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REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

THIRTEENTH PARLIAMENT | THIRD SESSION (2024)

COMMITTEE ON DELEGATED LEGISLATION

REPORT ON THE INQUIRY INTO IRREGULAR AND ILLEGAL GRANT OF TAX
EXEMPTIONS TO A COMPANY UNDER THE SPECIAL OPERATING
FRAMEWORK AGREEMENT

 THE NATIONAL ASSEMBLY PAPERS LAID	
SEPTEMBER, 2024.	
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TABLED BY:	Hon. Samuel chepkoya MP Chairperson
CLERK-AT THE-TABLE:	A. Shitubo



The Directorate of Audit, Appropriations & General Purpose Committees

The National Assembly

Parliament Buildings

NAIROBI

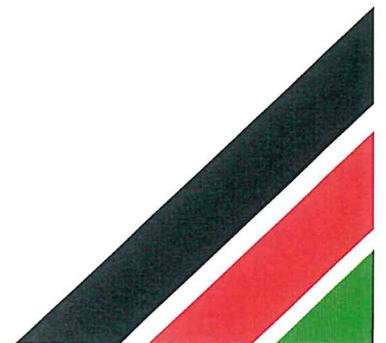


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ABBREVIATIONS AND ACRONYMS

ACC	–	Accurate Steel Mills Ltd
AGOA	–	African Growth and Opportunity Act
EALA	–	East African Legislative Assembly
GI	–	Galvanized Iron
IDF	–	Import Declaration Fee
ISO	–	International Organization for Standardization
MDGs	-	Millenium Development Goals
RDL	–	Railway Development Levy
SMEs	–	Small and Medium-Sized Enterprises
SOFA	–	Special Operating Framework Agreement
USA	–	United States of America
VAT	–	Value Added Tax

APPENDICES

1. Special Operating Framework Agreement
2. Special Operating Framework Agreement First Amendment
3. East Africa Community Gazette – Legal Notice No. EAC/342/2021
4. East Africa Community Gazette – Legal Notice No. EAC/343/2021
5. Letter Ref. MITED/SDI/5/1 dated 25th August, 2022
6. Letter Ref. MITED/SDI/7/16 dated 14th September, 2022
7. Letter Ref. No. MITI/SDI/1/88 dated 2nd October, 2023
8. Letter Ref. No. AG/CONF/21/68 Vol. II dated 18th October, 2023
9. Ref. No. AG/CONF/21/68 Vol. II dated 17th November, 2023
10. Treasury Circular No. 9/2018 dated 18th October, 2018
11. Protocol on the establishment of the East African Custom Union signed on 30th November, 1999
12. Protocol on the establishment of the East African Community Customs Union signed on 10th December, 2004
13. Letter Ref. MITI/SDI/1/10/VOL.V/(42) dated 23rd September, 2024
14. Blue Nile Rolling Mill Limited Letter dated August 22, 2019
15. Letter Ref. No. MOI/IND/7/78 dated October 14, 2019
16. Letter Ref. No. MITI/SDI/7/18, dated October 23, 2023
17. Letter Ref. No. DFN 415/411/011 Vol. 1 (7) dated July 19, 2024
18. Letter Ref. KAM/10/27/dm/jmw/mb/jw/TA/2024 dated 20th September, 2024
19. Letters from the industry to KAM
20. Letter Ref. AA/6584/2023 dated 17th September, 2024
21. Committee on Delegated Legislation Correspondences

CHAIRPERSON'S FOREWORD

This report presents the findings of the Committee on Delegated Legislation's inquiry into the alleged irregular and illegal tax exemptions granted to Blue Nile Rolling Mills Limited under a purported Special Operating Framework Agreement. The inquiry was initiated following a request for Statement on the floor of the House on 31st July, 2024 by the Member for Kiambaa Constituency, Hon. John Njuguna Kawanjiku, MP, who raised concerns about the legality and fairness of the exemptions. Upon request, the Hon. Speaker referred the matter to the Committee on Delegated Legislation for its consideration pursuant to Standing Orders 44(2)(c) of the National Assembly Standing Orders.

This is an investigation into the circumstances surrounding the grant of exemptions, the legal basis of the exemptions, the benefits conferred on the company and the potential impact on government's revenue and local steel industry among others.

In conducting the inquiry, the Committee held a total of four (4) sittings during which, it received oral and written submissions from various stakeholders, including: The National Treasury and Economic Planning, the Ministry of Investments, Trade and Industry, Kenya Association of Manufacturers and Blue Nile Rolling Mills Limited.

Having considered submissions by stakeholders, the Committee made the following findings:

Unconstitutionality

That, the Special Operating Framework Agreement dated 18th December, 2019 contravened:

- (a) Articles 35 on Access to Information in regard to Article 7 of the Agreement which is a Confidentiality Clause;
- (b) Article 201(a) on principles of public finance *to wit*; openness, accountability including public participation;
- (c) Article 95(4)(c) of the Constitution, with regard to oversight role of the National Assembly over national revenue and its expenditure;
- (d) Article 210(2) of the Constitution on maintenance of public records of tax waiver and report of waiver to the Auditor-General; and
- (e) Article 10(2)(c) and Article 118 of the Constitution which requires good governance, integrity, transparency and accountability.

Non-conformity with relevant statutes

That, the Agreement failed to conform with the relevant statutes including –

- (a) section 13 of the Income Tax Act (*Cap 470*) laws of Kenya which allows the Cabinet Secretary to exempt any income or class of income which accrued in or derived from Kenya from taxation -
 - i by publishing a gazette notice to that effect in accordance with sub-section (2); and
 - ii by submitting the notice to be laid before the National Assembly without unreasonable delay, in accordance with sub-section (3),

which requirements, the Committee observed were not followed, since the Cabinet Secretary for the National Treasury, neither published the notice in the gazette, nor submitted it for laying in, and approval by the National Assembly.

- (b) Section 68 of Value Added Tax Act (Cap 476) laws of Kenya saved all Special Operating Framework Arrangements entered into with the Government, which were in existence at the commencement of the Act in the year 2022. In this arrangement, the Agreement was signed between 16th and 30th January, 2020 falls within the timelines of the arrangements saved under the Value Added Tax Act. Consequently, the Committee having found that the purported SOFA arrangement between Blue Nile Rolling Mill Limited and the Government was unprocedural and unlawful, the Committee is of the opinion that Blue Nile Rolling Mill Limited ought not to benefit from the said saving.
- (c) The provisions of Law of Contract Act (Cap 23) in relation to signature and affixing of common seal. To the extent that the Agreement contained three signatures appended by parties but on different dates at different places, implying that not all the parties were present at the signing, contrary to the principles of the Law of Contract. The Agreement was void to the extent that it lacked the affixing of the common seal of one of the parties.
- (d) Miscellaneous Fees and Levies Act (Cap 469C) to the extent that Article 5 of the Agreement seeks exemption from Import Declaration Fees and Railway Development Levy. However, the same has not been exempted under the Miscellaneous Fees and Levies Act.
- (e) Tax procedures Act (Cap 469B) to the extent that the Committee considered that failure by Blue Nile Rolling Mill Limited to remit the attendant taxes amounted to tax avoidance, which is defined in section 3 of the Act as “***a transaction or a scheme designed to avoid liability to pay tax under any law.***” From the submission by the National Treasury, the Committee observed that, due to the tax avoidance, the Government lost revenue in terms of unpaid taxes amounting to Kshs. 2,311,745,548 as at July 2024.
- (f) Competition Act (Cap 504) contemplates fair trade practices. Section 21(3)(f) prohibits any agreement, decision or concerted practice, which applies dissimilar conditions to equivalent transactions with other parties, thereby placing them at a competitive disadvantage, which was the case in this circumstance. The Committee observed that this Agreement was discriminative and created unfair level ground for other industry players contrary to Article 24(2) of the Constitution on non-discrimination on any grounds.
- (g) The Statutory Instruments Act (Cap 2A) laws of Kenya to the extent that:
 - i The Circular No. 9/2018 Ref. no. ZZ/TS/GP/30 dated 18th October, 2018 issuing guidelines for grant of tax exemptions, which were relied upon in granting the SOFA, is a statutory instrument within the meaning of section 2 of the Statutory Instruments Act (*hereinafter the “the Act”*). The Committee observed that, although the above-mentioned guidelines is a statutory instrument, the same was not laid before the National Assembly in line with section 11(1) of the Statutory

Instruments Act for scrutiny and approval. Consequently, the circular ceased to have effect upon the expiry of seven days from the date of issuance as provided for under Section 11(4) of the Act.

- ii The SOFA Agreement was a statutory instrument which ought to have been submitted to the National Assembly for tabling and consideration as required under the Statutory Instruments Act. Consequently, the Committee observed that the SOFA Agreement was nullity *ab initio*.

Non-compliance with the principles of a standard contract/agreement

That the Agreement did not comply with the general principles of a standard contract or agreement in respect to the signatures appended and the dates reflected therein.

The Committee further observed that,

The exemption under EAC duty remission scheme were granted despite lack of demonstration of any application for the same which is a clear indication that the exemption was unprocedurally and unlawfully granted;

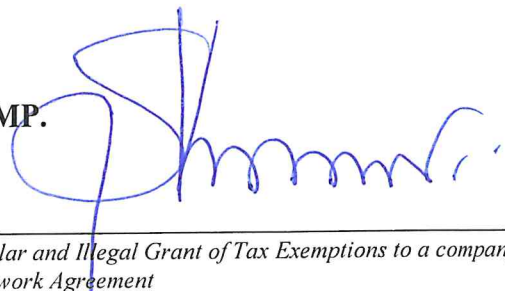
Having conducted the inquiry the Committee recommends that this House **adopts** the report on its inquiry into irregular and illegal grant of tax exemptions to a Company under the Special Operating Framework Agreement with the following recommendations, that this House resolves:

- (a) to declare that, the said Special Operating Framework Agreement was done outside the requisite legal framework, thus a nullity and hence void.
- (b) to direct all the relevant statutory bodies to take necessary legal action on parties involved in the whole process of the irregular tax exemptions under the Special Operating Framework Agreement therein.
- (c) pursuant to section 12(2) of Statutory Instruments Act, the Cabinet Secretary for the National Treasury and Economic Planning submits tax exemption guidelines for the implementation of Special Operating Framework Arrangements to the National Assembly within six months of the House adopting this report.

May I take this opportunity to thank all Members of the Committee for their contributions and input during the deliberations and writing of this report. I also thank the stakeholders for their submissions that enriched this report. The Committee further wishes to thank the offices of the Hon. Speaker and the Clerk of the National Assembly for the logistical support provided during the consideration and investigation of the issues raised in the statement.

It is now my pleasant duty and privilege, on behalf of the Committee on Delegated Legislation, to present the **report on the inquiry into irregular and illegal grant of tax exemptions to a company under the special operating framework agreement** to the House pursuant to Standing Order 199 for consideration and adoption.

HON. CHEPKONG'A KIPRONO SAMUEL, CBS, MP.
CHAIRPERSON,
COMMITTEE ON DELEGATED LEGISLATION.



1.0 PREFACE

1.1 Establishment and Mandate of the Committee

1. The Select Committee on Delegated Legislation is established under *Standing Order No. 210* of the National Assembly Standing Orders 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 accord 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 opinion of the Committee should more properly be dealt with in an Act of Parliament;
 - d) contains imposition of taxation;
 - e) directly or indirectly bars the jurisdiction of the Courts;
 - f) gives retrospective effect to any of the provisions in respect to which the Constitution or the Act does not expressly give any such power;
 - g) involves expenditure from the Consolidated Fund or other public revenues;
 - h) is defective in its drafting or for any reason the form or purport of the statutory instrument calls for any elucidation;
 - i) appears to make some unusual or unexpected use of the powers 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-reviewable 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 –

Chairperson

Hon. Chepkong’ a Kiprono Samuel, CBS, M.P.

Ainabkoi Constituency

UDA

Vice-Chairperson

Hon. Githinji Robert Gichimu, M.P.

Gichugu Constituency

UDA

Committee Members

Hon. Mbui Robert, CBS, M.P

Kathiani Constituency

WDM-Kenya

**Hon. (Maj) (Rtd) Dekow Barrow Mohamed,
M.P**

Garrisa Township Constituency

UDA

**Hon. Julius Lekakeny Ole Sunkuli, EGH,
EBS, M.P.**

Kilgoris Constituency

KANU

Hon. Kamene Joyce, M.P

Machakos County

WDM-Kenya

**Hon. (Dr.) Onchoke, Mamwacha Charles,
M.P.**

Bonchari Constituency

UPA

Hon. (Dr.) Kimaiyo, Gideon Kipkoech, M.P.

Keiyo South Constituency

UDA

Hon. Komingoi, Kibet Kirui, M.P.

Bureti Constituency

UDA

Hon. Chebor, Paul Kibet, M.P

Rongai Constituency

UDA

Hon. Yakub Adow Kuno, M.P

Bura Constituency

UPIA

**Hon. (Maj) (Rtd) Abdullahi, Bashir Sheikh,
M.P.**

Mandera North Constituency

UDM

Hon. Mwirigi John Paul, M.P.

Igembe South Constituency

Hon. Odoyo, Jared Okello, M.P.

Nyando Constituency

UDA

Hon. Chepkorir Linet, M.P.
Bomet County

UDA

**Hon. Ruku, Geoffrey Kariuki Kiringa,
M.P.**
Mbeere North Constituency

DP

Hon. Mwale, Nicholas S. Tindi M.P.
Butere Constituency

ODM

Hon. Mugabe Innocent Maino, M.P.
Lukuyani Constituency

ODM

ODM

Hon. Munyoro Joseph Kamau, M.P
Kigumo Constituency

UDA

Hon. Lenguris Pauline, M.P.

Samburu County

UDA

Hon Mnyazi Amina Laura, MP.
Malindi Constituency

ODM

1.3 Committee Secretariat

4. The secretariat facilitating the Committee comprises –

Ms. Esther Nginyo
Clerk Assistant I (Team Leader)

Mr. Dima Dima
Principal Legal Counsel I

Mr. Brian Langwech
Clerk Assistant III

Ms. Isabella Mwembi
Clerk Assistant III

Mr. Silvanus Makau
Clerk Assistant III

Mr. Peter Barasa Wafula
Legal Counsel II

Ms. Viola Saiya
Research Officer III

Mr. Noah Chemweno
Serjeant at Arms

Mr. Valerian Pascal
Hansard Reporter III

Ms. Rahab Chepkilim
Audio Officer

2.0 STATEMENT ON THE IRREGULAR AND ILLEGAL GRANT OF TAX EXEMPTIONS TO A COMPANY UNDER THE SPECIAL OPERATING FRAMEWORK AGREEMENT

2.1 Introduction

5. On 31st July, 2024, pursuant to the provisions of Standing Order 44(2)(c), the Member for Kiambaa Constituency, Hon. John Njuguna Kawanjiku, MP, sought for a statement from the Chairperson of the Committee on Delegated Legislation. The Statement relates to claims that Blue Nile Rolling Mills Limited, a company in the Steel Production Industry, which operates under a Special Operating Framework Agreement (SOFA) was irregularly and illegally granted tax exemptions.
6. The Hon. Member submitted that in 2020, Blue Nile Rolling Mills Limited entered into a Special Operating Framework agreement with the Government, which resulted in the company receiving several tax exemptions.
7. The Hon. Member claimed that according to Article 5 of the agreement between the Government and Blue Nile Rolling Mills Limited, the company is exempt from paying up to 10% Corporate Income Tax for the initial five years, as well as Value Added Tax (VAT), Import Duty, Import Declaration Fee (IDF) and Railway Development Levy (RDL) on all imported raw materials.
8. The Hon. Member claimed that these tax exemptions had led to loss of public revenue due to unpaid taxes, provided the company with a competitive economic advantage, disrupted local markets and posed a risk to the sustainability of the local steel production industry.
9. Additionally, the Hon. Member claimed that the law provides that tax exemptions under SOFA can only be granted to companies incorporated for purposes of undertaking manufacture of human vaccines, and whose capital investment is at least ten billion shillings (Kshs. 10 billion). The Company in question neither manufactures human vaccines nor meets the required investment threshold of ten billion shillings.
10. The Hon. Member highlighted that these exemptions had allowed the company to operate with significantly lower costs compared to its competitors contrary to Competition laws, making it nearly impossible for other manufacturers in the steel production industry to compete. This has led to widespread alarm among local manufacturers, who are facing the threat of closing their businesses if these unfair competitive advantages continue unchecked.
11. The Hon. Member claimed that the government has reportedly been losing approximately Kshs. 30 billion annually in unpaid taxes due to these exemptions, noting that this comes at a time when the government is grappling with the hurdle of reduction of tax collection.
12. The Hon. Member noted that, the said tax exemptions had been granted to the Company through various Legal Notices in exercise of delegated authority.

13. Consequently, the Hon. Member sought that the Committee on Delegated Legislation inquires into the allegations and make relevant recommendations thereof.
14. In conducting the inquiry, the Committee would be guided by the following terms of reference:
- (a) the circumstances under which the tax exemptions on Income Corporate Tax, Value Added Tax, Import Duty, IDF and RDL were granted to Blue Nile Rolling Mills Limited;
 - (b) the total value of tax exemptions that have been granted to Blue Nile Rolling Mills Limited so far and the estimated value of the exemptions that will have been granted to the Company on the expiry of the Agreement;
 - (c) the contents of the Agreement between the Company and government, the period for which the Company shall enjoy the tax exemptions under the Agreement and the implication thereof in terms of loss of public funds;
 - (d) whether the requirements of the law in granting tax exemptions under SOFA to the Company were complied with and indicate the persons that were responsible for approving the tax exemptions granted to the Company; and
 - (e) the number of employees employed by the Company and the status of compliance with ensuing tax obligations by the Company;
 - (f) the number of Companies dealing with the manufacture of galvanizing wire/ steel production that are currently enjoying tax exemptions and the value of the investments of the Company;
 - (g) the status of other existing Special Operating Framework Agreements and their impact on the economy; and
 - (h) any other matter, that the Committee may deem appropriate.

2.2 Legal and Policy Context for Tax Exemptions

15. Granting of tax exemptions is guided by Article 210 of the Constitution which provides that:
- (1) *No tax or licensing fee may be imposed, waived or varied except as provided by legislation.*
 - (2) *If legislation permits the waiver of any tax or licensing fee:-*
 - a) *a public record of each waiver shall be maintained together with the reason for the waiver; and*
 - b) *each waiver, and the reason for it, shall be reported to the Auditor-General.*
16. The window for granting an exemption is provided for under Section 77 of the Public Finance Management Act (*Cap 412A*) laws of Kenya, which provides that:

The Cabinet Secretary may waive a national tax, a fee or charge imposed by the National Government and its entities in accordance with criteria prescribed in regulations provided that—

(a) the National Treasury shall maintain a public record of each waiver together with the reason for the waiver and report on each waiver in accordance with Section 82 of this Act;

(b) such a waiver or variation has been authorized by an Act of Parliament; and... ..

17. Section 28A of the Income Tax Act (*Cap 470*) laws of Kenya, in respect of the Special Operating Framework Arrangement provides that:

A company which –

(a) is engaged in business under a special operating framework arrangement with the Government;

(b) incorporated for purposes of undertaking the manufacture of human vaccines;

(c) whose capital investment is at least ten billion shillings,

shall be subject to the rate of tax specified in the special operating framework arrangement with the Government.

18. Legal Notice No. EAC/363/2023 published in the East African Community Gazette dated 20th October, 2023 and Legal Notice No. EAC/403/2022 published in the East African Community Gazette dated 31st October, 2022 sought to approve the remission of import duty for a number of companies, under duty remission scheme. The legal notice was published pursuant to section 140 of the East African Community Customs Management Act, 2004 which provides that:

(1) The Council may grant remission of duty on goods imported for the manufacture of goods in a Partner State.

(2) The Council may prescribe regulations on the general administration of the duty remission under this section.

(3) The manufacturer and the approved quantity of the goods with respect to which remission is granted under this section shall be published by the Council in the Gazette.

19. Regulations 3 of the East African Community Customs Management (Duty Remission) Regulations, 2008 provides that:

The Council may grant remission of duty under section 140 of the Act on -

(a) goods imported for use in the manufacture of goods for export;

(b) such goods imported for use in the manufacture of approved goods for home consumption as the Council may, from time to time, by notice in the Gazette, determine.

20. Regulation 6 of the East African Community Customs Management (Duty Remission) Regulations, 2008 provides that:

(1) Remission of duty granted under these Regulations shall be valid for a period of twelve months from the date of the publication of the grant in the Gazette.

(2) The Council, may on the application by a manufacturer, grant remission on such further quantity of goods to be imported by the manufacturer under these Regulations.

(3) The Council may, on application by a manufacturer, extend the period referred to in sub regulation (1) for a further period of six months.

21. Article 2(6) of the Constitution provides that

Any treaty or convention ratified by Kenya, shall form part of the laws of Kenya.

22. Article 9 sub-article 1(f) of the Treaty for the Establishment of East African Community establishes the East African Legislative Assembly as an organ of the Community.

23. Section 140 of the East African Community Customs Management Act, 2004 mandates the Council of Ministers of the Community to grant remission of duty on goods imported for the manufacture of goods in a partner state.

24. Section 1 of East African Community Customs Management Act, 2004 provides that the Act applies to all partners states, Kenya included.

25. Section 28A of the Income Tax Act (*Cap 470*) laws of Kenya, provides for the requirement for a company to qualify for tax exemptions under SOFA, which include a company that undertakes manufacture of human vaccines and has a capital investment of at least Kshs. 10 billion.

26. The Cabinet Secretary, Ministry of Industry, Trade and Cooperatives, and the National Treasury and Planning entered into SOFA arrangement with a company registered as Blue Nile Rolling Mills Limited on 18th December, 2019 in respect to exemptions from duty under Income Tax Act, Miscellaneous Fees and Levy Act, Value Added Tax Act, Income Corporate Tax and Import Duty Remission.

27. The SOFA was not published in the gazette and was not forward to Parliament for consideration and approval as required by Articles 10, 118, 201, and 210(a) of the Constitution.

28. Section 11(1) of the Statutory Instruments Act (*Cap 2A*) laws of Kenya, requires that statutory instruments, [including those related to tax exemptions], be laid before Parliament within seven (7) sitting days, upon publication. Further, section 11(4) of the Act provides that

where a statutory instrument is not laid as required under the law, it ceases to have effect on the last day for which it was supposed to be laid.

29. The Statutory Instruments Act (*Cap 2A*) defines the statutory instrument to mean any rule, order, regulation, direction, form, tariff or costs or fees, letters patents, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.
30. Section 5(1) of the Statutory Instruments Act (*Cap 2A*) obligates a regulation making authority to consult before making a statutory instrument which is likely to have a direct, or a substantial indirect effect on business or restrict competition.
31. The Committee is of the opinion that, the processes and procedures involved and the attendant documents qualify to be statutory instruments within the meaning of section 2 of the Statutory Instruments Act (*Cap 2A*) which provides for statutory instrument to include ... ***“or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued”***.

3.0 STAKEHOLDERS' ENGAGEMENT

32. In considering the Statement, the Committee held a total of four (4) sittings during which it received oral and written submissions from the following:

- (a) The National Treasury and Economic Planning;
- (b) The Ministry of Investments, Trade and Industry
- (c) The Kenya Association of Manufacturers; and
- (d) The Blue Nile Rolling Mills Limited

3.1 Submissions by the National Treasury and Economic Planning

33. The Committee invited the Principal Secretary for the National Treasury to brief it on the statement vide letters Ref: NA/DAA&GPC/CDL/2024(064) dated 6th August, 2024 and Ref. NA/DAA&GPC/CDL/2024(070) dated 14th August, 2024. The Committee held meetings with the National Treasury on 13th and 21st August, 2024. It was briefed as follows, that:

34. In 2018, the Government revised tax laws through the Finance Act, 2018, specifically affecting the Value Added Tax Act, Income Tax Act, and Miscellaneous Fees and Levies Act to include tax incentives under Special Operating Framework Agreements. The Income Tax Act, for instance, was amended to allow for a specific tax rate for companies under such agreements, deviating from the standard corporate tax rate. Outlined below are the specific laws relating to SOFA: -

(a) Income Tax Act, Cap. 470 paragraph 2(k) of the Third Schedule to the Income Tax Act states that:

in the case of a company engaged in business under a special operating framework arrangement with the Government, the tax rate shall be to the extent provided in the agreement.

(b) Paragraphs 102 and 31 of the First Schedule part 1 and 11 of the VAT Act, 2013 provides for the VAT exemption on the goods and services imported or purchased locally for use in implementation of projects under SOFA:

Part 1:

102. Goods imported or purchased locally for direct and exclusive use in the implementation of projects under a special operating framework arrangement with the Government.

Part 11:

31. Services imported or purchased locally for direct and exclusive use in the implementation of projects under a special operating framework arrangement with the Government.

(c) The Second Schedule to the Excise Duty Act, 2015 was amended to provide for exemption of excise duty on goods imported for the implementation of the projects under SOFA. The provision states that:

13. Goods imported or purchased locally for direct and exclusive use in the implementation of projects under special operating framework arrangements with the Government.

(d) The Second Schedule to the Miscellaneous Fees and Levies Act, 2016 was amended in Part A(xxiii) and Part B(vii) to provide for waiver of Import Declaration Fee (IDF) and Railway Development Levy (RDL) on goods imported for implementation of projects under special operating framework.

35. In response to the circumstances under which the tax exemption on Income Corporate Tax, Value Added Tax, Import Duty, Import Declaration Fee, and Railway Development Levy were granted to Blue Nile Rolling Mills Limited, the National Treasury submitted as hereunder;
36. In 2020, Blue Nile Rolling Mills entered into SOFA arrangement with the Government when the import duty on wire rods was at 0% in accordance with the East African Community Customs Management Act, 2014.
37. The National Treasury reported that Blue Nile Rolling Mills Limited, based in Thika, Kenya, is engaged in importing wire rods to produce galvanized wire for various steel products. Blue Nile Rolling Mills Ltd was incorporated on 24th December, 2007 under the Companies Act and bears registration number C.140925.
38. Following the amendments made through the Finance Act of 2018, which allowed for SOFA to provide tax incentives, the company entered into the said agreement with the Government on January 16, 2020. The agreement was signed between the Ministry of Industry, Trade and Cooperatives, The National Treasury and Planning, and Blue Nile Rolling Mills Limited (**Appendix 1**) and later an addendum to the agreement was signed on 8th March, 2022 (**Appendix 2**).
39. In the agreement, the Government committed to provide the necessary incentives to facilitate the company to manufacture galvanized wire through provision of a sunset clause for lower corporation tax of 10% for the first five years from the date of signing the agreement, which ends in December 2024.
40. The National Treasury further explained that Blue Nile Rolling Mills Limited took advantage of these amendments to support its investment and industry expansion by setting up the galvanized iron (GI) wire manufacturing project with the expected capital outlay of over \$19 million in the first phase.
41. However, subsequent increases in import duty and the introduction of new levies adversely impacted the company's financial stability and its ability to fulfill commitments under the agreement.

42. In November, 2021 the 39th meeting of the Sectoral Council on Trade, Industry, Finance and Investment, increased import duty on steel products of tariff numbers 7213.91.10 and 7213.91,90 from 0% to 25% or \$200/MT whichever is higher with effect from 1st July, 2022 through the East Africa Community Gazette – Legal Notice No. EAC/342/2021 (**Appendix 3** dated 21st November, 2021).
43. The Sectoral Council further considered and approved that the companies that use wire rods of tariff number 7213.91.10 to manufacture steel products be granted duty remission through the East Africa Community Gazette – Legal Notice No. EAC/343/2021 (**Appendix 4** dated 21st November, 2021).
44. The National Treasury submitted that companies in the EAC Partner States that use wire rods of tariff number 7213.91.10 including Blue Nile Rolling Mills Limited, requested to be gazetted under the East African Community Duty Remission. However, apart from the letter from the Office of the Cabinet Secretary, Ministry of Industrialization, Trade and Enterprise Development dated 25th August, 2022 Ref. No. MITED/SDI/5/1 (**Appendix 5**) to the Cabinet Secretary, The National Treasury and Economic Planning titled “*Remission of Duty for Wire Rods*”.
45. In addition, the State Department for Industrialization wrote to the National Treasury through a letter Ref. No. MITED/SDI/7/16 dated 14th September, 2022 (**Appendix 6**) indicating the need for remission of wire rods under the East African Community Duty Remission, this is after having received a confirmation from Devki Steel Mills Ltd to State Department for Industrialization that they were unable to supply wire rods required by Blue Nile Rolling Mills for their production under SOFA. In view of this, the State Department for Industrialization recommended that Blue Nile Rolling Mills Ltd be granted remission under the EAC Duty Remission Scheme based on lack of the quality that was necessary for their continued operation until the local production capability is confirmed. Furthermore, the Ministry of Industrialization, Trade and Enterprise Development recommended that other companies facing similar situation be treated in the same manner.
46. The Finance Act, 2023 amended Miscellaneous Fees and Levies Act, introducing the Export and Investment Promotion Levy at various rates. The levy applied to imported goods including wire rods which is used as a raw material for making galvanized wires, nails, and fencing wires. Under this development, the Cabinet Secretary, Ministry of Investment, Trade and Industry, sought legal advice from the Attorney General through the letter Ref. No. MITI/SDI/1/88 dated 2nd October, 2023 (**Appendix 7**).
47. The Attorney General through the letters Ref. No. AG/CONF/21/68 Vol. II dated 18th October, 2023 (**Appendix 8**) and Ref. No. AG/CONF/21/68 Vol. II dated 17th November, 2023 (**Appendix 9**) advised that the Government should honor the original tax incentives agreed upon and exempt the company from new taxes to uphold the SOFA’s terms. The legal advice is summarized as follows:-
- (a) Continuation of importation of raw materials used to produce GI wire under EAC Duty Remission Scheme;

(b) Exemption from new levies including the Export and Investment Promotion Levy; and

(c) Continue honoring the SOFA until it comes to an end.

48. In regards to the total value of tax exemptions that have been granted to Blue Nile Rolling Mills Limited so far and the estimated value of the exemptions that will have been granted to the Company on the expiry of the Agreement, the National Treasury submitted as hereunder;

49. The total value of tax exemptions granted to Blue Nile Rolling Mills Limited so far, and the estimated future exemptions upon the expiry of the Special Operating Framework Agreement (SOFA), for the period between 2020 and July 2024 is tabulated as hereunder;

YEAR	Value Added Tax (VAT)	Import Declaration Fee (IDF)	Railway Development Levy (RDL)	Total Tax Exempted (Kshs.)
2020	56,776,930.00	-	-	56,776,930.00
2021	155,994,525.00	13,653,335.00	3,272,538.00	182,920,398.00
2022	277,283,792.00	27,050,803.00	3,284,770.00	327,619,365.00
2023	442,767,574.00	43,653,789.00	41,581,627.00	528,002,990.00
2024	232,435,257.00	36,318,011.00	1,790,814.00	290,544,082.00
TOTAL	1,165,258,078.00	120,675,938.00	49,929,749.00	1,385,863,765.00

Source: KRA: Table 1: Actual Total value of taxes, fees and levies exempted 2020 - July 2024

YEAR	IMPORT DUTY (KSHS.)
2022	97,993,651.00
2023	505,206,015.00
2024	322,682,117.00
Total	925,881,783.00

Source: KRA: Table 2: Amount of taxes exempted under Duty Remission Scheme 2020 - July 2024

50. In regards to the contents of the Agreement between the Company and the Government, the period for which the Company shall enjoy the tax exemptions under the Agreement and the implication thereof in terms of loss of public funds, the National Treasury submitted as hereunder;

51. The total revenue foregone between 2020 and July 2024 is two billion three hundred and eleven million seven hundred and forty-five thousand five hundred and forty-eight shillings (**Kshs. 2,311,745,548.00**) and the estimation of total value of the taxes, fees and levies to be

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granted from August 2024 up to end of the SOFA in 2030 is about **Kshs. 4,815,738,914.40** depending on the company's continued operation in Kenya.

52. The SOFA, which runs from 21st January, 2020, to 2030, grants Blue Nile Rolling Mills various tax benefits. These include a reduced corporate tax rate of 10% for the first five years (expected to expire in December 2024), VAT exemptions on inputs used for the project, and exemptions from Import Declaration Fees and Railway Development Levy. The Government has committed to absorbing any adverse taxation changes for the duration of the agreement, though VAT exemptions apply only to inputs, not to other imports or sales.
53. In Regards to compliance with the law, the Ministry confirmed that the requirements for granting tax exemptions under the SOFA were met. The Cabinet Secretary for the National Treasury and Planning, along with the Cabinet Secretary for the Ministry of Industry, Trade, and Investment, were responsible for approving the exemptions and signing the agreement. Applications for any tax exemptions under SOFA were guided by Treasury Circular No. 9/2018 dated 18th October, 2018 (**Appendix 10**).
54. In regards to the number of employees employed by the Company and the status of compliance with ensuing tax obligations by the Company, the National Treasury submitted that Blue Nile Rolling Mills Limited employs 1,030 Kenyans in various levels as follows:

EMPLOYEE LEVEL	NUMBER
Senior Management	30
Middle-level Management	65
Lower Management	485
Contract Staff	450
Total	1030

Source: KRA: Table 3: Blue Nile Rolling Mills Limited employee distribution

55. In response to the number of companies dealing with manufacture of galvanizing wire/steel production that are currently enjoying tax exemptions and the value of the investments of the Company, the National Treasury submitted that when the SOFA was signed in January 2020, Blue Nile Rolling Mills was the sole producer of galvanized wire in Kenya. Since then, about four additional companies entered the market but were affected by increased import duties. Currently, three companies that is, Blue Nile Rolling Mills, Roofings Kenya Limited, and KD Wire Products Limited are under the duty remission scheme.
56. Responding to the status of other existing SOFA arrangements and their impact on the economy, the Ministry submitted that there are two other SOFAs in place with Positivo and Moderna for human vaccine manufacturing which have never commenced operations in Kenya.

57. Further, the National Treasury submitted that SOFAs have a significant economic impact. They create favorable conditions that stimulate both the expansion of existing manufacturing operations and the establishment of new ones, leading to substantial job creation. This includes not only direct employment in manufacturing but also indirect jobs in related sectors like logistics and services, thereby contributing to overall economic growth.
58. Additionally, they submitted that the agreements also boost industrial output by reducing costs and improving efficiencies, enabling manufacturers to produce more goods at competitive prices. This increase in production helps meet domestic demand and enhances the country's position in global markets, leading to improved exports and a better trade balance.
59. While responding to the issue on any other matter that the Committee may deem appropriate, the National Treasury submitted that Kenya is a signatory to the East African Community Protocol on the establishment of the East African Custom Union signed on 30th November, 1999 (**Appendix 11**). They submitted that Article 9 of the EAC Treaty States provides for the establishment of organs and institutions of the Community which include East African Legislative Assembly (EALA), Sectoral Committees among other institutions. These organs make decisions which are binding to EAC members, which Kenya is duty-bound for example, the implementation Duty Remission Scheme. Kenya ratified the Protocol on the establishment of the East African Community Customs Union signed on 10th December, 2004 (**Appendix 12**).
60. Kenya ratified the treaty on the East African Community to domesticate it on 11th July, 2011. Section 8 of the treaty provides that any Act of the Community shall from the date of publication of that Act in the gazette of the Community, have the full force of the law in member states.

3.2 Submissions by the Ministry of Investments, Trade and Industry

61. The Committee invited the Principal Secretary for the State Department for Industry to brief it on the statement vide letters Ref: NA/DAA&GPC/CDL/2024(082) dated 22nd August, 2024 and Ref. NA/DAA&GPC/CDL/2024(089) dated 5th September, 2024.
62. The State Department submitted a written memorandum through letter Ref. MITI/SDI/1/10/VOL.V/(42) (**Appendix 13**) dated 23rd September, 2024 in response to the issues raised in the statement.
63. In response to the circumstances under which the tax exemptions on income corporate tax, Value Added tax, Import Duty, Import Declaration Levy (IDF) and Railway Development levy (RDL) were granted to Blue Nile Rolling Mills Limited, the Ministry of Investments, Trade and Industry submitted as follows:
64. Tax exemptions and waivers are available to companies that submit applications to the Ministry for specific relief. Once an application is received, the Ministry reviews it carefully to determine if granting the waivers would benefit the country.

65. The Ministry submitted a timeline of events that resulted in the signing of the Special Operating Framework Agreement (SOFA) between the Company and the two Ministries representing the Government as hereunder; -
66. That on August 27, 2019, the Ministry of Investments, Trade and Enterprise Development (MITED) received a request for a Special Operating Framework Agreement (SOFA) from Blue Nile Rolling Mills Limited, as detailed in their letter dated August 22, 2019 (**Appendix 14**).
67. That the Ministry (MITED) engaged in discussions with the investor, a discussion which led to the creation of a draft SOFA agreement. This draft was sent to the Cabinet Secretary for the National Treasury and Planning for review and further guidance in a letter dated October 14, 2019, reference number MOI/IND/7/78 (**Appendix 15**).
68. The SOFA agreement between the Government of Kenya and Blue Nile Rolling Mills was signed on January 30, 2020, following the inclusion of the SOFA provision in the Finance Bill of 2018.
69. In March 2022, the Government, represented by the Ministry of Industry, Trade and Cooperatives and the National Treasury and Planning, signed the First Amendment Agreement (**Appendix 2**) to the Special Operating Framework Agreement with Blue Nile Rolling Mills Limited. This amendment aimed to protect the incentives established in the original SOFA, which is valid for 10 years. As a result, any changes in duties and taxes that could negatively impact the investor would be the Government's responsibility.
70. In 2022, after the Kenya Kwanza Government took office and the Principal Secretary of the State Department for Industry was appointed, due diligence was conducted on the SOFA established between the Government and Blue Nile Rolling Mills Limited. This led to a letter, reference number MITI/SDI/7/18, dated October 23, 2023 (**Appendix 16**), addressed to the Principal Secretary of the National Treasury.
71. Following this, a communication was sent to the Cabinet Secretary and the Attorney General to request their opinions on the issue. The Attorney General provided his legal opinion, confirming the legality of the SOFA in a letter dated November 17, 2023, reference number AG/CONF/21/68 vol.11 (**Appendix 9**).
72. After receiving the advice, the Cabinet Secretary, Ministry of Investments, Trade and Industry, in a letter dated November 29, 2023, reference number MITI/SDI/7/78, withdrew and nullified the SOFA cancellation letter (Ref: MITI/SDI/7/18 dated October 23, 2023), thereby allowing SOFA to remain in effect. Similarly, the National Treasury communicated this decision to the Kenya Revenue Authority for the implementation of SOFA in a letter dated January 17, 2024, reference number TRE/415/9/(10).
73. This was after determination that the issue at hand involved an ongoing contract and terminating it would result in legal liability for the Government. It was agreed that the only way to halt the SOFA would be to amend the Finance Bill, 2023.

74. Regarding the issues related to the SOFA, the Principal Secretary, the National Treasury and Economic Planning, in his letter (**Appendix 17**) dated July 19, 2024, reference number DFN 415/411/011 Vol. 1 (7), emphasized the necessity of reviewing the existing SOFA and developing a policy framework for its implementation.
75. The signing of the Special Operating Framework Agreement between the Government of Kenya and Blue Nile Rolling Mills Limited indicated that the Company would be exempt from Value Added Tax (VAT), Import Declaration Fee (IDL), Railway Development Levy (RDL), and Customs Duty on the importation of raw materials.
76. The Ministry noted the need to recognize that while the Special Operating Framework Agreement (SOFA) is a global practice for providing incentives to large investors, there is a need for the country to establish a clear policy and legal framework for its implementation.
77. The Ministry's response regarding the total value of tax exemptions that have been granted to Blue Nile Rolling Mills Limited so far and the estimated value of the exemptions that will be granted to the company on the expiry of the Agreement, indicated that Executive Order No. 2 of 2023 regarding the reorganization of Government of the Republic of Kenya assigns the responsibility for managing public finance, overseeing revenue collection as outlined in all applicable laws, and formulating overall economic policy to the National Treasury. As a result, the National Treasury is better positioned to provide the relevant figures.
78. On the question of the contents of the Agreement between the Company and Government, the period for which the company shall enjoy the tax exemptions under the agreement and the implication thereof in terms of loss of public funds, the Ministry indicated to the Committee as follows:-
79. The Special Operating Framework Agreement (SOFA) between the Ministry of Industry, Trade and Cooperatives, the National Treasury and Planning, and Blue Nile Rolling Mills Limited was countersigned by the Cabinet Secretaries from both the National Treasury and Planning and the Ministry of Industry, Trade and Cooperatives, along with the Chairman of Blue Nile Rolling Mills. This agreement outlines the incentives provided by the Government to the investor and the commitments that the investor is expected to fulfill.
80. **Article 1 on Project Description** provides for the background of the agreement, indicating that Blue Nile Rolling Mills was to invest in a new high-speed galvanizing factory in Kenya, with an estimated cost of USD 19 million and an annual capacity of 30,000 tons. This investment aimed to strengthen the Government's commitment to developing the manufacturing sector, one of the four pillars of the Big Four Agenda of Jubilee Administration.
81. Article 2 on Deliverables outlines the key deliverables of the project as specified in the agreement. The deliverables include:
- (a) *The manufacture of galvanized wire and other steel-related components and products.*
 - (b) *Ensuring knowledge transfer, fostering research innovation, and sourcing locally supplied galvanized wire.*

- (c) Utilizing the galvanized wire as an intermediate input to boost the production of auxiliary products such as chain links, galvanized British Reinforcement Concrete (BRC), barbed wire, razor wire, and staple pins.
- (d) Creating direct employment for at least 300 individuals, along with additional indirect job opportunities.
- (e) Expanding the galvanized plant's capabilities to produce galvanized wire products that meet the needs of Kenyans and East African communities.
- (f) Establish a comprehensive distribution network to facilitate sales and product stocking in response to market demands.

82. The Ministry of Investments, Trade and Industry submitted a copy of the agreement to the Committee for perusal of the contents listed therein.
83. Regarding whether the legal requirements for granting tax exemptions under the SOFA to the company were met, and who was responsible for approving these exemptions, the Ministry stated that the SOFA agreement was signed by the Cabinet Secretary, the National Treasury and Planning, the Cabinet Secretary, Ministry of Industry, Trade and Cooperatives, representing the Government, and the Chairman of Blue Nile Rolling Mills Limited. However, the authority to grant waivers and exemptions lies with the National Treasury, which is better positioned to provide detailed responses to this inquiry.
84. In addition, regarding the number of employees at the company and its compliance with tax obligations, the Ministry reported that Blue Nile Rolling Mills Limited currently employs 1,030 staff members, with 649 working in the Galvanized Iron (GI) division, representing 63% of the total workforce. As for the company's tax compliance status, the Ministry submitted that the National Treasury has a more effective mechanism to monitor compliance levels and the legal authority to provide updates on this issue.

3.3 Submissions by the Kenya Association of Manufacturers

85. The Committee invited the Chief Executive Officer, Kenya Association of Manufacturers to brief it on the statement vide letters Ref: NA/DAA&GPC/CDL/2024(083) dated 22nd August, 2024 and Ref. NA/DAA&GPC/CDL/2024(085) dated 5th September, 2024. The Kenya Association of Manufacturers (KAM) through a written response vide letter Ref. KAM/10/27/dm/jmw/mb/jw/TA/2024 dated 20th September, 2024 (**Appendix 18**), submitted to the Committee as follows, THAT: -
86. KAM was not involved in the process of granting the SOFA and thereby has no visibility of its beneficiaries and was not consulted. In addition, KAM had written to the relevant government agencies requesting them to share information regarding the SOFA in question.
87. Furthermore, KAM reported that it learned about the issues related to SOFA from complaints by its members, who highlighted the negative impact SOFA has had on the steel industry ((**Appendix 19**)). For instance, in a letter dated July 5, 2024, Accurate Steel Mills Ltd stated that despite meeting the conditions outlined in the relevant SOFA, investing over Kshs.

10,000,000,000, and employing thousands of workers, only one company had signed the SOFA. Furthermore, this agreement disregards the East African Community's decision to allow Kenya to maintain a 10% duty on billets to support local manufacturers.

88. Additionally, it was KAM's submission that they support government incentive programs aimed at attracting local and foreign investment. However, they do not endorse any initiative that disrupt the manufacturing value chain or create an uneven playing field. Through a letter dated 5th July, 2024, Jumbo Steel Mills Limited informed KAM that the tax exemptions extended to one company [**Blue Nile Rolling Mills Limited**] had created unfair competition in the steel industry.
89. KAM acknowledged that the issue was active in the court and noted that the best course of action would be to allow the judges the opportunity to render their decision.
90. KAM further noted that, any incentives provided by the government should go through an evaluation process that includes public participation. This approach would be essential to ensure transparency and accountability in the decision-making process surrounding these incentives.

3.4 Submissions by the Blue Nile Rolling Mills Limited

91. The Committee invited the Managing Director, Blue Nile Rolling Mills Limited to brief it on the statement vide its letters Ref: NA/DAA&GPC/CDL/2024(081) dated 22nd August, 2024 and Ref. NA/DAA&GPC/CDL/2024(091A) dated 5th September, 2024.
92. Blue Nile Rolling Mills Limited through their Legal representative, Ahmednasir Abdullahi Advocates, LLP through a letter Ref. AA/6584/2023 (**Appendix 20**) dated 17th September, 2024 made written submission as hereunder:
93. On the issue regarding the legal and policy framework on the SOFA, Blue Nile Rolling Mills Limited submitted that, the Government of Kenya, guided by Vision 2030, recognized manufacturing as a crucial driver of economic growth and development. This was due to its significant capacity for job and wealth creation, as well as its strong potential to help achieve the Millennium Development Goals (MDGs).
94. To implement the transformative goals of Vision 2030, Sessional Paper No. 9 of 2012 titled "*The National Industrialization Policy Framework for Kenya 2012-2030: Transforming Kenya into a Globally Competitive Regional Industrial Hub*" was developed. The main policy objective is to help the industrial sector achieve and maintain an annual growth rate of 15%, positioning Kenya as the most competitive and desirable destination for industrial investment in Africa, which would result in increased employment and wealth creation.
95. They submitted that, to put the policy framework into action, the government made amendments to the Income Tax Act in the 3rd schedule and to the Value Added Tax in Part 1 by adding section 102. These changes were enacted through the Finance Act, 2018, which served as an important piece of legislation designed to provide a legal framework for government policies.

96. Additionally, they submitted that Section 33 of the Finance Act, 2018 amended Part A of the 2nd schedule of the Excise Duty Act, 2015 by adding paragraph 13. The Finance Act, 2018 also revised Part A of the 2nd schedule of the Miscellaneous Fees and Levies Act, 2016. Essentially, the Finance Act 2018 was enacted to introduce various tax incentives aimed at stimulating economic growth and supporting the government's “*Big Four*” economic agenda, which focused on ensuring food security, constructing affordable housing, providing universal healthcare, and enhancing manufacturing for value addition and job creation.
97. The Act also established a tax exemption of 2% of customs value and 1.5% of customs value for the Import Declaration Fees and Railway Development Levy, respectively, for goods imported exclusively under special operating framework agreements with the government. This expanded the existing tax incentive system for infrastructure and other projects involving special government arrangements.
98. They further noted that the provisions related to the SOFA, specifically Sections 19, 33, and 51 of the Finance Act, 2018, were included in the Finance Bill, 2018. This was proposed by the National Treasury and presented to the National Assembly on June 19, 2018.
99. Additionally, the Departmental Committee on Finance and Planning of the National Assembly conducted public hearings from 1st to 3rd August, 2018, engaging stakeholders to gather their input on the Finance Bill 2018. This was acknowledged and confirmed by the court in **Kenya Bankers Association v Attorney General & another, Central Bank of Kenya (Interested Party) [2019] eKLR**.
100. They further submitted that it was a matter of public record, as noted in *Kenya Bankers Association v Attorney General & another: Central Bank of Kenya (Interested Party) (supra)*, that on August 29, 2018, the National Assembly reviewed and approved the Finance Bill 2018. The Bill was then sent to His Excellency the President for assent, in accordance with Article 115 of the Constitution.
101. It was their submission that the Court addressed the issue of public participation concerning the Finance Act 2018 in significant cases brought before it. In the case of *Kenya Bankers Association v Attorney General & another: National Assembly (Interested Party) [2020] eKLR*, the Court confirmed that “*the Interested Party presented evidence showing that the Finance Bill 2018 underwent public participation.*” Consequently, the Court concluded by stating that; “*I concur with the respondents and the Interested Party that the contested provisions of the Finance Act 2018 cannot be challenged on the basis of insufficient public participation. Therefore, it is unnecessary to further discuss this issue.*”
102. They submitted that, to support its economic policy, the Government of Kenya amended Section 68 of the Value Added Tax Act, 2013, by adding a new subsection (2A) immediately after subsection (2). This new provision states that, despite the repeal of paragraph 102 of the First Schedule, the exemption for goods imported or locally purchased for direct and exclusive use in projects under a SOFA arrangement with the Government will remain in effect for existing projects for the duration of the agreement. This amendment was made through the Finance Act 2020. The transitional clause aims to ensure the continuity of the

SOFA, highlighting the Government's commitment to implementing its policy through legislative measures.

103. They further submitted that, in 2022, the Finance Act amended the Income Tax Act by adding Section 28A, which specifies that companies engaged in SOFA with the Government for manufacturing human vaccines, with a capital investment of at least ten billion shillings, will be taxed according to the terms of the agreement.
104. Additionally, Section 30 of the Finance Act, 2022 modified the First Schedule of the Value Added Tax Act, introducing provisions for tax exemptions on goods, inputs, and raw materials imported or locally purchased by such companies, subject to Cabinet Secretary's approval. This section also applies to taxable goods under similar conditions in the Second Schedule of the Miscellaneous Fees and Levies Act.
105. The constitutionality and legality of the Finance Act, 2022 were challenged in the case *Kabata & 4 others v National Assembly & 3 others*, but the Court dismissed the petitions for lack of merit.
106. In response to the query on circumstances under which tax exemptions were granted to Blue Nile Rolling Mills Limited, it was submitted that when the SOFA was introduced, Blue Nile Rolling Mills Limited was the first commercial manufacturer of galvanized wire in Kenya, aligning with the government's import substitution strategy outlined in Sessional Paper No. 9 of 2012. The Agreement specifically focused on the production of galvanized wire.
107. Additionally, Blue Nile Rolling Mills Limited submitted that as of July 2024, it had received tax exemptions totaling USD 1,762,190, equivalent to Kshs. 188,000,000 in IDF and RDL. While VAT is not entirely exempt, it is deferred, as it must be paid on sales. Moreover, the company did not utilize the corporate tax discount due to outstanding investment allowances.
108. Regarding whether the tax exemptions are exclusive to Blue Nile Rolling Mills Limited, the company stated as follows:
 - i. Over 200 manufacturing companies, including several steel companies, benefit from Import Duty exemptions through the Duty Remission Scheme.
 - ii. According to the VAT Act of 2022 (Paragraph 146) and the Miscellaneous Fees and Levies Act of 2022 (Second Schedule, Part A (xxvi) and Part B (x)), many companies in the industry have received exemptions for IDF, RDL, and Import Duty, as well as deferred VAT.
 - iii. No other company in the same sector applied for SOFA, even though the Finance Bill of 2018 allowed all eligible entities to do so.
109. The Company stated that the Agreement between the Company and the Government aimed at promoting direct investment and foster inclusive economic growth in Kenya. Key points include:

- (a) The commitment of the Ministry of Industry, Trade and Cooperatives and the Ministry of the National Treasury and Planning to support the development of the manufacturing sector and steel industry, in line with the National Industrialization Policy Framework and the Kenya Industrialization Transformation Program.
- (b) The Company's commitment to invest in a galvanizing plant in Kenya, which would also involve promoting employment and facilitating knowledge and technology transfer within related industries.
- (c) The Company, in collaboration with the Ministry of Industry, Trade and Cooperatives and the Ministry of the National Treasury and Planning, had committed to establishing a high-speed galvanizing factory in Thika Town, Kiambu County, with an estimated investment of USD 19 million. This project aimed for nearly 100% local value addition and was expected to generate foreign earnings or savings of around USD 15 million.
- (d) The deliverables of the project were outlined under Article 2 of the Agreement, focusing on the production of galvanized wire and other steel-related products. According to Article 3, the project aimed to position Kenya as a regional manufacturing hub, create direct and indirect jobs, support automation and technology transfer, and enhance research and development in the steel sector. Additionally, it would promote business development services and provide opportunities for Kenyans to design and manufacture "Made in Kenya" products.
- (e) Economically, the project was anticipated to boost Kenya's foreign exchange through import substitution and export of galvanized wire products, while also reducing the cost of locally manufactured steel-related products.
- (f) Under Article 5 of the Agreement, the Government granted the Company several incentives, including: -
 - i. Exemption from VAT on inputs for building materials, machinery, production lines, equipment, spare parts, consumables, and other supplies used solely for constructing the galvanized wire plant.
 - ii. Exemption from import duty, as per the EAC Customs Management Act 2004.
 - iii. Exemption from VAT on imported raw materials intended for the manufacturing process.
 - iv. Exemption from IDF and RDL on imported raw materials for exclusive use in manufacturing, along with a reduced corporate income tax rate of 10% for the first five years.
- (g) Finally, the Agreement specified that the investor would maintain all the incentives for a period of ten years, and any changes in duties and taxes that could negatively impact the investor would be the responsibility of the Government.

110. Concerning the requirement on hiring a minimum of 300 employees under SOFA, the Company submitted that it had complied by employing over 1,000 employees from various backgrounds, including 457 on pensionable terms.
111. They submitted that the SOFA arrangement was in accordance with the established legal framework and that the Agreement had been largely executed with significant project implementation and funding exceeding 30 million dollars from various financiers.
112. In conclusion, Blue Nile Rolling Mills Limited submitted to the Committee that, on November 17, 2023, the Attorney General provided an advisory on the legality of the SOFA, which confirmed that:
- i. The Agreement was legally valid and binding for a duration of ten years.
 - ii. The execution of the Agreement completed the transaction, meaning that the Finance Act of 2023 could not nullify the rights established under it.
 - iii. Based on the principle of legitimate expectation, the government was required to honor the Agreement.

4.0 COMMITTEE OBSERVATIONS

113. The Committee having analyzed the submissions by stakeholders made observations on issues relating *inter alia* to: unconstitutionality, non-conformity with relevant statutes, non-compliance with the principles of a standard contract/agreement as here under:

4.1 Unconstitutionality

114. Article 7 of the purported SOFA arrangement on confidentiality is unconstitutional to the extent that it infringes on –

- (a) Article 35 of the Constitution on access to information, as the same excludes non-parties to gain access to the information contained therein.
- (b) Article 201(a) of the Constitution, which requires openness, accountability including public participation in matters relating public finance, which principles, the parties did not adhere in the execution of the Agreement.
- (c) Article 95(4)(c) of the Constitution, provides for oversight role to the National Assembly over national revenue and its expenditure. The Committee observed that failure by the relevant ministries to involve the National Assembly at any stages of the process followed in exempting the Blue Nile Rolling Mill Limited from tax remission, denied the House of the performance of its oversight role.

115. Article 210(2) of the Constitution which requires maintaining of public records of tax waiver and report of waiver to the Auditor-General with reasons, as the same was not demonstrated in the documentation provided.

116. The whole architecture of the purported agreement contravenes the provisions of Article 10(2)(c) and Article 118 of the Constitution which requires good governance, integrity, transparency and accountability.

4.2 Non-conformity with relevant statutes

117. The Agreement failed to conform with the relevant statutes including –

- a) section 13 of the Income Tax Act (*Cap 470*) laws of Kenya allows the Cabinet Secretary to exempt any income or class of income which accrued in or derived from Kenya from taxation -
 - i. by publishing a gazette notice to that effect in accordance with sub-section (2); and
 - ii. by submitting the notice to be laid before the National Assembly without unreasonable delay, in accordance with sub-section (3),

which requirements, the Committee observed were not followed, since the Cabinet Secretary for the National Treasury, neither published the notice in the gazette, nor submitted it for laying in, and approval by the National Assembly.

- b) Section 68 of Value Added Tax Act (Cap 476) laws of Kenya saved all Special Operating Framework Arrangements entered into with the Government, which were in existence at the commencement of the Act in the year 2022. In this arrangement, the Agreement was signed between 16th and 30th January, 2020 falls within the timelines of the arrangements saved under the Value Added Tax Act. Consequently, the Committee having observed that the purported SOFA arrangement between Blue Nile Rolling Mill Limited and the Government was unprocedural and unlawful, the Committee is of the opinion that Blue Nile Rolling Mill Limited ought not to benefit from the said saving.
- c) The provisions of Law of Contract Act (Cap 23) in relation to signature and affixing of common seal. To the extent that the Agreement contained three signatures appended by parties but on different dates at different places, implying that not all the parties were present at the signing, contrary to the principles of the Law of Contract.
- d) Miscellaneous Fees and Levies Act (Cap 469C) to the extent that Article 5 of the Agreement seeks exemption from Import Declaration Fees and Railway Development Levy. However, the same has not been exempted under the Miscellaneous Fees and Levies Act.
- e) Tax procedures Act (Cap 469B) to the extent that the Committee considered that failure by Blue Nile Rolling Mill Limited to remit the attendant taxes amounted to tax avoidance, which is defined in section 3 of the Act as “***a transaction or a scheme designed to avoid liability to pay tax under any law.***” From the submission by the National Treasury, the Committee observed that, due to the tax avoidance, the Government lost revenue in terms of unpaid taxes amounting to Kshs. 2,311,745,548 as at July 2024.
- f) Competition Act (Cap 504) contemplates fair trade practices. Section 21(3)(f) prohibits any agreement, decision or concerted practice, which applies dissimilar conditions to equivalent transactions with other parties, thereby placing them at a competitive disadvantage, which was the case in this circumstance. The Committee observed that this Agreement was discriminative and created unfair playground for other industry players.
- g) The Statutory Instruments Act (Cap 2A) laws of Kenya to the extent that:
- i. The Circular No. 9/2018 Ref. no. ZZ/TS/GP/30 dated 18th October, 2018 issuing guidelines for grant of tax exemptions, which were relied upon in granting the SOFA, is a statutory instrument within the meaning of section 2 of the Statutory Instruments Act (*hereinafter the “the Act”*). The Committee observed that, although the above-mentioned guidelines is a statutory instrument, the same was not laid before the National Assembly in line with section 11(1) of the Statutory Instruments Act for scrutiny and approval. Consequently, the circular ceased to take effect upon the lapse of the requisite timelines as provided for under Section 11(4) of the Act.

- ii. The SOFA was a statutory instrument which ought to have been submitted in the National Assembly for tabling, consideration as required under the Statutory Instruments Act. Consequently, the Committee observed that the SOFA was a nullity from the onset.

4.3 Non-compliance with the principles of a standard contract/agreement

118. The Committee noted that the Agreement did not comply with the general principles of a standard contract or agreement contemplated where the parties to the contract are between bodies corporate or a government and body corporate. The Committee observed that the Agreement contained three signatures appended by parties but on different dates at different places, implying that not all the parties were present at the signing, contrary to the principles of the Law of Contract.

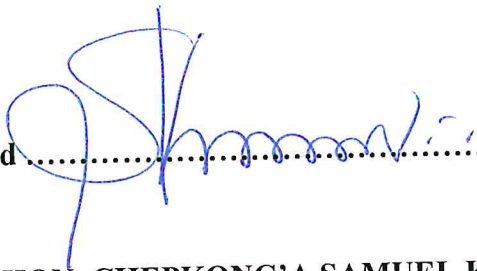
4.4 General Observations

119. The Committee observed that, although Blue Nile Rolling Mills Limited continues to enjoy the exemptions under EAC duty remission scheme, there is no proof that the said company applied or requested to be exempted from duty remission under the EAC duty remission scheme.
120. Consequently, the Committee noted that failure of proof of request for exemption under EAC duty remission scheme by Blue Nile Rolling Mills Limited, is a clear indication that the exemption was unprocedurally and unlawfully granted to the Company to the disadvantage of other industry players contrary to the provisions of the Competition Act (Cap 504) on unfair trade practices.
121. The Agreement entered between the National Treasury and Planning, Ministry of Industry, Trade and Cooperatives and Blue Nile Rolling Mills Limited was dated 18th December, 2019. The said Agreement failed to recognize any change in duty and taxes. The Committee further noted that the purported amendment to the initial agreement which shielded the Company against increase in taxes and duty at the expense of the government did not exist. As such, Blue Nile Rolling Mills Limited continues to enjoy tax exemption including any increase in tax and duty subject to a non-existing amendment Agreement.

5.0 COMMITTEE RECOMMENDATIONS

122. Having conducted the inquiry to the statement by the Hon. John Njuguna Kawanjiku, MP, and having considered the submissions by the National Treasury and Economic Planning, Ministry of Investments, Trade and Industry, Kenya Association of Manufacturers and the Blue Nile Rolling Mills Limited, the Committee recommends that this House **adopts** the report on its inquiry into irregular and illegal grant of tax exemptions to a Company under the Special Operating Framework Agreement with the following recommendations, **THAT:**
123. Considering that the Special Operating Framework Agreement arrangement between the Government and Blue Nile Rolling Mill Limited was deemed unprocedural and unlawful, this House resolves to declare that, the said Special Operating Framework Agreement was done outside the requisite legal framework, thus a nullity and hence void.
124. This House resolves to direct all the relevant statutory bodies to take necessary legal action on parties involved in the whole process of the irregular tax exemptions under the Special Operating Framework Agreement therein.
125. Pursuant to Section 12(2) of Statutory Instruments Act, this House resolves that, the Cabinet Secretary for the National Treasury and Economic Planning submits tax exemption guidelines for the implementation of Special Operating Framework Arrangements to the National Assembly within six months of the House adopting this report.

Signed




Date

25/09/2024

THE HON. CHEPKONG'A SAMUEL KIPRONO, CBS, MP
(CHAIRPERSON)

COMMITTEE ON DELEGATED LEGISLATION

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 26 SEP 2024	
DAY: Thursday	
TABLED BY:	Hon. Samuel chepkong'a, MP Chairperson
CLERK-AT THE TABLE:	A. Shituko