilson Dima Dima | - | Principal Legal Counsel |
| 4) | Mr. Anthony Wamae | - | Serjeant-at-Arms |
| 5) | Mr. Charles Ayari | - | Superintendent of Electronics (Audio) |

MIN.NO. /NA/CDL/2021/103 PRAYERS AND PRELIMINARIES

The Chairman the meeting to order at fifty minutes past eleven o'clock with Prayer.

MIN.NO. /NA/CDL/2021/104 ADOPTION OF THE AGENDA

The Committee unanimously adopted the Agenda as presented having been proposed by Hon. Abdi Tepo, MP and seconded by Hon. Edith Nyenze, MP.

MIN.NO. /NA/CDL/2021/105 CONFIRMATION OF MINUTES OF THE PREVIOUS SITTINGS

Confirmation of Minutes of the previous sitting was deferred.

MIN.NO. /NA/CDL/2021/10/6 CONSIDERATION OF THE PUBLIC FINANCE MANAGEMENT (DROUGHT MANAGEMENT EMERGENCY FUND) REGULATIONS, 2021

The Committee was informed that the Public Finance Management (National Drought Emergency Fund) Regulations, 2021, was made by the Cabinet Secretary for National Treasury and Planning pursuant to Sections 24(4) of the Public Finance Management Act, (*No. 18 of 2012*) and was published in the gazette *vide* Legal Notice No.27 of 2021.

Overview of the Regulations

- 1) Part I (Preliminaries) provides for citation and interpretation.
- 2) Regulation 3 establishes the National Drought Emergency Fund.
- 3) Capital (Regulation 4): The initial capital of the Fund is Kshs. 2 billion appropriated by Parliament as provided for in Regulation 4. The Fund will also be financed through annual appropriations by the National Assembly and may include grants, donations and contributions from well-wishers including donors and the private sector.
- 4) Oversight Board (Regulation 9): The Board of the National Drought Management Authority established under section 18 (1) of the National Drought Management Authority Act, 2016 will oversight the administration of the Fund. The Functions of the Board are specified in Regulation 9.
- 5) The Secretariat (Regulation 14): The Secretariat of the Fund is the National Drought Management Authority established under section 13 (1) of the National Drought Management Authority Act, 2016 as reiterated under Regulation 14.
- 6) The National Drought and Food Security Steering Committee (Regulation 17): Regulation 17 establishes the National Drought and Food Security Steering Committee chaired by the Deputy President, deputised by the Chairperson of the Council of Governors. Other Members of the Committee include cabinet secretaries responsible for drought risk management, devolution, planning, finance, water, health, education, defence, national government coordination, agriculture, livestock and fisheries, social protection,

environment, energy, wildlife and meteorology.

- 7) The Cabinet Secretary responsible for drought risk management is the Secretary to the Committee.
- 8) The functions of the Steering Committee are as follows –
- 9) provide policy recommendations on drought response interventions;
- 10) provide leadership and oversight on drought and food security interventions during the alarm and emergency stages;
- 11) receive, consider and make decisions based on reports from the Inter-Governmental Technical Committee; and
- 12) mobilise resources for drought response interventions during alarm and emergency stages.
- 13) The Steering Committee reports to the Cabinet.
- 14) Inter-Governmental Technical Committee on Drought and Food Security (Regulation 18): the Inter-governmental Technical Committee comprises of principal secretaries responsible for drought risk management, devolution, planning, finance, water, health, education, defence, national government coordination, agriculture, livestock and fisheries, social protection, environment, energy, wildlife and meteorology. It also includes five (5) nominees of the Council of Governors, being county executive committee (CEC) members responsible for matters drought, water, health, agriculture and finance, preferably from drought-prone areas. The Technical Committee will be chaired by the Principal Secretary for matters relating to drought risk management. The Secretary to the Committee is the Administrator of the Fund.
- 15) County Drought Committee (Regulation 19): Each drought-prone County will establish a County Drought Committee which will be co-chaired by the Governor and the County Commissioner. It will comprise of various officers from both National and County Government, on matters responsible for drought risk management, planning, finance, water etc. The Regulations also establish the County Drought Committee the regulations have assigned the Cabinet Secretary / National Treasury and Planning the responsibility to prescribe a framework for consultation with development partners;
- 16) The Regulations also provide for the criteria for project identification, submission of project proposals, allocation of funds among various components of the drought risk management to facilitate posterity of the Fund and where necessary, co-financing by county governments and non-state actors.
- 17) The Regulations further provide for –
 - i. oversight by Parliament through annual reporting to the Auditor General and quarterly reporting on projects financed by the Fund,
 - ii. maintenance of proper records in the management and administration of the Fund

- including reporting requirements to comply with the provisions of the Public Finance Management Act, 2012;
- iii. provides for the administrative costs of running the Fund at a maximum of five per centum (5%);
 - iv. offences and penalty of misappropriation of the Fund as provided for under Section 199 of the Public Finance Management Act; and
 - v. procedure for winding-up of the Fund.

Conferring with the Regulation Making Authority

The Committee held a prepublication scrutiny meeting with the National Treasury & Planning on the 1st February, 2021 in Mombasa, in which the following concerns were raised:

- 1) The Committee observed that in most instances, Members of Parliament are often among the first people to respond in times of crises. However, the Regulations are silent on the place and role of the members of Parliament.
- 2) Under Regulation 20 on resource mobilization, the Committee inquired about the justification for the allocation of resources to the affected areas in the country.
- 3) It was noted that there were drafting errors contrary to section 13(m) of the Statutory Instruments Act relating to numbering of Regulation 20 and Reg.21 that the Ministry was to attend to before publication.
- 4) That Regulation 23 deals with emergencies not handled by the Fund which were not clearly defined in Regulation 2.
- 5) The Committee sought clarity on why certain ministries such as the Ministry of Energy and the Ministry of Environment and Natural Resources, were excluded as stakeholders.
- 6) It was the view of the Committee that there is no clear outline of operationalization of the Fund and more so accountability of the management of the Funds in order to curb improper management of public finances by the persons in charge.
- 7) It was brought to the attention of the Committee that Counties that are prone to drought have been identified and will benefit from the proposed Fund.

Committee Observations

The Committee made the following observations –

1) Statutory Timelines

The Regulations were published in the gazette on 5th March, 2021, vide Legal Notice No. 27 of 2021, submitted to the Clerk of the National Assembly on 17th March, 2021 and laid in the House on 23rd March, 2021 being within the requisite statutory timelines under section 11(1) of the Statutory Instruments Act.

2) Consultation / Public participation

Articles 10 and 118 of the Constitution, section 5, 5A and the Schedule to the Statutory Instruments Act, read together with Standing Order 210 requires the regulation-making authority to conduct public participation and sufficient consultation with the stakeholders and persons likely to be affected by the Regulations.

During consultations with the regulation making authority, the National Treasury jointly with the Ministry of Devolution and ASAL demonstrated to the Committee that extensive consultations were undertaken during preparation of the Regulations. Various key stakeholders including County Governments, line ministries, development partners among others were consulted and their input taken into account before finalization of the Regulations.

The Ministry submitted an Explanatory Memorandum with a schedule of persons who appeared in various forums to give their input to the draft Regulations.

Committee Resolution

Having examined the Public Finance Management (Drought Management Emergency Fund) Regulations, 2021 in line with the Constitution of Kenya, the Interpretations and General Provisions Act (Cap 2), the Public Finance Act (No 18 of 2012), the National Drought Management Authority Act (*No. 4 of 2016*) and the Statutory Instruments Act (No 23 of 2013), the Committee resolved to **approve** them as proposed by Hon. Alice Wahome, M.P. and seconded by Hon. Abdi Tepo, M.P.

MIN.NO. /NA/CDL/2021/107 CONSIDERATION OF EXEMPTION FROM INCOME TAX FOR JAPANESE COMPANIES, CONSULTANTS & EMPLOYEES (L.N. NO. 15 OF 2021)

The Committee was informed that section 13(2) of the Income Tax Act (Cap 470) mandates the Cabinet Secretary, by notice in the Gazette, to provide that any income or class of income which accrued in or was derived from Kenya shall be exempt from tax to the extent specified in such notice and that any such exemption shall cease to have effect either generally or to the extent specified in the notice. Further, that where the Cabinet Secretary issues such a notice it has to be laid before the National Assembly without unreasonable delay.

The Committee conferred with the Cabinet Secretary, National Treasury & Planning on 15th April, 2021 whereby he briefed the Committee on the contents of the Legal Notice No. 15 of 2021 being the various agreements signed between the Government of Kenya and the Government of Japan.

The said Legal Notice seeks to exempt from income tax, the Japanese consultants, Japanese companies and Japanese employees involved in the implementation of the projects listed in the second column of the Schedule to the Notice.

The Cabinet Secretary then reiterated that the overall benefits derived from the effective and efficient implementation of the projects outweigh the taxes foregone and that the income from the jobs created from these projects and incomes derived from the expenditure on the projects generate tax revenue that is far above the tax foregone as a result of the exemptions.

Committee Observations

1. Statutory Timelines

Legal Notice No. 15 of 2021 was published on 26th February 2021, submitted to the Clerk of the National Assembly on 9th March, 2021 and laid before the House on 23rd March, 2021 in accordance with section 11 of the Statutory Instruments Act, 2013. This was done without unreasonable delay as contemplated in section 13 (2) of the Income Tax Act.

The Act also provides that if a resolution is passed by the Assembly within twenty days on which it next sits after the notice is so laid that the notice be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the issuing of a new notice.

The Notice was laid in the House on the 23rd March, 2021 and the House was on recess where the twenty day statutory timeline would lapse on the 18th May, 2021.

The House has to pronounce itself within the statutory timelines and if the notice expressly approved or [is not annulled] then it shall be deemed to have been impliedly approved.

2. Public Participation

The Ministry submitted both before the Committee and in its documentation forwarded to the National Assembly that the Legal Notice is an understanding between the two Governments and that public participation may, therefore, not apply.

Having considered the above averment, the Committee subjected the Notice to the test specified in the Statutory Instruments Act, 2013, in respect thereto and noted that –

Section 13(2) does allow the Cabinet Secretary to exempt certain activities from taxation, save that if he so exempts then the Notice must be published in the Gazette (for the public to know) without delay and that it must be submitted to the National Assembly.

It may, therefore, not be a statutory instrument within section 2 of the Statutory Instruments Act, 2013 and may, therefore, not be subjected to public participation in the manner contemplated in sections 5 and 5A of the SI Act.

Committee Resolution

Having considered the Legal Notice No 15 of 2021, relating to the Exemption from Income Tax of the Japanese Companies, Japanese Consultants and Japanese Employees involved in the implementation of the projects listed in the second column of the Schedule to the Notice, the Committee resolved to **approve** it as proposed by Hon. Abdi Tepo, M.P and seconded by Hon. Kamoti Mwamkale, M.P.

MIN.NO. /NA/CDL/2021/108

**CONSIDERATION OF EXEMPTION FROM
INCOME TAX BY AN AIRLINE IN WHICH THE
GOVERNMENT OF KENYA OWNS AT LEAST 45%
OF ITS SHARES AND ITS SUBSIDIARIES (L.N. NO.
27 OF 2021)**

The attention of the Committee was drawn to a case filed in High Court of Kenya at Machakos in respect to the validity and constitutionality of section 12(D) of the Income Tax Act as amended in **Constitutional Petition No. E005 of 2021** and in which the National Assembly is the first Respondent sued with the Commissioner General of Kenya Revenue Authority and the Attorney General.

The Court issued Conservatory Orders in an interlocutory ruling, pending the hearing and determination of the matter. The Ruling issued restrains the Commissioner General of Kenya Revenue Authority from implementing section 12(D) of the Income Tax Act which is the subject matter of Legal Notice No 27 of 2021, currently under consideration by the Committee.

The Committee was further informed that National Assembly is party to the suit, being the first respondent and that the conservatory orders so issued, is at the core and touches on the substantive aspect of the suit.

Way Forward

As result of the aforementioned matter, consideration of the Exemption from Income Tax by an Airline in which the Government of Kenya owns at Least 45% of its shares and its subsidiaries (L.N. No. 27 of 2021) was further **deferred** owing to the fact that the Committee could not make any determination on the matter of *sub judice*, in which the National Assembly is party to the suit.

MIN.NO. /NA/CDL/2021/109

ANY OTHER BUSINESS

Consultative retreat with regulation making authorities: The Committee resolved to undertake the retreat with various regulation making authorities including the Public Service Commission and the National Treasury & Planning from Thursday, 27th May to Monday, 31st May, 2021 in Mombasa County.

MIN.NO. /NA/CDL/2021/110

ADJOURNMENT

The meeting was adjourned at 12.40 p.m. until Wednesday, 12th May, 2021 at 10.00 a.m.

Signed:.....

Date.....12 May, 2021.....

HON. KASSAIT KAMKET, M.P.
(CHAIRPERSON)

**MINUTES OF THE 20TH SITTING OF THE COMMITTEE ON DELEGATED
LEGISLATION HELD VIRTUALLY ON TUESDAY, 27TH APRIL, 2021 AT 10.00 A.M.**

PRESENT

1. The Hon. Muriuki Njagagua, M.P. - Vice Chairperson (Chaired meeting)
2. The Hon. Waihenya Ndirangu, M.P.
3. The Hon. Cecily Mbarire, MGH, M.P.
4. The Hon. Waihenya Ndirangu, M.P.
5. The Hon. Alice Wahome, M.P.
6. The Hon. Daniel Maanzo, M.P.
7. The Hon. Martha Wangari, M.P.
8. The Hon. Ronald Tonui, M.P.
9. The Hon. Timothy Wanyonyi, M.P.
10. The Hon. (Dr.) Wilberforce Oundo, M.P.
11. The Hon. Patrick Mariru, M.P.
12. The Hon. Abdi Tepo, M.P.
13. The Hon. Edith Nyenze, M.P.
14. The Hon. George Murugara, M.P.
15. The Hon. Munene Wambugu, M.P.
16. The Hon. Robert Gichimu, M.P.

ABSENT WITH APOLOGY

1. The Hon. Kassait Kamket, M.P. - Chairperson
2. The Hon. William Cheptumo, M.P.
3. The Hon. Kamoti Mwamkale, M.P.
4. The Hon. Jennifer Shamalla, M.P.
5. The Hon. Robert Mbui, M.P.
6. The Hon. Gideon Mulyungi, M.P.
7. The Hon. Sammy Seroney, M.P.
8. The Hon. Nicholas Tindi Mwale, M.P.

IN-ATTENDANCE

National Assembly Secretariat

- 1) Ms. Susan Maritim - Senior Clerk Assistant
- 2) Mr. Mohamed Jimale - Clerk Assistant II
- 3) Mr. Wilson Dima Dima - Principal Legal Counsel
- 4) Mr. Anthony Wamae - Serjeant-at-Arms
- 5) Mr. Charles Ayari - Superintendent of Electronics (Audio)
- 6) Mr. Thomas Ogwel - Fiscal Analyst

MIN.NO. /NA/CDL/2021/093 PRAYERS AND PRELIMINARIES

The meeting commenced at 10.15 a.m. with the Prayers and preliminary remarks by the Vice Chairman.

MIN.NO. /NA/CDL/2021/094 ADOPTION OF THE AGENDA

The Committee unanimously adopted the Agenda as presented having been proposed by Hon. Abdi Tepo, MP and seconded by Hon. Edith Nyenze, MP.

MIN.NO. /NA/CDL/2021/095 CONFIRMATION OF MINUTES OF THE PREVIOUS SITTINGS

Minutes of the previous sittings were read and confirmed as follows –

Minutes of the 19th Sitting held on 15th April, 2021 were confirmed as a true record of the proceedings having been proposed by Hon. Patrick Mariru, M.P. and seconded by Hon. George Murugara, M.P.

MIN.NO. /NA/CDL/2021/096 MATTERS ARISING

Under **MIN.NO. /NA/CDL/2021/089**, the Committee was informed that the National Treasury was yet submit the documents and information requested regarding the consideration of Legal Notices 15 and 27 of 2021. The information was to be submitted by close of business on 27th April, 2021.

MIN.NO. /NA/CDL/2021/097 CONSIDERATION OF EXEMPTION FROM INCOME TAX FOR JAPANESE COMPANIES, CONSULTANTS & EMPLOYEES (L.N. NO. 15 OF 2021)

Consideration of the Exemption from Income Tax for Japanese Companies, Consultants & Employees (L.N. No. 15 of 2021) was deferred to the next meeting to allow for submission of additional documentation from the regulation making authority.

MIN.NO. /NA/CDL/2021/098 CONSIDERATION OF EXEMPTION FROM INCOME TAX BY AN AIRLINE IN WHICH THE GOVERNMENT OF KENYA OWNS AT LEAST 45% OF ITS SHARES AND ITS SUBSIDIARIES (L.N. NO. 27 OF 2021)

Consideration of the Exemption from Income Tax by an Airline in which the Government of Kenya owns at Least 45% of its shares and its subsidiaries (L.N. No. 27 of 2021) was deferred to the next meeting to allow for submission of additional documentation from the regulation making authority.

MIN.NO. /NA/CDL/2021/099

**CONSIDERATION OF THE PUBLIC
FINANCE MANAGEMENT (DROUGHT
MANAGEMENT EMERGENCY FUND)
REGULATIONS, 2021**

Consideration of the Public Finance Management (Drought Management Emergency Fund) Regulations, 2021 was also deferred to the next meeting.

MIN.NO. /NA/CDL/2021/100

**CONSIDERATION OF THE STATEMENT
REQUESTED BY HON. ABDULSWAMAD
NASSIR, MP ON PETROLEUM PRICING
PARAMETERS**

The Vice Chairperson informed the Committee that pursuant to Standing Order 218(2), the Speaker approved the Statement by the Hon. Abdulswamad Sheriff Nassir, MP, Member for Mvita Constituency. The matter was referred for consideration jointly by the Committee on Delegated Legislation and the Departmental Committee on Energy and to undertake a joint inquiry on the pricing parameters used by the Energy and Petroleum Regulatory Authority (EPRA) in determining the maximum wholesale and retail petroleum prices in the country.

1) LEGAL BRIEF ON PETROLEUM PRICING PARAMETERS

The Prayers sought in the Statement are for the Joint Committee to urgently inquire into the matter, including engaging EPRA to explore avenues of revising the petroleum pricing parameters that are anchored on the Energy (Petroleum Pricing) Regulations 2010 and the Energy (Petroleum Pricing) (Amendment) Regulations 2012 and for the Joint Committee to report back to the House on the findings of the inquiry and their recommendations within thirty days.

Legal Framework

- i) Section 9 of the Energy Act establishes the Energy and Petroleum Regulatory Authority ("the Authority"), the functions of which as stipulated under section 10 of the said Act include to regulate importation, refining, exportation, transportation, storage and *sale of petroleum and petroleum products* with the exception of crude oil.
- ii) Section 101(y) of the Petroleum Act (*No. 2 of 2019*) empowers the Cabinet Secretary responsible for petroleum on recommendation of the Authority to *make regulations for determining the maximum wholesale and retail prices of petroleum and petroleum products*.
- iii) Section 224(2)(e) of the Energy Act provides that any subsidiary legislation issued before the commencement of the Energy Act shall remain in force until repealed or revoked.
- iv) The Energy (Petroleum Pricing) Regulations, 2010, published *vide LN No. 196 of 2010* and the Energy (Petroleum Pricing) (Amendment) Regulations, 2012 published *vide LN No. 26 of 2012* seek to regulate the pricing of petroleum and petroleum products.

- v) The Energy (Petroleum Pricing) Regulations, 2010, aforementioned, and the 2012 amendments were not subjected to the Statutory Instrument Act, 2013.
- vi) Regulation 1 provides that the maximum wholesale prices and the retail pump prices of petroleum products at a wholesale depot or retail dispensing site shall be determined in accordance with the formula set out in regulation 4.
- vii) Regulation 2 provides that the prices determined using the formula set out in Regulation 4 of these Regulations shall be the maximum wholesale and retail pump prices of petroleum products which a person carrying on petroleum business shall sell at a wholesale depot or a retail dispensing site.
- viii) Regulation 3 provides that the maximum determined prices shall become effective on the 15th day of every calendar month and shall remain in force until the 14th day of the following calendar month.
- ix) Regulation 4 provides for the maximum wholesale and retail pump prices of petroleum products in shillings per litre.
- x) Regulation 5 provides for the weighted, average cost in shillings per litre ex the Kenya Petroleum Refineries Limited (KPRL) and ex the Kipevu Oil Storage Facility (KOSF).
- xi) Regulation 6 provides that the unit cost of imported refined petroleum products [C] shall be determined in accordance with the calculation used in the open tender system for importation of petroleum products.
- xii) Regulation 7 provides that the unit cost of petroleum products obtained from crude oil refined at the Kenya Petroleum Refineries Limited *If: 'crp* _ shall be the sum of landed cost of crude oil, refinery fees, inventory financing costs and insurance costs for the crude imports allocated to the refinery approved product yields, benchmarked to the cost of importation of the same refined products.
- xiii) Regulation 7 as amended and Regulation 8 of Regulations, provides that the average mean exchange rate of leading commercial banks selected by the Commission on the last discharge date shall be used in converting the imported refined petroleum products and crude oil costs determined under Regulations 6 and 7 from foreign currency to Kenya Shillings.

2) BRIEF BY THE PARLIAMENTARY BUDGET OFFICE

Background

Petroleum pricing in Kenya is undertaken in accordance with the Energy (Petroleum Pricing) Regulations, 2010 (Legal Notice No. 196 of 2010). Currently, all petroleum products for local consumption are imported in refined form. On a monthly basis Kenya Consumes 160,000,000 litres of Super Petrol; 220,000,000 litres of Diesel; 75,000,000 litres of Jet A1 and 13,000,000 of Kerosene.

The computation of petroleum pump prices takes into account the following key cost components:

- a) The landed cost - The weighted average costs (per product) of imported Super Petrol, Diesel and Kerosene;
- b) Storage and distribution costs;
- c) Gross Margins; and
- d) Applicable taxes and Levies;

The Committee was further presented with the trend of Super Petrol, Diesel and Kerosene pump price breakdown from January 2019 to March 2021 and that importation of Super Petrol, Diesel and Kerosene into Kenya is undertaken through the Open Tender System (OTS) in accordance with Legal Notice No. 24 of 2012. The OTS mirrors the prevailing prices of petroleum products in the international markets.

For the period January to March 2021, the average landed cost of imported Super Petrol increased by 38.41% from KES 36.01 per litre to KES 49.84 per litre, that of Diesel increased by 26.68% from KES 36.96 per litre to KES 46.82 per litre while that of Kerosene increased by 27.97% from KES 33.57 per litre to KES 42.96 per litre.

The Table 1 below compares the pump price components between January and March 2021 while table 2 compares pump prices between selected countries in the world.

Table 1: Comparison between pump price components in January 2021 and March 2021

Product	Super Petrol (Kshs/Litre)			Diesel (Kshs/Litre)			Kerosene (Kshs/Litre)		
Month	Jan-21	Mar-21	Change	Jan-21	Mar-21	Change	Jan-21	Mar-21	Change
Landed Cost	36.01	49.84	38.41%	36.96	46.82	26.68%	33.57	42.96	27.97%
Storage and Distribution	3.17	3.25	2.52%	2.97	3.01	1.35%	2.94	2.98	1.36%
Margins	12.39	12.39	-	12.36	12.36	-	12.36	12.36	-
Taxes & Levies	55.42	57.33	3.45%	44.11	45.47	3.08%	38.25	39.55	3.40%
Nairobi Price	106.99	122.81	14.79%	96.40	107.66	11.68%	87.12	97.85	12.32%

Table 2: Comparison of pump prices in Kenya with selected countries in the world

No.	Country	Super Petrol (Kshs/Litre)	Diesel (Kshs/Litre)
1.	Kenya - Nairobi	122.81	107.66
2.	Tanzania - Dodoma	96.50	93.19
3.	Uganda - Kampala	118.64	110.85
4.	Rwanda - Kigali	120.18	116.34
5.	South Africa - Inland	117.87	118.42
6.	China	116.01	101.43
7.	Germany	187.67	168.97
8.	United Kingdom	190.57	194.96
9.	France	198.46	184.98

Source: www.globalpetrolprices.com [accessed on 15th March 2021]

Petroleum Taxes and Levies

On the Petroleum Taxes and Levies, The Committee was informed the breakdown of taxes and levies as at March, 2021 and the table below provides for the trend in taxes and levies for petroleum products from December,, 2010.

Table 3: Breakdown of the taxes and levies in Kenya, March 2021

Product	Super Petrol	Diesel	Kerosene
Unit	Kshs/litre	Kshs/litre	Kshs/litre
Excise Duty Tax	21.95	11.37	11.37
Road Maintenance Levy	18.00	18.00	-
Petroleum Development Levy	5.40	5.40	0.40
Petroleum Regulatory Levy	0.25	0.25	0.25
Railway Development Levy	0.95	0.89	0.82
Anti-adulteration Levy	-	-	18.00

Merchant Shipping Levy	0.03	0.03	0.03
Import Declaration Fee Levy	1.65	1.56	1.44
Value Added Tax (VAT)	9.10	7.97	7.25
Taxes and levies	57.33	45.47	39.55

Table 4 below provides the percentage contribution of taxes and levies to the petroleum pump price in selected jurisdictions.

Country	Contribution of Taxes and Levies Petroleum Pump prices
India	69%
Italy	64%
France	63%
Germany	63%
Britain	62%
Spain	53%
Japan	47%
Canada	33%
United State of America	19%

Figure 6: Global petroleum taxes [Source: Petroleum Planning and Analysis Cell, IOC]

Table 5 tabulates the percentage contribution of taxes and levies in the March 2021 petroleum pump price.

Table 5: Contribution of taxes and levies in the March 2021 pump price

Products	Super Petrol		Diesel		Kerosene	
		%		%		
Cost Components	Kshs/litre	Contribution	Kshs/litre	Contribution	Kshs/litre	% Contribution
Product Costs	49.84	40.58%	46.82	43.49%	42.96	43.90%

Products	Super Petrol		Diesel		Kerosene	
Storage and distribution	3.25	2.65%	3.01	2.80%	2.98	3.05%
Margins	12.39	10.09%	12.36	11.48%	12.36	12.63%
Taxes and Levies	57.33	46.68%	45.47	42.23%	39.55	40.42%
Retail Prices in Nairobi	122.81	100.00%	107.66	100.00%	97.85	100.00%

The comparison of petroleum taxes in the region is tabulated in table 6.

Table 6: Comparison of Petroleum Taxes in the region

Product	Super Petrol	Diesel	Kerosene
Country	Kshs/Litre	Kshs/Litre	Kshs/Litre
Kenya	57.33	45.47	39.55
Uganda	40.37	30.80	5.98
Tanzania	37.45	31.59	29.08

Notes: Kshs/ UGX exchange rate @ UGX 33.42 per Kshs [source: www.cbk on 16th March 2021]

Kshs/ TZshs exchange rate @ TZshs 21.14 per Kshs [source: www.cbk on 16th March 2021]

Legal Basis of the Taxes and Respective Revisions of Tax Rates

The legal basis of petroleum taxes incorporated in the petroleum pump price build-up

- Revised Excise Duty on Diesel from Kshs 8.244 per litre to Kshs 10.305.
- Introduced Excise Duty on Kerosene at the rate of Kshs 7.205 per litre.
- Revised Excise Duty on Super Petrol from Kshs 19.505 per litre to Kshs 20.519, that on Diesel from Kshs 10.305 to Kshs 10.841 and that on Kerosene from Kshs 7.205 to Kshs 7.580.
- Revised Excise Duty on Super Petrol from Kshs 20.519 per litre to Kshs 19.505, that on Diesel from Kshs 10.841 to Kshs 10.305 and that on Kerosene from Kshs 7.580 to Kshs 7.205.
- Adjusted Excise Duty on Super Petrol, Diesel and Kerosene by +5.15%.

- (f) Adjusted Excise Duty on Super Petrol, Diesel and Kerosene by +4.94%.
- (g) Revised Road Maintenance Levy on Super Petrol and Diesel from Kshs 9 per litre to Kshs 12.
- (h) Revised Road Maintenance Levy on Super Petrol and Diesel from Kshs 12 per litre to Kshs 18.
- (i) Revised the Petroleum Development Levy on Super Petrol and Diesel from Kshs 0.40 per litre to Kshs 5.40.
- (j) Revised the Petroleum Regulatory Levy on Super Petrol and Kerosene from Kshs 0.05 per litre to Kshs 0.12 and that on Diesel from Kshs 0.04 per litre to Kshs 0.12.
- (k) Revised the Petroleum Regulatory Levy on Super Petrol, Diesel and Kerosene from Kshs 0.12 per litre to Kshs 0.25.

Performance of the Petroleum Taxes and Levies (Kshs. Million)

Petroleum Taxes /Levies	2019/20		
	Actual	Target	Performance rate (%)
Import Duty-Oil	1,656	1,563	93
Excise Duty- Oil	65,065	64,424	101
VAT-oil	5,506	5,627	98
VAT-Oil at 8%	15,926	17,303	92
Petroleum Development Levy	2,044	2,261	90
Road Maintenance Levy	74,458	80,387	93
Petroleum Regulatory Levy	1,073	1,232	87
Anti-Adulteration Levy	2,762	2,791	99
Total	168,490	175,588	96

Source: KRA

Committee Observations

The Committee made the following observations –

- i) The recent increase in fuel was greatly affected by the hike in international prices and further compounded by domestic levies and taxes.
- ii) On comparison between pump price in East Africa, it was observed that Kenya has the highest pump price even as compared with the landlocked countries e.g. Rwanda and Uganda. Taxes and levies are the biggest contributor to the pump price of Super Petrol and the second greatest contributor to the price of Diesel and Kerosene.
- iii) Import Declaration Fee, Railway Development Levy and Value Added Tax are charged as a percentage of the product cost resulting in a compounding effect when product costs increase.
- iv) As global oil prices escalate, pump prices in Kenya will continue to rise. It would therefore be prudent to pursue a price stabilization mechanism to mitigate against the economic impacts brought about by high petroleum pump prices such as the recent intervention by the National Treasury to compensate for increase in landed cost so as to maintain the petroleum product prices.
- v) The operationalization of the Petroleum Consolidated Fund provided for in the Petroleum Act needs to be fast tracked. The Fund shall cater for strategic stocks as well as the regulations to provide for a governance framework for the Petroleum Development Levy which Government intends to utilize to stabilize the prices.
- vi) On the demand side, containment measures and economic disruption related to the Covid19 outbreak have led to a slowdown in production and producing a significant drop in the global demand for oil.

Way Forward

The Parliamentary Budget Office was requested to submit additional information/analysis on distribution and transportation costs from other East African countries as a contributing factor to cost of petroleum products.

PBO was further requested to avail information on landed cost of refined oil in January 2020.

The Committee will at a later date invite the Ministry of Petroleum and Mining, the Energy and Petroleum Regulatory Authority (EPRA) to appear before the joint Committee to demonstrate the extent to which it complied with the statutory formulae in arriving at the pump prices.

MIN.NO. /NA/CDL/2021/101 ANY OTHER BUSINESS

No other business arose.

MIN.NO. /NA/CDL/2021/102 ADJOURNMENT

The meeting was adjourned at 11.15 a.m. until Thursday, 29th April, 2021 at 10.00 a.m. for a joint meeting with the Departmental Committee on Energy.

Signed:.....

HON. KASSAIT KAMKET, M.P.
(CHAIRPERSON)

Date..... 12 May, 2021

**MINUTES OF THE 19TH SITTING OF THE COMMITTEE ON DELEGATED
LEGISLATION HELD VIRTUALLY ON THURSDAY, 15TH APRIL, 2021 AT 10.00 A.M.**

PRESENT – VIRTUAL

- | | | |
|---|---|------------------|
| 1) The Hon. Kassait Kamket, M.P. | - | Chairperson |
| 2) The Hon. Muriuki Njagagua, M.P. | - | Vice Chairperson |
| 3) The Hon. Cecily Mbarire, MGH, M.P. | | |
| 4) The Hon. Alice Wahome, M.P. | | |
| 5) The Hon. Timothy Wanyonyi, M.P. | | |
| 6) The Hon. (Dr.) Wilberforce Oundo, M.P. | | |
| 7) The Hon. Patrick Mariru, M.P. | | |
| 8) The Hon. Martha Wangari, M.P. | | |
| 9) The Hon. Abdi Tepo, M.P. | | |
| 10) The Hon. Ronald Tonui, M.P. | | |
| 11) The Hon. Edith Nyenze, M.P. | | |
| 12) The Hon. George Murugara, M.P. | | |
| 13) The Hon. Gideon Mulyungi, M.P. | | |
| 14) The Hon. Jennifer Shamalla, M.P. | | |
| 15) The Hon. Munene Wambugu, M.P. | | |
| 16) The Hon. Robert Gichimu, M.P. | | |
| 17) The Hon. Sammy Seroney, M.P. | | |

ABSENT WITH APOLOGY

- 1) The Hon. Waihenya Ndirangu, M.P.
- 2) The Hon. William Cheptumo, M.P.
- 3) The Hon. Kamoti Mwamkale, M.P.
- 4) The Hon. Daniel Maanzo, M.P.
- 5) The Hon. Robert Mbui, M.P.
- 6) The Hon. Nicholas Tindi Mwale, M.P.

IN-ATTENDANCE

National Assembly Secretariat

- | | | |
|-------------------------|---|---------------------------------------|
| 1) Ms. Susan Maritim | - | Senior Clerk Assistant |
| 2) Mr. Mohamed Jimale | - | Clerk Assistant II |
| 3) Mr. Wilson Dima Dima | - | Principal Legal Counsel |
| 4) Mr. Anthony Wamae | - | Serjeant-at-Arms |
| 5) Mr. Charles Ayari | - | Superintendent of Electronics (Audio) |

The National Treasury and Planning (Virtual Attendance)

- | | | |
|----------------------------|---|--|
| 1) Hon. (Amb) Ukur Yattani | - | Cabinet Secretary |
| 2) Mr. Wanyambura Mwambia | - | Senior Deputy Director, M&FA |
| 3) Mr. Joseph Ngugi | - | Deputy Director, Macro Fiscal Affairs |
| 4) Ms. CPA Isabella Kogei | - | Asst. Director, Budget/Parliamentary Liaison Officer |

Kenya Revenue Authority

- | | | |
|-----------------------|---|---|
| 1) Mr. Maurice Oray | - | Deputy Commissioner, Corporate Tax Unit |
| 2) Mr. Ephraim Munene | - | Manager, Policy and Tax Advisory |

MIN.NO. /NA/CDL/2021/084 PRAYERS AND PRELIMINARIES

The meeting commenced at 10.15 a.m. with the Prayers.

MIN.NO. /NA/CDL/2021/085 ADOPTION OF THE AGENDA

The Committee unanimously adopted the Agenda as presented having been proposed by Hon. Jennifer Shamalla, MP and seconded by Hon. Martha Wangari, MP.

MIN.NO. /NA/CDL/2021/086 CONFIRMATION OF MINUTES OF THE PREVIOUS SITTINGS

Minutes of the previous sittings were read and confirmed as follows –

Minutes of the 17th Sitting held on 10th March, 2021 were confirmed as a true record of the proceedings having been proposed by Hon. Abdi Tepo, M.P. and seconded by Hon. George Murugara, M.P.

Minutes of the 18th Sitting held on 23rd March, 2021 were confirmed as a true record of the proceedings having been proposed by Hon. Timothy Wanyonyi, M.P. and seconded by Hon. Abdi Tepo, M.P.

MIN.NO. /NA/CDL/2021/087 MATTERS ARISING

No matter arose.

MIN.NO. /NA/CDL/2021/088 CONSIDERATION OF THE PUBLIC FINANCE MANAGEMENT (DROUGHT MANAGEMENT EMERGENCY FUND) REGULATIONS, 2021

Consideration of the Public Finance Management (Drought Management Emergency Fund) Regulations, 2021 was deferred to the next meeting.

MIN.NO. /NA/CDL/2021/089 CONSIDERATION OF EXEMPTION FROM INCOME TAX FOR JAPANESE COMPANIES, CONSULTANTS & EMPLOYEES (L.N. NO. 15 OF 2021)

The Cabinet Secretary informed the Committee that –

- 1) The legal basis for granting an exemption as contained in Legal Notice No. 15 of 2021 is stipulated in section 13(2) of the Income Tax Act, Cap 470 which empowers the Cabinet Secretary to exempt certain income tax.
- 2) The exemption is in respect of income which accrued in or was derived from Kenya by Japanese companies, Japanese Consultants or Japanese employees involved in the projects under the Financing Agreements signed between the Government of Kenya and Government of Japan.
- 3) The policy and requirement of the Japan Government of Japan is to have Japanese companies, consultants and Japanese nationals involved in the implementation of any project financed by the Government of Japan exempted from tax. This is not limited to Kenya but is the requirement by the Government of Japanese for all financing agreements between the Government of Japan and any other Government. All Agreements signed between Japanese Government and the Government of Kenya contain this exemption.
- 4) The overall benefits to be derived from effective and efficient implementation of these projects out way the tax forgone. In addition, the income from the jobs created from these projects and the income derived from the expenditure on these projects generates revenue that is far above the tax foregone as a result of the exemption.
- 5) On public participation, the exemption from income tax under the Agreements signed between the GoK and the Government of Japan is an understanding between two Governments, public participation may therefore not apply.

Plenary Discussions

The Committee raised the following concerns –

- i) The exemption is discriminatory and stands to benefit the Japanese nationals more than the Kenyan citizens. Local companies are not exempted from taxes, yet the Japanese enjoy expatriate benefits. In addition, Kenyan companies doing business in Japan do not enjoy similar exemptions.
- ii) Status of Nakuru – city or not?
- iii) Projects earmarked for development in each of the counties e.g. Nakuru County.

Way Forward

The Committee resolved to write to the National Treasury to request for the following information & documents –

- i) brief on the Agreement(s) between the Government of Kenya and the Japanese Government including the date(s) they were signed, what they seek to achieve, projects to be undertaken, project(s) duration and copies of such Agreement(s).
- ii) clarification on the Loans and Grants including the percentage of each; and

- iii) list of countries with similar exemptions including ongoing negotiations for such exemptions.

MIN.NO. /NA/CDL/2021/090

**CONSIDERATION OF EXEMPTION FROM
INCOME TAX BY AN AIRLINE IN WHICH THE
GOVERNMENT OF KENYA OWNS AT LEAST 45%
OF ITS SHARES AND ITS SUBSIDIARIES (L.N. NO.
27 OF 2021)**

The Committee was informed that the Legal Notice was issued under Section 13 (2) of the Income Tax Act and it seeks to exempt an airline including its subsidiaries where the government owns at least forty five per cent of its shares, from minimum tax imposed under Section 12(d) of Income Tax Act.

Policy Background

- 1) The Finance Act, 2020 amended the Income Tax Act to introduce minimum tax to be charged on all business enterprises whether they are in profit position or not. This is meant to discourage tax planning, where some companies perpetually declare losses to avoid paying tax in Kenya, while others may not be paying the correct amount of tax. These companies benefit from services such as security, roads and hospitals among others.
- 2) The amendment did not take into consideration specific sectors of the economy that are strategic to any government for purposes of operations of governments e.g., the aviation industry which is strategic to any government for purposes of security and even trade. Many Governments such as Ethiopia, South Africa among others has significant shareholding to allow competing effectively at international level.
- 3) The introduction of minimum tax would significantly affect the stability of the operations of the aviation industry particularly on those airlines that are partially or indirectly owned by the Government. To ensure that this tax does not significantly compromise the operations of these airlines, it is necessary and in line with practice by other Governments to cushion these airlines from the impact of paying minimum tax as it is clearly known that the companies' financial position is on downwards trend.
- 4) On public participation, the CS informed the Committee that after the enactment of the Finance Act, 2020 that introduced minimum tax, the National Treasury received various presentations from stakeholders on the impact of the new tax on several classes of businesses including public entities that are facing challenges.
- 5) Implementation will be monitored by the Kenya Revenue Authority and may be reviewed as the target institution improves profitability.

Plenary Discussions

The Committee raised the following concerns –

- i) exempting Kenya Airways and its subsidiaries alone will discriminate other airlines operating domestically and also other companies especially those affected by the COVID-19 pandemic;
- ii) Justification for exemption of Kenya Airways yet it has been experiencing financial challenges for several years even before the COVID-19 pandemic and has been bailed out before.

The CS responded that Kenya Airways is a national carrier with strategic trade/business and tourism interests including the host of UNEP HQs and therefore needs support. In addition, GoK guaranteed the company a loan of approximately Kshs. 75billion which is yet to be fully repaid. Other countries have also injected funds to protect their national carrier during the pandemic.

The CS further informed the Committee that Kenya Airways is not exempted from Corporate Tax and other taxes, only the minimum tax.

- iii) possible political and personal interests in exemption of Kenya Airways whose majority shareholding is in private hands: the CS responded that he was not aware about political interests in exempting Kenya Airways and that the exemption is for business interest to save the national carrier.

Way Forward

The Committee resolved that the National Treasury avails the following documentation: -

- i. List of Kenya Airways' subsidiary companies and shareholding in each of the companies;
- ii. How the exemption will affect Kenya Airways Partners e.g. KLM and Air France; and
- iii. Kenya Airways Audit Reports for FYs 2018/2019, 2019/2020 and 2020/2021.

MIN.NO. /NA/CDL/2021/090

EXEMPTION OF COVID-19 INSTRUMENTS FROM SCRUTINY (S.14 OF THE STATUTORY INSTRUMENTS ACT, 2013)

The Committee was informed that Section 11(1) and (2) of the Statutory Instruments Act, 2013 requires every Cabinet Secretary responsible for a regulation-making authority to submit all statutory instruments published under their dockets, for tabling before the National Assembly. The statutory instruments issued by the Ministry of Health and the Ministry of Interior and National Government that touch on, are incidental or ancillary to the COVID-19 pandemic have a common goal, object and purpose, and are all aimed at mitigating the effect and spread of the COVID 19 pandemic and therefore qualify to be classified under "COVID-19 related Statutory Instruments".

In considering the exemption of COVID-19 instruments from scrutiny, the Committee noted that most of the Regulations subject matter therein, are made either by the Ministry of Health or Ministry of Interior and Coordination of the National Government. Further –

- i. all the instruments are made pursuant to section 36 of the Public Health Act;

- ii. all the Public Health instruments have the same subject matter being restriction of movement in and out of various specified regions in the country with an aim of curbing the spread of COVID-19 pandemic;
- iii. The issuance of the Rules on restrictions of movements in and out of the various places in the country have been based on the statistics of COVID-19 events of persons testing positive to the pandemic within the said areas;
- iv. The Ministry has occasionally amended, varied or made Rules extending the validity of the principal Rules; and
- v. With the incidences of the pandemic increasing or decreasing in different parts of the country, it is contemplated that the Ministry shall issue further gazette notices declaring restriction of movements or revoking the existing legal notices on the same subject matter thereby increasing the number of instruments in the said class.

Committee Resolution

Having examined the Public Health COVID-19 related instruments listed below, the Committee resolved that the instruments are in line with the Constitution, the Public Health Act, the Public Order Act, the Statutory Instruments Act, the Interpretations and General Provisions Act and that these instruments fall within the classification of "COVID-19 related Statutory Instruments" and thereby resolved to approve the Public Health (Covid-19 Indoor Meetings) Rules, 2020 (Legal Notice No. 224 of 2020).


The decision was proposed and seconded by Hon. George Murugara, M.P and Hon. Martha Wangari, MP, respectively.

MIN.NO. /NA/CDL/2021/091 ANY OTHER BUSINESS

1. **Request for meeting by the National Gender & Equality Commission:** The Committee was informed that the National Gender and Equality Commission had requested for a pre-publication consultations on the NGEK Regulations. The Committee resolved to undertake the activity after resumption from recess.
2. **Coverage of Committee Activities:** The Committee resolved that the media ought to be invited to cover Committee meetings especially during consideration of crucial business like the exemption of taxes.

MIN.NO. /NA/CDL/2021/092 ADJOURNMENT

The meeting was adjourned at 11.45 a.m. until Tuesday, 27th April, 2021 at 10.00 a.m.

Signed:.....


Date..... 27 April 2021

HON. KASSAIT KAMKET, M.P.
(CHAIRPERSON)



REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING

Telegraphic Address: 22921
Finance – Nairobi
Fax No. 315779
Telephone: 2252299

THE NATIONAL TREASURY
P O BOX 30007 – 00100
NAIROBI
KENYA

VERY
URGENT

When Replying Please Quote

Ref. ZZ/TS/GP/30

March 29, 2021

Michael Sialai, EBS
Clerk of the National Assembly
Parliament Building
NAIROBI

ODLP
to table.
CNA
30/3/2021

Dear

Sialai,

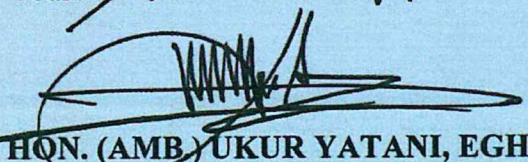
RE: LEGAL NOTICE NO.27 OF 2021- EXEMPTION FROM INCOME TAX

The above-mentioned Legal Notice was published on 26th March 2021.

In compliance with Section 11 of the Statutory Instruments Act, 2013, I hereby submit the Legal Notice No.27 of 2020 on exemption of income tax and Explanatory Memorandum for the same, for tabling in the National Assembly.

Yours

Sincerely,

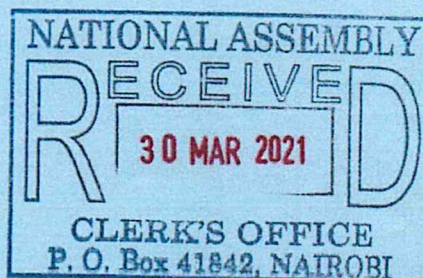

HON. (AMB) UKUR YATANI, EGH

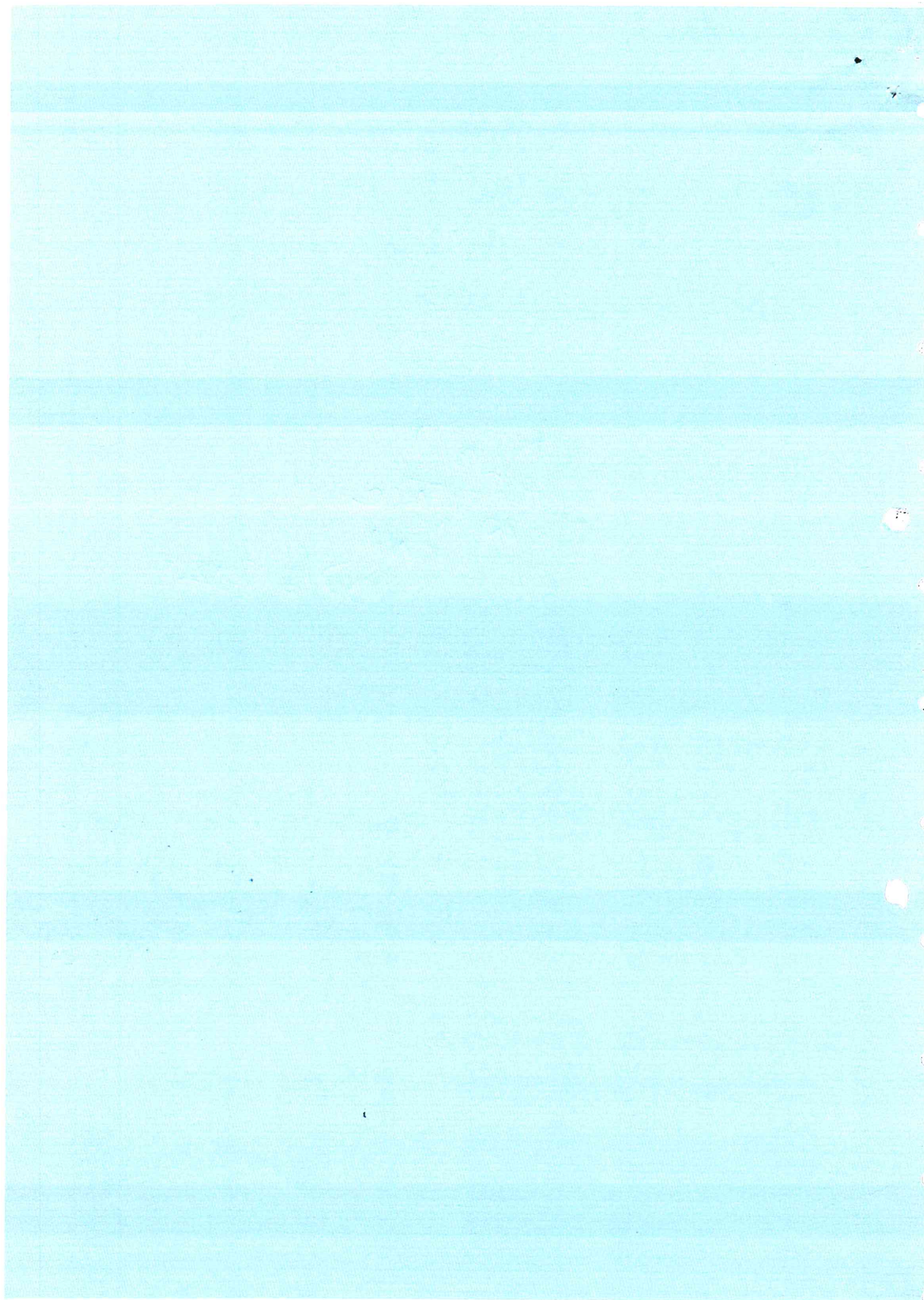
CABINET SECRETARY/THE NATIONAL TREASURY AND PLANNING

Encl.

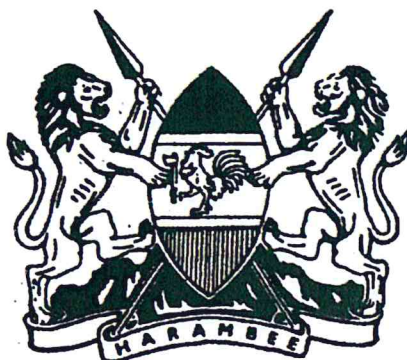
② Had take office
to register to the
committee under
10th of 30-3-2021
cause planning and
reimbursement of
the
Moses
31/3/21.

Copy to: Justice (Rtd) P. Kihara Kariuki, EGH
The Attorney General
State Law Office
NAIROBI





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THE KENYA GAZETTE

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SPECIAL ISSUE

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Kenya Gazette Supplement No. 37

17th March, 2021

(Legislative Supplement No. 13)

LEGAL NOTICE NO. 27

THE INCOME TAX ACT

(Cap. 470)

EXEMPTION

IN EXERCISE of the powers conferred by section 13 (2) of the Income Tax Act, the Cabinet Secretary for the National Treasury and Planning directs that the income derived from or accrued in Kenya by an airline in which the Government of Kenya owns at least forty-five per cent of its shares, and the subsidiaries of that airline, shall be exempt from the provisions of section 12D of the Act.

Dated the 15th March, 2021.

UKUR YATANI,
Cabinet Secretary for National Treasury and Planning.

LEGAL NOTICE NO. 28

THE STAMP DUTY ACT

(Cap. 480)

EXEMPTION

IN EXERCISE of the powers conferred by section 106 (1) of the Stamp Duty Act, the Cabinet Secretary for the National Treasury and Planning, on recommendation of the Cabinet Secretary for Lands and Physical Planning, directs that the instruments executed in respect of the transfer of land parcel L.R. No. 37/760, situate in Nairobi, from St. Patrick's Missionary Society Registered Trustees, of P.O. Box 25084-00603, Nairobi, to the Salesians of Don Bosco Registered Trustees Kenya, of P.O. Box 62322-00200, Nairobi, shall be exempt from the provisions of the Act.

Dated the 5th March, 2021.

UKUR YATTANI,
Cabinet Secretary for the National Treasury and Planning.

EXPLANATORY MEMORANDUM TO THE LEGAL NOTICE ON THE INCOME TAX EXEMPTION

LEGAL NOTICE NO. 27 of 2021

PART I

Name of Statutory Instrument	: The Income Tax Exemption
Name of Parent Act	: Income Tax Act, Cap 470
Enacted Pursuant to	: Section 13(2) of the Income Tax Act
Name of the Ministry	: The National Treasury and Planning
Gazetted on	: 26 th March 2021

PART II

1. Purpose of the Statutory Instrument

The objective of the Legal Notice is to exempt from income tax an airline including its subsidiaries where the Government owns at least forty-five percent of its shares, from the provision of the section 12 D of the Income Tax Act.

2. Legislative Context

The Legal Notice exempt from income tax the income derived from or accrued in Kenya from the provision of the section 12 D of the Income Tax Act. Section 12D of the Income Tax Act introduces minimum tax payable by all entities regardless of whether they are in profit making position or not.

3. Policy Background

- 3.1 The Finance Act, 2020 amended the Income Tax Act to introduced minimum tax to be charged on all business enterprises whether they are in profit position or not. This is meant to discourage tax planning, where some companies perpetually declare losses to avoid paying tax in Kenya, where other may not be paying the collect amount of tax. These companies benefit from services such a security, roads, hospitals among others. In addition, they employ

Kenyans who are educated in schools supported by the Government through tax revenue paid by other business entities.

3.1. The Kenya Airways Limited requested to be exempted from paying minimum tax citing the following grounds:

- a) The Covid-19 pandemic crippled affected operation of airlines and thus worsened its financial position of the already ailing company which has been making losses over the recent years.
- b) Considering its financial operation, the minimum tax will render the company's operation unsustainable.
- c) The airline continued to pay lease expenses even during the suspension of all international operation occasioned by the covid19 pandemic, this is in addition to other costs such as regular inspections of aircrafts in compliance with international regulations thus increasing likelihood of making losses.
- d) The Kenya Airways Limited as the national carrier plays a pivotal role in the economy through marketing Kenya as a tourism destination, trade facilitation, job creation among others. It is because of its important role in the economy that the Government, as the majority shareholder, has continued to provide tax incentives and bail out to finance its operations despite making losses over time. It was therefore considered prudent to grant the exemption from minimum tax to help the company continues its operations up to the time it is back to profitability.

4. Public Participation

After the enactment of the Finance Act, 2020 that introduced minimum tax, the National Treasury received various presentation from stakeholders on the impact of this new tax on several class of business including public entities that are facing financial challenges. Kenya Airways Limited which was seriously affected by covid-19 pandemic and of recent years the company has been declaring loses, also presented it case to the National Treasury demonstrating the need for consideration for exemption from this new tax.

5. Impact

The Regulations are expected to relieve the Kenya Airways Limited which the country's National carrier with government as the majority shareholder from the

liability of paying minimum tax. This is meant to allow the company to recover back to profitability.

6. Monitoring and review

The implementation of the exemption will be monitored by the Kenya Revenue Authority and may be reviewed as the institution targeted improved their profitability.

7. Request to the National Assembly

The National Assembly is invited to:

- a) note the contents of this Memorandum and
- b) adopt the Legal Notice No. 27 of 2021.

8. Contact

Cabinet Secretary,
National Treasury & Planning,
NAIROBI

Twelfth Parliament

(No.033)



Fifth Session
Afternoon Sitting

(351)

REPUBLIC OF KENYA

TWELFTH PARLIAMENT – (FIFTH SESSION)

THE NATIONAL ASSEMBLY

ORDERS OF THE DAY

TUESDAY, MARCH 30, 2021 AT 2.30 P.M.

ORDER OF BUSINESS

PRAYERS

1. Administration of Oath
2. Communication from the Chair
3. Messages
4. Petitions
5. Papers
6. Notices of Motion
7. Questions and Statements

8*. PROCEDURAL MOTION – EXTENSION OF SITTING TIME
UNTIL CONCLUSION OF SPECIFIED
BUSINESS

(The Leader of the Majority Party)

THAT, pursuant to the provisions of Standing Order 30(3)(a), this House orders that should the time appointed for adjournment of the House be reached before conclusion of the business on today's Order Paper, the sitting of the House shall stand extended until the conclusion of business.

9*. MOTION – ALTERATION OF THE 2021 CALENDAR

(The Leader of the Majority Party)

THAT, pursuant to the provisions of Standing Order 28(4), this House, resolves to further alter its Calendar (*Regular Sessions*) for the Fifth Session (2021), as adopted on Wednesday, February 10, 2021 and amended on Tuesday, March 9, 2021 so as to –

- (a) suspend its Sitting of Tuesday (Evening), March 30, 2021;
- (b) suspend all its ordinary Sittings from Thursday, 1st April, 2021 to Thursday, 29th April, 2021; and,
- (c) resume its regular sittings on Tuesday, 4th May, 2021 at 2.30p.m.to continue with the First Part of the Session.

......./10*

CNA
Submitted for
your approval
30/03/21

10*. PROCEDURAL MOTION-CONSIDERATION OF CERTAIN
BUSINESS RECEIVED DURING THE
RECESS PERIOD

(The Leader of the Majority Party)

THAT, notwithstanding the provisions of Standing Orders 120, 122 and 126 relating to *Publication, Procedure upon Publication and First Reading of Bills* and Standing Order 210(2) relating to *Tabling of Statutory Instruments*, and further pursuant to the provisions of Standing Order 256 (*Exemption of Business from the Standing Orders*), this House orders that, during the period of the April Recess (*1st April to May 3rd, 2021*)-

- (i) **should a Bill be published** during the said period, or a published Bill become due for First Reading during the period, the Speaker shall, upon lapse of at least seven days following the publication of the Bill, the fulfillment of the provisions of Article 110(3) of the Constitution and following a determination that such Bill is of priority, forthwith refer the 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;
- (ii) **should any statutory instrument be transmitted** for tabling before the House during the period, the Speaker shall, following a determination that the statutory instrument is of priority, forthwith refer the statutory instrument to the relevant Committee for consideration and cause the statutory instrument to be tabled in the House during its next Sitting in accordance with the provisions of section 11 of the Statutory Instruments Act (No. 3 of 2013);
- (iii) **should any Paper be transmitted** for tabling before the House during the period, the Speaker shall, following a determination that the Paper is of priority, forthwith refer the Paper to the relevant Committee for consideration and cause the Paper to be tabled in the House during its next Sitting;
- (iv) upon the submission of the Report of the relevant Committee on the ***Constitution of Kenya (Amendment) Bill, 2020*** promoted by the ***Building Bridges Initiative*** under Article 257 of the Constitution, the Speaker shall forthwith cause the Report to be circulated to all Members (in electronic form) and prioritize Special Sitzings of the House convened pursuant to the provisions of Standing Order 29 to consider the said Bill in keeping with the requirements of Article 257 of the Constitution;

...../10*(cont'd)

- (v) with respect to all **Public Petitions** pending before Committees, the counting of the sixty (60) days consideration period prescribed under Standing Order 227(2) (*Committal of Petitions*) shall cease today and resume when the House next sits in the Fifth Session; and,
- (vi) the Clerk is directed to make necessary arrangements to facilitate **virtual meetings of Committees** and Members are asked to attend and participate in the virtual meetings of Committees from their offices within Parliament Buildings as envisaged in the Parliamentary Powers & Privileges Act, 2017 and the Speaker's Guidelines regarding *Conduct of Committee Meetings During the COVID-19 Pandemic Period*.

**11*. PROCEDURAL MOTION – EXTENSION OF TIME FOR
CONSIDERATION OF NOMINEE FOR
APPOINTMENT AS PRINCIPAL
SECRETARY**

(The Chairperson, Departmental Committee
on Education and Research)

THAT, pursuant to the provisions of section 13 of the Public Appointments (Parliamentary Approval) Act, 2011 relating to *extension of period for consideration of nominees for appointment to a public office*, this House **resolves** to extend the period for consideration of the nominee submitted by H.E. the President for appointment as **Principal Secretary for the State Department for Implementation of Curriculum reforms** by a period of fourteen (14) days from 21st April, 2021.

**12*. MOTION – CONSIDERATION OF THE VALUE ADDED TAX
(AMENDMENT) REGULATIONS, 2020**

(The Chairperson, Committee on Delegated Legislation)

THAT, this House **adopts** the Report of the Committee on Delegated Legislation on its consideration of the Value Added Tax (Amendment) Regulations, 2020 *laid on the Table of the House on Tuesday, February 16, 2021*, and pursuant to the provisions of sections 6 and 67 of the Value Added Tax Act, 2013 **approves** the Value Added Tax (Amendment) Regulations, 2020 published as *Legal Notice No. 188 of 2020*.

(Question to be put)

**13*. MOTION – CONSIDERATION OF THE VALUE ADDED TAX
(ELECTRONIC TAX INVOICE) REGULATIONS, 2020**

(The Chairperson, Committee on Delegated Legislation)

THAT, this House **adopts** the Report of the Committee on Delegated Legislation on its consideration of the Value Added Tax (Electronic Tax Invoice) Regulations, 2020 *laid on the Table of the House on Tuesday, February 16, 2021*, and pursuant to the provisions of sections 6 and 67 of the Value Added Tax Act, 2013 **approves** the Value Added Tax (Electronic Tax Invoice) Regulations, 2020 published as *Legal Notice No. 189 of 2020*.

(Question to be put)

14*. MOTION – CONSIDERATION OF THE VALUE ADDED TAX
(DIGITAL MARKET PLACE SUPPLY) REGULATIONS,
2020

(The Chairperson, Committee on Delegated Legislation)

THAT, this House **adopts** the Report of the Committee on Delegated Legislation on its consideration of the Value Added Tax (Digital Market Place Supply) Regulations, 2020 *laid on the Table of the House on Tuesday, February 16, 2021*, and pursuant to the provisions of sections 6 and 67 of the Value Added Tax Act, 2013 **approves** the Value Added Tax (Digital Market Place Supply) Regulations, 2020 published as *Legal Notice No. 190 of 2020*.

(Question to be put)

15*. THE HEALTH LAWS (AMENDMENT) BILL (NATIONAL
ASSEMBLY BILL NO. 2 OF 2021)

(The Leader of the Majority Party)

First Reading

* Denotes Orders of the Day

...../Notices*

Ref: 21/Tax/bn/2021

27th April 2021

The Cabinet Secretary
The National Treasury
Treasury Building
NAIROBI

Attn: JZ Ngugi

Dear Sir,

Mr. Mwambia
This is the information I got from KQ. It will be in response to the question raised by Parliament
27/4/2021

LEGAL NOTICE NO. 27 OF 2021 EXEMPTION FROM INCOME TAX

Further to our telephone conversation, below find requested information to support exemption from income Tax:

1. List of Kenya Airways Subsidiaries and their shareholding:

Subsidiary	Principle Activity	KQ Shareholding
Kenya Airfreight Handling Limited	Cargo Handling for perishable products	51%
Jambojet Limited	Local passenger air transport	100%
African Cargo Handling Limited	Cargo Handling	100%
Kencargo Airlines International Limited	Dormant	100%
Fahari Aviation Limited (Pride Oil Limited)	Drone and emerging technologies in aviation	100%

2. How the exemption will affect the partners e.g. KLM and Air France

KLM is a shareholder of Kenya Airways PLC with a shareholding of 7.76%. KQ has made losses hence no benefit will be derived by KLM. The company has not declared any dividends in view of the losses.

The Income Tax Act (ITA) under Paragraph 42 of the First Schedule has exempted airlines from tax in Kenya in view of reciprocal exemption. KLM and Air France are therefore exemption from taxes in Kenya in view of the Double Taxation Treaty and exemption under paragraph 42 of First Schedule to ITA.

3. Financial Statements for the years 2018, 2019 and 2020/2021.

The company has a December year end. We enclose 20 hard copies of financial statements for the three years as requested.

We thank you for your continued support and cooperation.

Yours sincerely



Beatrice Njagi
Manager Tax

INFORMATION FROM KENYA AIRWAYS

Below are some of the measures Governments have taken to support aviation.

We explore below the specifics of interventions made by some governments around the world to support the aviation industry:

- Senegal announced USD128 million in relief for the Tourism and Air Transport sector.
- Seychelles has waived all landing and parking fees for April to December, 2020.
- Cote d'Ivoire has waived its Tourism Tax for transit passengers.
- Lufthansa has agreed to a €9 billion bailout with the German government.
- As part of its economic support intervention, South Africa is deferring payroll, income and carbon taxes across all industries, which will also benefit airlines domiciled in that country.
- The Tanzania Civil Aviation Authority has proposed the following measures:
 1. Postponement without penalties of payments related to charges for services offered by the Authority to all airlines that made official requests;
 2. Cessation of arrangements for increasing charges to operators during or till immediately after the COVID -19 pandemic;
 3. Implementation of a cost reduction strategy in order to ensure that the little revenue generated covers the Authority's key operational activities, critical in ensuring aviation business continuity;

IATA has further received a formal confirmation from the AFDB that they would be providing financial support in the fight against COVID-19 through the following interventions:

1. Indirect support to aviation industry through budget support to national governments in Africa;
2. Direct assistance to aviation private sector companies including airlines through debt deferrals and liquidity facilities; and
3. Technical assistance to help the aviation industry recover from the impact of COVID-19 and support regional preparedness to prevent the spread of communicable diseases through travel.

Kenya Subsidiaries

Subsidiary	Shareholding	Principal Activity
Jambojet Limited	100%	Local passenger air travel
African Cargo Handling Limited	100%	Cargo Handling
Kenya Airfreight Handling Limited	51%	Cargo handling for perishables
Kencargo Airlines International Limited	100%	Dormant
Fahari Aviation Limited	100%	Dormant

PARLIAMENT OF KENYA

INTERNAL MEMO

TO: THE CHAIRPERSON, COMMITTEE ON DELEGATED LEGISLATION;

THRO": THE CLERK OF THE NATIONAL ASSEMBLY;

FROM: THE DIRECTORATE OF LITIGATION & COMPLIANCE SERVICES;

DATE: 11TH MAY, 2021.

**MACHAKOS HIGH COURT CONSTITUTIONAL PETITION NO. E005 OF 2021:
KITENGELA BAR OWNERS ASSOCIATION - V - THE NATIONAL ASSEMBLY
& 2 OTHERS.**

CONSOLIDATED WITH:

**MACHAKOS HIGH COURT CONSTITUTIONAL PETITION NO. E001 OF 2021
(FORMERLY NAIROBI PET. NO E079 OF 2021): THE KENYA ASSOCIATION OF
MANUFACTURERS & 2 OTHERS - V - THE NATIONAL ASSEMBLY & 2
OTHERS.**

The above matters refer.

BACKGROUND

1. The above two Constitutional Petitions are instituted by two separate Petitioners namely: registered officials of the Isinya East Sub County Bar Owners Association

being the Petitioners in *Machakos High Court Constitutional Petition E005 of 2021*; and the Kenya Association of Manufacturers, the Retail Trade Association of Kenya and The Kenya Flower Council being the Petitioners in *Machakos High Court Constitutional Petition No. E001 of 2021 (Formerly Nairobi Pet. No E079 of 2021)*.

2. The National Assembly, The Kenya Revenue Authority and the Attorney General are joined in both Petitions as the 1st, 2nd and 3rd Respondents respectively. The Institute of Certified Public Accountants, the Law Society of Kenya and Robert Kamwara are joined as Interested Parties in the matters. *Attached herewith, please find copies of the said two Petitions.*
3. The Petitioners contend that the amendments introduced into the Income Tax Act, Cap 470 in 2020, by the Tax Laws (Amendment) (No. 2) Act, 2020 introduces the Minimum Tax chargeable at the rate of 1% of the gross revenue, does not amount to Value Added Tax (VAT), custom duties nor excise tax, and should therefore not be included in the Income Tax Act. The Petitioners therefore argue that the imposition of this tax is unlawful, unconstitutional and unreasonable, therefore should be declared as such by the Constitutional Court.

SUMMARY OF THE ISSUES IN THE PETITIONS:

4. Various issues are advanced by the Petitioners against the constitutionality of section 12D of the Income Tax Act, Chapter 470 of the Laws of Kenya as amended by the Tax Laws (Amendment) (No. 2) Act, 2020 as follows:
 - i) The Petitioners argue that the said Minimum tax does not amount to *Value Added Tax (VAT)*, *custom duties* nor *excise tax*, and should therefore NOT be included in the Income Tax Act.
 - ii) Further it is argued that since the impugned tax is chargeable on the gross turnover of a business and not on the gains or profits earned having deducted all expenditures wholly and exclusively incurred in the production of income, it cannot be classified as income tax since it is in contradiction

with the charging provisions of section 3(2) as read together with section 15(1) of the Income Tax Act.

- iii) The Petitioners further contend that the introduction of the impugned tax has generated inconsistency, uncertainty and confusion in the application of the provision. The Petitioners claim that the impugned tax is inconsistent and contrary to the meaning and purpose of income tax as provided in the Act. The Petitioners claim that these inconsistencies have left them uncertain as to what is applicable to them as income tax.
- iv) The Petitioners argue that further inconsistencies arise whereby the provisions of the Act are in contradiction with the Minimum Tax Guidelines published by the Kenya Revenue Authority thereby causing further confusion as to its application.
- v) The Petitioners also contend that the imposition of the impugned tax goes against the Constitutional principles of public finance set out in Article 201 of the Constitution, specifically, Article 201(b)(i) of the Constitution which requires the promotion of an equitable society through the fair and just sharing of the burden of taxation. The Petitioners claim that the imposition of the impugned tax shall result in an unfair burden on its members.
- vi) The Petitioners claim that the introduction of the impugned tax leads to the infringement of the right to property. The Petitioners specifically claim that the National Assembly is in contravention of Article 40(2)(a) of the Constitution which states that parliament shall not enact a law which arbitrarily deprives a person of property of any description or of any interest in or right over any property of any description.
- vii) The Petitioners argue that profits are property, and the impugned tax illegally and unfairly threatens enterprises with taxes beyond 30%,

amounting to a deprivation of property contrary to Article 40 of the Constitution.

viii) The Petitioners also claim contravention of Article 27 of the Constitution which provides for equality in the application and protection of the law. They claim that the impugned amendment discriminates against the petitioners and other traders in the consumer products sector by favouring those in the energy and petroleum sector and in the insurance sector who enjoy an exemption from minimum tax.

ix) Finally, the Petitioners contend that the impugned amendment may lead to the imposition of unlawful double taxation as against the Petitioners and other similar taxpayers whereby instalment taxes as provided in section 12(2) of the Income Tax Act are paid in similar monthly instalments within the same period of time as provided under paragraph 1(a) of the twelfth schedule to the Income Tax Act.

5. The Petitioners in *Machakos Constitutional Petition No. E005 of 2021* filed an Application under a Certificate of Urgency dated 23rd March 2021 supported by the Affidavit of Stanley Njuguna Waweru sworn on the same date. The Petitioners sought for conservatory orders restraining the implementation, further implementation, administration, application and/or enforcement of section 12D of the Income Tax Act, Chapter 470 of the Laws of Kenya as amended by the Tax Laws (Amendment) (No. 2) Act, 2020. *(a copy of the said Application is enclosed herewith).*
6. In response and opposition to the said Application, the National Assembly filed Grounds of Opposition dated 16th April, 2021 opposing the averments made by the Petitioners in their Application and a supporting Affidavit.

CONSERVATORY ORDERS

7. The Application for conservatory orders was dispensed with by way of written submissions and Honourable Justice G.V Odunga sitting in Machakos High Court delivered a ruling dated 19th April 2021 issuing conservatory orders restraining the Kenya Revenue Authority (the 2nd Respondent), from the implementation, administration, application and/or enforcement of section 12D of the Income Tax Act, Chapter 470 of the laws of Kenya as amended by the Tax laws (Amendment) (No.2) Act, 2020 by collecting or demanding payment of the Minimum Tax pending the hearing and determination of the Petition. *(a copy of the Court Ruling dated 19th April 2021 by Honourable Justice G.V Odunga is enclosed herewith).*
8. On account of the urgency in the matter and due to the timelines presented in the Income Tax Act for the payment of various instalments of the tax, the court gave directions regarding the filing and service of responses and submissions in the main Petition to enhance expeditious disposal of the matter, and directed that the matter be mentioned on the 19th of May 2021 for the highlighting of submissions.
9. On the same date, Honourable Justice Mrima gave directions in the *Nairobi High Court Petition No. E079 of 2021* directing that the Petition be transferred to the High Court at Machakos and be mentioned before Hon. Justice G.V Odunga for further directions.
10. The said Petition was mentioned before Honourable Justice G.V Odunga in the High Court at Machakos on 11th May, 2021 wherein the Judge consolidated the two Petitions, with *Machakos Constitutional Petition No. E005 of 2021* being the lead file.
11. Honourable Justice G.V Odunga further directed all the parties to comply with directions of filing and service of responses and submissions. The Court further rescheduled the mention for highlighting of submissions to be undertaken on the 3rd June 2021.

12. We have filed and served responses for the National Assembly and await further action by the Petitioners in order to enable us file our Submissions in the matters.

LEGAL OPINION:

13. Under the Constitution, the power to levy taxes is vested in Parliament and courts should not interfere with the exercise of that power merely because they perceive that they may have exercised it differently, if they were the Parliament. In support of that, the decisions of High Court in KUDHEIHA v. Kenya Revenue Authority & 3 Others [2014] eKLR and Mark Obuya & Others v. Commissioner of Domestic Taxes & 2 Others [2014] eKLR are now trite law.
14. Further, under Article 209 of the Constitution, it is within the power of the National Government to levy the tax and to determine the rate of taxation. The decision of the Supreme Court of Scotland in Scotch Whisky Association & Others v. the Lord Advocate & Another [2017] UKSC 76 demonstrate reluctance of the court to interfere with the Government's policy decisions on taxes.
15. Finally, it is arguable whether the Petitioners are subjected to double taxation or discriminated against, considering that other industries like betting and gambling, tobacco, alcohol and motor vehicles pay the same or similar forms of taxes. In their view, taxes do not have to be similar to be rational.
16. In dismissing similar arguments by the Sports pesa in 2018, the Court of Appeal in the case of *Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others [2018] eKLR*, the Court of Appeal held as follows;

"The penultimate ground of appeal challenges the finding of the learned judge that the rate of taxation imposed by the Finance Act 2017 on the appellants' industry is not unfair, punitive, discriminatory or in violation of Article 201(b), which demands that the burden of taxation shall be shared equitably.

The power to levy taxes and to determine the rate thereof is vested by Article 95 in the National Assembly, which is specifically empowered to appropriate funds for expenditure by the national government and other State organs. It is the National Assembly alone that is empowered under Article 114 (3) to levy taxes by means of a Money Bill. In the exercise of that constitutional power, it was initially proposed in the Finance Bill, 2017 that the tax levied upon the appellants' industry should be increased to 50% of gross turnover. After public participation and taking into account the views of the President, the National Assembly determined the rate of taxation should be 35% of the gross turnover. The appellants now invite us to hold that the learned judge erred in not finding that rate of taxation to be unfair, punitive and discriminatory.

Where the Constitution had reposed specific functions in an institution or organs of State, the courts must give those institutions or organs sufficient leeway to discharge their mandates and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of the Constitution, the law or that their decisions are so perverse, so manifestly irrational that they cannot be allowed to stand under the principles and values of our Constitution. Courts must decline to intervene at will in the constitutional spheres of other organs, particularly when they are invited to substitute their judgment over that of the organs in which constitutional power reposes, because those organs have expertise in their area of mandate, which the courts do not normally have. We must accordingly shun invitation to dabble in matters of national economic policy, when what is placed before us are the views of only two players in one industry”.

WHETHER THE COMMITTEE ON DELEGATED LEGISLATION MAY CONSIDER REQUESTS RELATING TO THE PROVISIONS OF SECTION 12D OF THE INCOME TAX ACT PENDING HEARING AND DETERMINATION OF THE PETITIONS.

17. The purpose of conservatory orders issued by a Court in a matter is to ensure that the Applicants do not suffer any prejudice for the duration of the hearing of the

main petition before the Court. The Court is restricted from making any definite or conclusive findings of fact or law on the dispute before it since this duty falls within the jurisdiction of the court having jurisdiction to hear the substantive dispute. This was the position of the Court in the case of *Kenya Association of Manufacturers & 2 Others vs. Cabinet Secretary - Ministry of Environment and Natural Resources & 3 Others* [2017] eKLR

18. The court also takes into consideration the danger that the applicants may suffer prejudice if the conservatory orders sought are not granted by the Court. The high Court in the Case of *Centre for Rights Education and Awareness (CREAW) & 7 Others; Petition No. 16 of 2011* held this position and stated as follows:

"It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

19. The Conservatory orders made by the Court in the Application herein only have the effect of suspending the implementation of section 12D of the Income Tax Act pending the hearing and determination of the main Petitions highlighting the substantive disputes.
20. The impugned provisions of the Act therefore remain unaffected to the extent of the constitutionality and legality of the enactment process since these are matters to be considered and decided upon in the hearing of the main petition.
21. Being that the conservatory orders granted by the High Court are interim in nature and have no permanent implications on the legality and constitutionality of the impugned provisions, in the occasion that the orders made by the Court are set aside or the substantive petition is decided in favour of the Respondents, the

impugned provisions shall come into force and the Kenya Revenue Authority (the 2nd Respondent) shall immediately move to implement the provisions of section 12D of the Income Tax Act.

22. In such a case, it is not an exercise in futility for the National Assembly to consider a request for exemption or otherwise, of a taxpayer, from the applications of the impugned provision, considering that at the time the matter is concluded, the National Assembly be on recess or incapable of having a speedy consideration of the matter thus disadvantaging the applicant who shall be liable to pay the Minimum Tax in accordance with the provisions of the Act when the suspension is lifted, thereby suffering great prejudice. Again, the National Assembly and the Kenya Revenue Authority who are parties in the Petition stand to suffer no prejudice in their responses and defence in the Petitions since the conservatory orders are not curtailing debate on the impugned legislation nor restricting the legislative authority of the National Assembly as espoused in Articles 94 and 95 of the Constitution.

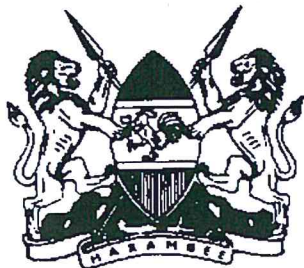
RECOMMENDATION AND WAY FORWARD

In view of the foregoing, the Committee is requested to note the content of this brief on the Petitions challenging the provisions of section 12D of the Income Tax Act, Chapter 470 of the laws of Kenya, as amended by the Tax laws (Amendment) (No.2) Act, 2020.

Respectfully submitted for your information and consideration.

DIRECTORATE OF LITIGATION & COMPLIANCE SERVICES.

REPUBLIC OF KENYA



DIRECTORATE OF LEGAL SERVICES, NATIONAL ASSEMBLY

EXEMPTION FROM INCOME TAX
UNDER SECTION 13(2) OF AN
AIRLINE IN WHICH THE
GOVERNMENT OF KENYA OWNS
AT LEAST 45% OF ITS SHARES
AND ITS SUBSIDIARIES -THE
INCOME TAX ACT (Cap 470) LN No.
27 of 2021.

Date

12/5/21

SCRUTINY OF LN No. 27 of 2021 EXEMPTION FROM INCOME TAX BY AN AIRLINE IN WHICH THE GOVERNMENT OF KENYA OWNS AT LEAST 45% OF ITS SHARES AND ITS SUBSIDIARIES.

Brief Overview

The Legal Notice was issued under Section 13 (2) of the Income Tax Act and it seeks to exempt an airline including its subsidiaries where the government owns at least forty five per cent of its shares, from minimum tax imposed under Section 12(d) of Income Tax Act, as amended.

Policy Background

- 1) The Finance Act, 2020 amended the Income Tax Act to introduce minimum tax to be charged on all business enterprises whether they are in profit position or not. This is meant to discourage tax planning, where some companies perpetually declare losses to avoid paying tax in Kenya, while others may not be paying the correct amount of tax. These companies benefit from services such as security, roads and hospitals among others.
- 2) The amendment did not take into consideration specific sectors of the economy that are strategic to any government for purposes of operations of governments e.g., the aviation industry which is strategic to any government for purposes of security and even trade. Many Governments such as Ethiopia, South Africa among others has significant shareholding to allow competing effectively at international level.
- 3) The introduction of minimum tax would significantly affect the stability of the operations of the aviation industry particularly on those airlines that are partially or indirectly owned by the Government. To ensure that this tax does not significantly compromise the operations of these airlines, it is necessary and in line with practice by other Governments to cushion these airlines from the impact of paying minimum tax as it is clearly known that the companies' financial position is on downwards trend.

- 4) On public participation, the CS informed the Committee that after the enactment of the Finance Act, 2020 that introduced minimum tax, the National Treasury received various presentations from stakeholders on the impact of the new tax on several classes of businesses including public entities that are facing challenges.
- 5) Implementation will be monitored by the Kenya Revenue Authority and may be reviewed as the target institution improves profitability.

Plenary Discussions

The Committee raised the following concerns –

- i) That exempting Kenya Airways and its subsidiaries alone will discriminate other airlines operating domestically and also other companies especially those affected by the COVID-19 pandemic;
- ii) That what justification is there for exemption of Kenya Airways yet it has been experiencing financial challenges for several years even before the COVID-19 pandemic and has been bailed out before.
 - The Cabinet Secretary responded that Kenya Airways is a national carrier with strategic trade/business and tourism interests including the host of UNEP and therefore needs support. In addition, GoK guaranteed the company about Kshs. 75 billion which is yet to be fully repaid. Other countries have also injected funds to protect their national carrier during the pandemic.
 - The Cabinet Secretary CS further informed the Committee that Kenya Airways is not exempted from Corporate Tax and other taxes, only the minimum tax.
- iii) The Committee inquired whether there is a possible political and personal interests in exemption of Kenya Airways whose majority shareholding is in private hands: the Cabinet Secretary responded that he was not aware about political interests in exempting Kenya Airways and that the exemption is for business interest to save the national carrier.

Resolutions of the Committee on way forward

The Committee resolved that for them to be able to address the matter, the National Treasury should submit-

- a) List of Kenya Airways' subsidiary companies and shareholding in each of the companies;
- b) How the exemption will affect Kenya Airways Partners e.g. KLM and Air France; and
- c) Kenya Airways Audit Reports for FYs 2018/2019, 2019/2020 and 2020/2021.

Observations

The attention of the Committee has been brought to a case filed in High Court of Kenya at Machakos in respect to the validity and constitutionality of section 12(D) of the Income Tax Act as amended in **Constitutional Petition No. E005 of 2021** and in which the National Assembly is the first Respondent sued with the Commissioner General of Kenya Revenue Authority and the Attorney General.

The Court has issued Conservatory Orders in an interlocutory ruling, pending the hearing and determination of the matter. The Ruling issued restraints the Commissioner General of Kenya Revenue Authority from implementing section 12(D) of the Income Tax Act which is the subject matter of Legal Notice No 27 of 2021, currently under consideration by the Committee.

The Directorate of Legal Services had guided the Committee that granted that the National Assembly is party to the suit, being the first respondent herein, and that given that the conservatory orders so issued, is at the core and touches on the substantive aspect of the suit, it would be *subjudice* if the Committee of the National Assembly, which is a party to the suit proceeds in making any determination in respect thereto to the matter in question.

Legal Opinion from the Directorate of Litigation and Compliance

However a further legal opinion forwarded to the Committee by the Directorate of Litigation and Compliance, who are representing the National Assembly in the matter in Court, has indicated that there would be no prejudice suffered by the National Assembly if the Committee proceeded to consider the matter, despite the conservatory orders issued by the court.

Recommendation

The National Treasury had submitted the documentation sought by the committee for the committee's consideration *viz*:

- (a) A List of Kenya Airways' subsidiary companies and shareholding in each of the companies;
; and
- d) Kenya Airways Audit Reports for FYs 2018/2019, 2019/2020 and 2020/2021.

It is our considered opinion, that the committee may give a hearing to the submissions and Counsel on the legal opinion from the Directorate of Litigation and Compliance, who are actually handling the matter in court before making its decision on instant matter.

Dima Dima

Principal Legal Counsel

