

Approved  
8/10/13



REPUBLIC OF KENYA

KENYA NATIONAL ASSEMBLY

PARLIAMENT  
OF KENYA  
LIBRARY

ELEVENTH PARLIAMENT – SECOND SESSION

THE DEPARTMENTAL COMMITTEE  
ON  
FINANCE, PLANNING & TRADE

② Deputy Speaker

REPORT ON  
THE TAX APPEALS TRIBUNAL BILL, 2013

This is for  
you may approve

PARLIAMENT BUILDINGS  
NAIROBI

Sidi  
8/10

OCTOBER, 2013

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## INTRODUCTION

The Departmental Committee on Finance, Planning & Trade is one of the twelve Departmental committees of the National Assembly established under SO 216 and mandated to, inter alia; **‘to study and review all legislations referred to it;**

Specifically, the Committee deals with *Public finance, monetary policies, public debt, financial institutions, investment and divestiture policies, pricing policies, banking, insurance, population, revenue policies, planning, national development, trade, tourism promotion and management, commerce and industry.*

The Standing Orders also empowers the Committee to make its own selection of the subjects regarding the policy, management and administration among others of the Ministries and Departments falling under its jurisdiction.

## COMMITTEE'S MEMBERSHIP

The committee comprises of the following members:-

1. Hon. Benjamin Langat, MP (**Chairman**)
2. Hon. Nelson Gaichuhie, MP (**vice Chairman**)
3. Hon. Jones M Mlolwa, MP
4. Hon. Anyanga, Andrew Toboso, MP
5. Hon. Timothy M .E. Bosire, MP
6. Hon. Shakeel Shabbir Ahmed, MP
7. Hon. Joash Olum, MP
8. Hon. Dr. Oburu Oginga, MP
9. Hon. Patrick Makau King'ola, MP
10. Hon. Abdullswamad Sheriff, MP
11. Hon. Sumra Irshadali, MP
12. Hon. Ogendo Rose Nyamunga, MP
13. Hon. Iringo Cyprian Kubai, MP
14. Hon. Dennis Waweru, MP

15. Hon. Tiras N. Ngahu, MP
16. Hon. Sakaja Johnson, MP
17. Hon. Jimmy Nuru Angwenyi, MP
18. Hon. Ronald Tonui, MP
19. Hon. Mary Emase, MP
20. Hon. Joseph Limo, MP
21. Hon. Lati Lelelit, MP
22. Hon. Kirwa Stephen Bitok, MP
23. Hon. Sammy Mwaita, MP
24. Hon. Daniel E. Nanok, MP
25. Hon. Eng. Shadrack Manga, MP
26. Hon. Abdul Rahim Dawood, MP
27. Hon. Sakwa John Bunyasi, MP
28. Hon. Alfred W. Sambu, MP
29. Hon. Sammy Koech, MP

On Thursday, 27<sup>th</sup> June, 2013, the Tax Appeals Tribunal Bill, 2013 went through the First Reading and referred to the Departmental Committee on Finance, Planning & Trade pursuant to the provisions of the Standing Order No. 127 of the National Assembly.

Pursuant to Article 118 of the Constitution and Standing Order 127, the Departmental Committee on Finance, Planning & Trade facilitated Public Participation by engaging the stakeholders on the Bill. The Committee met with the National Treasury, Pricewaterhousecoopers (Independent auditing firm), Institute of Certified Public Accountants of Kenya (ICPAK), the Kenya Revenue Authority, and the National Treasury.



## COMMITTEE OBERVATIONS

The Committee observed that:

- i. The Tax Appeals Tribunal Bill, 2013 was developed to consolidate all tax appeals under a single tribunal. It is a move aimed at reducing the administrative bureaucracies of the current system where various tax legislations provide for taxpayers to file their tax disputes to various tribunals that were set in the Income Tax Act, the VAT Act and the Customs and Excise Act as the case may be. An effective appeals process as envisaged by the intent behind this Bill should result in a framework for speedy resolution of tax disputes.
- ii. The maintenance of the independence of the envisaged Tribunal will be fundamental if it had to objectively discharge its mandate. This will be made possible right from the point of identifying and appointing members of the Tribunal and providing it with sufficient resources in terms of the quality of the personnel and adequate budget.
- iii. Appointment, removal, staffing and remuneration of the members / clerk / staff of the tribunal have been placed under the cabinet Secretary responsible for matters of finance. It is the opinion of the Committee that the tribunal should be done by an independent and impartial party / body. For example in the United Kingdom (UK) the tax tribunal system is administered by the Ministry of Justice. Likewise, the Tax Appeals Tribunal could be constituted under the legal department. Other independent appointing / vetting bodies like the Public Service Commission and the Salaries and Remuneration Commission should be considered.
- iv. The Tribunal is expected to inquire into tax disputes emanating from a wide spectrum of lines of businesses. Therefore there is need to provide room for an adequate mix of professionals to enable the tribunal acquire at no cost the benefit of technical input from cross-section of professionals. Issues relating to determination of tax disputes go beyond interpretation of tax laws. Industry-specific skills and competencies may be useful to the Tribunal. Clause (4)(2) in its current form is interpretable to mean that majority of members of the Tribunal (maximum 10) shall be lawyers.

- v. There is need for the public to hold the tribunal accountable by providing clear timelines within which it should deliver its ruling once the dispute has been filed. This will conform to the fair administrative practices envisaged in Article 47 and 50 the Constitution.
- vi. The following is the analysis of the Bill clause by clause:

| Clause | Highlights                                                                                                                                                 | Comments                                                                                                                                                                                                                                                                                                                               |
|--------|------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1      | Short title and commencement                                                                                                                               |                                                                                                                                                                                                                                                                                                                                        |
| 2      | Interpretation                                                                                                                                             | Provides general definitions                                                                                                                                                                                                                                                                                                           |
| 3      | Establishment of the Tribunal                                                                                                                              | Previously, there have existed provisions for setting up Tribunals under the Income Tax Act, the VAT Act and the Customs and Excise Act. The bill seeks to consolidate this to a single Tribunal. This is essential as it will provide a proper and streamlined regulatory framework for dispute resolution with regard to Tax Appeals |
| 4      | Outlines the requirements for membership of the Tribunal                                                                                                   | There is need to include the requirement that members must be knowledgeable in the subject matter of taxation                                                                                                                                                                                                                          |
| 5      | Prescribes tenure of office for the chairperson and members of the Tribunal; Cabinet Secretary with powers to hire and fire                                | The hiring, remuneration should not be a preserve of the Cabinet secretary alone. Other bodies should also be brought on board.                                                                                                                                                                                                        |
| 6      | Members of the Tribunal to take oath of office before the Chief Registrar of the Judiciary                                                                 | This gives the tribunal legitimacy as is the case to other organs of government                                                                                                                                                                                                                                                        |
| 7      | Cabinet Secretary to provide staff to the Tribunal for proper discharge of functions                                                                       | The hiring, remuneration should not be a preserve of the Cabinet secretary alone. Other bodies should also be brought on board                                                                                                                                                                                                         |
| 8      | Allowances to be determined by Cabinet Secretary and expenses of the Tribunal to be paid out of funds provided by Parliament through the National Treasury | Will occasion additional expenditure of public finances                                                                                                                                                                                                                                                                                |
| 9      | Arrangement of business – chairperson to constitute panel, determine the place at which panel will sit and procedure for                                   | Outlines the functions of the chairperson                                                                                                                                                                                                                                                                                              |



|    |                                                                                                                                       |                                                                                                                                                                                                                              |
|----|---------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|    | conduct of business                                                                                                                   |                                                                                                                                                                                                                              |
| 10 | Constitution of a panel to listen to proceedings                                                                                      | Chairing of the panels should not be a preserve of the lawyers only. Members of other professional bodies like ICPAK can also chair.                                                                                         |
| 11 | Provides for position of clerk of the panel to be a secretary to the panel                                                            | There is an error of omission in subsection 11(2).<br>Should be amended to read as follows:<br>"A person shall <b>not</b> be qualified to be appointed as a clerk unless that person is qualified to serve as a court clerk" |
| 12 | Provision for filing Appeals to the Tribunal. Appellant required to pay a non-refundable fee of Kshs 20,000                           | An unfair provision. Proposal to amend the section such that where an appeal is upheld, amount should be refunded                                                                                                            |
| 13 | Outlines the procedure for filing a Tax Appeal                                                                                        | Supporting documentation should also be provided                                                                                                                                                                             |
| 14 | Provision of civil Procedure Act not to apply to the Tribunal                                                                         |                                                                                                                                                                                                                              |
| 15 | Requirement for the Commissioner to submit material documents to the Tribunal as advised by the clerk within thirty days              | This is normal practice                                                                                                                                                                                                      |
| 16 | Secretary to inform concerned parties of venue and date of hearing within 14 days; evidence can be given orally or through affidavits | Need to indicate timeframe for Tribunal to initiate hearings after petitions have been filed                                                                                                                                 |
| 17 | Tribunal empowered to summon witnesses                                                                                                | Need to include that failure to comply will constitute an offence                                                                                                                                                            |
| 18 | Tribunal can make order to stay or affect the implementation of the decision under review                                             | Will ensure effectiveness of proceeding                                                                                                                                                                                      |
| 19 | Tribunal members with conflict of interest not to take part in proceedings unless with consent of all parties                         |                                                                                                                                                                                                                              |
| 20 | Outlines powers of the Tribunal during proceedings; Tribunal to have powers of subordinate courts with regard to hearing proceedings  | This will enable it discharge its mandate effectively                                                                                                                                                                        |
| 21 | Defines actions that constitute contempt of the Tribunal and the                                                                      |                                                                                                                                                                                                                              |

|    |                                                                                                                                                                                       |                                                                                                 |
|----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------|
|    | likely penalties for the offence                                                                                                                                                      |                                                                                                 |
| 22 | Outlines penalties for persons who disobey Tribunal summons, withholds evidence or fails to respond adequately                                                                        | This will bring sanity in the process                                                           |
| 23 | Tribunal to have powers to engage an independent expert                                                                                                                               | This section can be repealed if the members of the Tribunal are skilled in tax matters          |
| 24 | Proceedings of Tribunal to be of judicial nature with rules prescribed by the Chief Justice                                                                                           | The simplicity of tax cases need to be maintained.                                              |
| 25 | Appellant can be represented by a tax agent. Outlines situations where Appeal hearings can be postponed                                                                               | This introduces fair administrative processes as provided for in Article 47 of the Constitution |
| 26 | All parties to be given reasonable opportunity to make submissions concerning evidence                                                                                                |                                                                                                 |
| 27 | Outlines conditions for the discontinuance, dismissal or reinstatement of an appeal                                                                                                   |                                                                                                 |
| 28 | Parties can agree to settle matter out of the Tribunal subject to conditions prescribed by the Tribunal                                                                               |                                                                                                 |
| 29 | Outlines how Tribunal will arrive at decision and manner in which the decision will be conveyed to concerned parties                                                                  | It is important to indicate the time frame in which the Tribunal should arrive at a decision    |
| 30 | The Burden of proof to be on the appellant                                                                                                                                            |                                                                                                 |
| 31 | In the event of awarding costs to appellant, Tribunal to issue certificate which will enforce orders for costs                                                                        |                                                                                                 |
| 32 | Provision to Appeal to the High Court on decisions of the Tribunal within 30 days                                                                                                     | There needs to be a time limit in which the appeal must be determined                           |
| 33 | Outlines offences under the Act and the penalties                                                                                                                                     |                                                                                                 |
| 34 | Employers to be jointly liable for actions committed by an employee or agent unless they can prove, beyond reasonable doubt, that they didn't know and were not in a position to know |                                                                                                 |
| 35 | Protects officers from personal                                                                                                                                                       |                                                                                                 |

|          |                                                                                                                                                             |                                                                                           |
|----------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------|
|          | liability for any act or omission done in discharging their functions unless found to have wilfully done so or to be negligent                              |                                                                                           |
| 36       | Disclosure of information from the Tribunal outside of normal functions, proceedings to constitute an offence                                               |                                                                                           |
| 37       | Outlines general penalties for offences under this Act.                                                                                                     |                                                                                           |
| 38       | Evidence from the Commissioner to be taken as conclusive evidence of tax liability unless the person liable to pay the tax proves otherwise                 | Burden of proof is with the appellant                                                     |
| 39       | Maximum sentence prescribed under this Act to Apply to those convicted of offences                                                                          |                                                                                           |
| 40       | Empowers authorised officers, with approval of the Director of Public Prosecutions, to prosecute on offences under this Act                                 |                                                                                           |
| 41,42,43 | Repeals provisions for the formation of Tax Appeals Tribunals under the Customs and Excise Act, Income Tax Act and VAT Act                                  |                                                                                           |
| 44       | Existing Tribunals to continue hearing appeals for a period of six months after commencement of the Act after which the Tax Appeals Tribunal will take over | The six Months provided for transition is a too long time to reform the appeals tribunal. |



## PROPOSED AMENDMENTS

Arising from the Committee's interaction with various stakeholders, the Committee is considering the following amendments for possible presentation to the House during the Committee stage of the Whole House:-

### CLAUSE 2:

**THAT**, Clause 2 be amended in the definition of the term "tax law" by inserting following new subsections immediately after subsection (c) :-

- (d) East African Community Customs Management Act; or
- (e) any other tax law administered by the Commissioner.

### **Justification**

The definition of the term "tax law" in Clause 2 omitted the "East African Custom Management Act". This Act is administered by the Commissioner of Customs Services and a dispute arising from the Commissioner of Customs is expected to be handled by the Tribunal.

The proposal to have a general provision is to cater for any tax law that may be enacted later. For example the enactment of an Excise Management Act to handle excise matters alone. The process of preparing an Excise Management Bill is at an advanced stage.

### CLAUSE 4:

**THAT**, Clause 4 be amended as follows:-

- (i) In subsection (2) by deleting the words "*At least*" appearing before the words "five Members" and substituting in place thereof with the words "*Not more than*"

### **Justification**

We need to provide room for an adequate mix of professionals to enable the tribunal acquire at no cost the benefit of technical input from cross-section of professionals. It is important to note that issues relating to determination of tax disputes go beyond interpretation of tax laws. Industry-specific skills and competencies may be useful to the Tribunal.

This will be made possible if we could have as many categories of professionals as possible as members of the Tribunal. The Clause in its current form is interpretable to mean that majority of members of the Tribunal (maximum 10) shall be lawyers.



- (ii) In subsection (3) (ii) by deleting the words “five years” and substituting in place thereof with the words “ten years”

**Justification**

Fortifies the qualification of the Members of the Tribunal

**CLAUSE 8:**

**THAT**, Clause 8 be amended by deleting subsection (1) and substituting in place thereof with the following new subsection:--

**8(1)-** 'The members of the Tribunal shall be paid such allowances for expenses as the Cabinet Secretary may determine with advise from the Salaries and Remuneration Commission (SRC) and the Public Service Commission.

**Justification**

The power to determine pay should not be solely given to a singular institution. It would be prudent that this authority is exercised with recommendation from the body constitutionally mandated to determine remuneration of public officers.

**CLAUSE 9:**

**THAT**, Clause 9 be amended as follows:-

- (i) by deleting subsection (2) and substituting in place thereof with the following new subsection:-

**9(2) -** The Chairman shall appoint the following three panels in respect of the VAT appeals, income Tax appeals and Customs Appeals. In appointing the panels, the Chairman shall give due regard to the expertise of the tribunal members

**Justification**

Given the Number of appeals that are filed daily, the responsibility of appointing a panel each time an appeal is filed will be daunting and almost impossible for the chairperson to perform. This is likely to create a backlog in the hearing of appeals.

- (ii) by Inserting new subsection 9(4) immediately after subsection 9(3):

**9(4) -**The Tribunal shall hear and determine an appeal within sixty (60) days of the appeal being duly registered at the Tribunal registry.

**Justification**

Effectiveness of the Tribunal is critical in timely settlement of tax disputes which will eventually make tax administration efficient.

**CLAUSE 10:**

**THAT**, Clause 10 be amended in subsection (2)(b) by-

Inserting the words “*or a member of the Institute of Certified Accountants of Kenya*” between the words “court” and “to”.

**Justification**

The Bill excludes the Civil Procedure Act and as such the expertise required to preside over the Tribunal does not necessarily have to be tied to being an Advocate of the High Court.

**CLAUSE 11:**

**THAT**, Clause 11 be amended in subsection (2) by Inserting the word “*not*” between the words “*shall*” and “*be*”.

**Justification**

This removes the ambiguity in language.

**CLAUSE 13:**

**THAT**, Clause 13 be amended as follows:-

- (i) by deleting subsection (2)(b) and substituting in place thereof with the following new subsection:-:

**13(2)**-The Appellant shall within fourteen days of the date of filing the notice of appeal submit enough copies as may be advised by the Clerk of

- (a) a memorandum of appeal
- (b) statement of facts and supporting documentation
- (c) the tax decision

**Justification**

To provide clarity on the date the memorandum of appeal and statement of facts should be filed. It also clarifies that the statement of facts should be accompanied by supporting documentation.

- (ii) in subsection (3)(b) by Inserting the words “*and the memorandum of appeal*” between the words “*facts*” and “*required*”

**Justification**

Correction of an omission on the face of the record

### CLAUSE 15

THAT, Clause 15 be amended by deleting subsection (2)

#### **Justification**

Clause 26 adequately deals with disclosure of documents. This section allows the Tribunal to request the Commissioner to submit documents of its own motion without having been instigated by the tax payer. The Tribunal may be seen to entering the arena of the dispute and may not be seen to be impartial if it begins to request documents of its own motion.

### CLAUSE 18

THAT, Clause 18 be deleted and substituting in place thereof with the following new Clause:-

**18** - Where an appeal against a tax decision has been filed under this Act, the amount of tax in dispute shall not be paid until the hearing and determination of the appeal and subject to the provisions of section 32 of this Act.”

#### **Justification**

This section presupposes that there is no stay of the Commissioner's decision until an order is made by the Tribunal. This is in conflict with Section 33 (1) of the VAT Act which provides a statutory stay as the tax payer is only required to pay the tax not in dispute and similarly Section 88(b)(ii) and Section 88(b)(iii) of the Income Tax Act. It will be extremely oppressive to require the tax payer to seek a stay from the Tribunal when the provisions for a stay are already contained in at least two of the tax statutes and it will also increase the work load of the Tribunal members who will be required to hear such applications as a matter of urgency.

### CLAUSE 21

THAT, Clause 21 be amended by deleting subsections (b) and (c) and substituting in place thereof with the following new subsection:-

**21(b)**- interrupts the proceedings or creates a disturbance, or takes part in creating disturbance in or near a place where the Tribunal is sitting; or

#### **Justification**

The interruption should be in the nature of a disturbance and not just any interruption.



## CLAUSE 22

**THAT**, Clause 22 be amended in subsection (c) by deleting the word “*deferred*” and substituting in place thereof with the word “*referred*”.

### **Justification**

The Bill in clause 22(c) has used the word “**deferred**” –in the following phrase “mentioned or deferred to any sermons served on him”. This is an apparent error hence should be deleted. This is a clean up.

## CLAUSE 24

**THAT**, Clause 24 be amended to provide for some discretionary power to determine the procedure with the Tribunal in matters not prescribed for as is the case in the legacy bodies.

### **Justification**

This will enhance the access to justice for all taxpayers despite their background. The quasi-judicial nature of the Tribunal should be maintained as this is not a court of law.

As a general, quasi-judicial bodies need not follow strict judicial rules of evidence and procedure. This should be kept in mind in coming up with the rules to avoid matters not proceeding due to technicalities. The discretion in relation to matters of process given to the Tribunal is therefore of great importance in matters before a quasi-judicial body.

## CLAUSE 27

**THAT**, Clause 27 be amended in subsection (5) by inserting the words “*or uphold*” immediately after the word “*dismisses*”.

### **Justification**

Subsection (5) provides that a person may appeal against dismissal of an appeal under subsections (2), (3) and (4). The decision under subsection (4) is upholding of an appeal. There is need to include upholding of an appeal, in subsection (5) to align it with the decision made under subsection (4)

## CLAUSE 32

**THAT**, Clause 31 be amended as follows:-

- (i) by deleting subsection (1) and substituting in place thereof with the following new subsection:-

**32(1)** - A party to proceedings before the Tribunal may within thirty days after being notified of the decision or within such period as the High Court may allow file a notice of appeal to the High Court and the party so appealing shall serve a notice of appeal on the other party within two days of filing a notice of appeal to the High Court. Provided that in the event the Tribunal does not allow the Appeal, any tax claimed by the Commissioner shall not become payable until the time for lodging an appeal has expired or, where the appeal has been commenced, until the appeal has been determined

**Justification**

It is not clear whether the notice of appeal should be filed within 30 days or whether it is the substantive appeal that should be filed. It is also not clear whether there is a stay on the tax in dispute pending the hearing and determination of the Appeal to the High Court.

- (ii) by deleting subsection (2) and substituting in place thereof with the following new subsection:--

**32(2)** - The High Court shall hear and determine appeals made under this section within thirty (30) days and in accordance with the rules set out by the Chief Justice

**Justification**

This is aimed at introducing efficiency and effectiveness of the process so as to bring finality on tax disputes within the shortest time possible

**CLAUSE 34**

**THAT**, Clause 34 be amended by deleting subsection (1).

**Justification**

It is very onerous to presume an employer guilty for an offence of an employee. This vicarious liability should only be limited to body corporate as provided under Section 34 (2) of this Act.

**THAT**, the marginal note of clause 34 be amended by deleting the words “officer of companies” and substituting in place thereof with the words “officers of corporate bodies”.

**Justification**

The marginal note to clause 34 of the Bill reads “Liability of employers and officers of the companies” The current marginal note is restrictive since there are many corporate bodies other than companies targeted by the provision – eg. co-operative societies, trusts, churches and non-governmental organizations. In order to address the situation, we propose that the marginal note to clause 34 of the Bill to be amended to read “Liability of officers of corporate bodies” to capture the coverage of the provisions.

CLAUSE 44

THAT the Bill be amended in Clause 44 sub-subsection (1) by deleting the words “six months” and replacing thereof with the words “sixty days”.

Justification

Expedites the process of reforming the tax appeals process by eliminating bureaucracies that have be-devilled the current appeals process

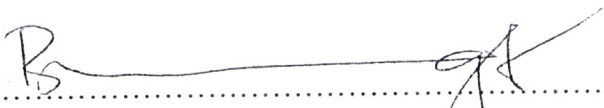
**ACKNOWLEDGEMENTS**

The Committee wishes to thank the Offices of the Speaker and the Clerk of the National Assembly for the support extended to it in the execution of its mandate.

The Committee also appreciates the Secretariat for the preparation of this report.

Finally, I wish to express my appreciation to the Honourable Members of the Committee who sacrificed their time to participate in the activities of the Committee and preparation of this report.

It is therefore my pleasant duty and privilege, on behalf of the Departmental Committee on Finance, Planning & Trade to table this report on the Tax Appeals Tribunal Bill, 2013 and commend it to the House for information pursuant to the provisions of Standing Order 127 of the National Assembly.

Signed  .....

CHAIRPERSON

(HON. BENJAMIN LANGAT, MP)

Date: 08-10-2013 .....



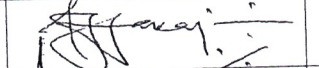

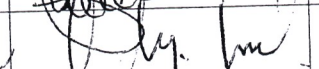
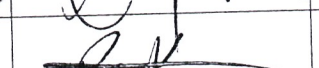

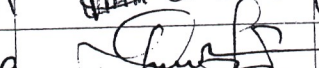

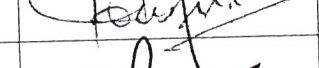

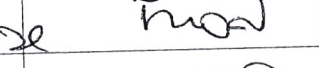

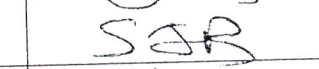


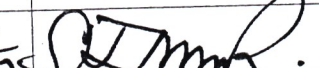


DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING & TRADE (11<sup>TH</sup> PARLIAMENT)

MEMBERS ATTENDANCE REGISTER

DATE 08/10/2013 TIME 11:00 am

AGENDA ADOPTION OF AMENDMENTS TO THE INSURANCE (AMENDMENT) BILL  
TAX APPEALS TRIBUNAL Bill; MICRO FINANCE (AMENDMENT) BILL; & KANTA DEPOSIT

| N   | NAME                        | SIGNATURE                                                                            | DESIGNATION |
|-----|-----------------------------|--------------------------------------------------------------------------------------|-------------|
| 0.  | Hon. Benjamin Langa         |    | Chair       |
| 1.  | Hon. Nelson Garichuwa       |    | V-Chair     |
| 2.  | Hon. Savaris Johnson        |    | Member      |
| 3.  | Hon. Shaleel Shabber        |    | Member      |
| 4.  | Hon. T. M. Nyandu           |    | "           |
| 5.  | Hon. Ronald Tonui           |   | "           |
| 6.  | Hon. Lathi Lelelit          |  | "           |
| 7.  | Hon. Tim-E Bosire           |  | "           |
| 8.  | Hon. Joseph Oluwa           |  | "           |
| 9.  | Hon. Anyago Andrew Toboso   |  | "           |
| 10. | Hon. N. A. Amunwa Orose     |  | "           |
| 11. | Hon. Jimmy Aramemi          |  | "           |
| 12. | Hon. SAKWA BUNYASI          |  | "           |
| 13. | Hon. Abdullswamad S. Nassir |  | "           |
| 14. | Hon. Sam Koech              |  | "           |
| 15. | Hon. Sammy Mwaitia          |  | "           |
| 16. | Hon. Patrick Makenzie       |  | "           |

**MINUTES OF THE 39<sup>TH</sup> SITTING OF THE DEPARTMENTAL COMMITTEE  
ON FINANCE, PLANNING & TRADE HELD ON TUESDAY 8<sup>TH</sup> OCTOBER,  
2013 IN THE COMMITTEE ROOM, 4<sup>TH</sup> FLOOR, CONTINENTAL HOUSE AT  
11.00 AM**

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**PRESENT**

Hon. Benjamin Langat, MP (**Chairperson**)  
Hon. Nelson Gaichuhie, MP(**Vice Chairperson**)  
Hon. Anyanga AndrewToboso, MP  
Hon. Sammy Koech, MP  
Hon. Ogendo Rose Nyamunga, MP  
Hon. Sammy Mwaita, MP  
Hon. Sakaja Johnson, MP  
Hon. Sakwa John Bunyasi, MP  
Hon. Timothy M .E. Bosire, MP  
Hon. Tiras N. Ngahu, MP  
Hon. Abdullswamad Sheriff, MP  
Hon. JoashOlum, MP  
Hon. Lati Lelelit, MP  
Hon. ShakeelShabbir Ahmed, MP  
Hon. Jimmy NuruAngwenyi, MP  
Hon. Patrick MakauKing'ola, MP

**ABSENT WITH APOLOGIES**

Hon. Sumra Irshadali,  
Hon. Alfred W. Sambu, MP  
Hon. Jones M.Mlolwa, MP  
Hon. Ronad Tonui, MP  
Hon. Joseph Limo, MP  
Hon. Mary Emase, MP  
Hon. Iringo Cyprian Kubai, MP  
Hon. Daniel EpuyoNanok, MP  
Hon. Abdul Rahim Dawood, MP  
Hon. Dr. OburuOginga, MP  
Hon. Dennis Waweru, MP  
Hon. Eng. Shadrack Manga, MP

**INATTENDANCE**

**NATIONAL ASSEMBLY**

|                 |   |                           |
|-----------------|---|---------------------------|
| Evans Oanda     | - | Clerk Assistant           |
| MWaniki Gichohi | - | Fiscal Analyst            |
| Josphat Motonu  | - | Fiscal Analyst            |
| Tobias Opana    | - | Junior Legislative Fellow |

## **THE NATIONAL TREASURY**

Justus Nyamunga  
Barack Amollo  
Jemimah Mwaniki  
Kalai Musee  
Hellen Olima  
Moses Maina  
Caxton Ngeywo  
Julius Muyua  
Joseph Ngugi

### **MIN. NO. 166/2013: PRELIMINARIES**

The meeting was called to order by Chairperson at 11.20 am followed by word of prayer. This was followed by brief introduction of the Members present and the group from the National Treasury.

### **MIN.NO. 167/2013: CONSIDERATION OF THE KENYA DEPOSIT INSURANCE (AMENDMENT) BILL, 2013**

The Committee deliberated on the all proposed amendment by the stakeholders and adopted the following amendments for introduction into the House during the Committee Stage of the Bill:

#### **CLAUSE 2**

THAT, Clause 2 of the Bill be amended in paragraph (a) by deleting the word "institutions" appearing after the word "managed" and substituting therefor the word "institution".

#### **CLAUSE 3**

THAT, Clause 3 of the Bill be amended in paragraph (b) by deleting the word "by" at the beginning of the paragraph.

#### **CLAUSE 4**

THAT, Clause 4 of the Bill be amended in paragraph (a) (i) by deleting the word "Board" and inserting the word "Corporation".

#### **CLAUSE 7**

THAT, Clause 7 of the Bill be amended by deleting the words "under section 20(3)" in the new section 20 A" and inserting the words "contributions under section 20(3)".

#### **CLAUSE 8**



THAT, Clause 8 of the Bill be amended in paragraph (b) by deleting the word “Funds” and inserting the word “Fund”.

#### CLAUSE 13

THAT, Clause 13 of the Bill be amended in paragraph (a) by deleting “(b)(b)” and inserting “(b)”.

#### CLAUSE 14

THAT, Clause 14 of the Bill be amended in paragraph (b) by deleting the paragraph and replacing it with the following new paragraph,

(2) “In the course of receivership the Corporation may recommend to the Central Bank that the institution be liquidated in which case the Central Bank shall appoint the Corporation as the liquidator.”

#### MIN.NO. 168/2013:            CONSIDERATION OF THE INSURANCE (AMENDMENT) BILL, 2013

The Committee deliberated on the all proposed amendment by the stakeholders and adopted the following amendments for introduction into the House during the Committee Stage of the Bill:

##### Clause 2

That clause 2 of the Bill is amended by inserting the following immediately after clause 1 subsection 2(e)-

2A. Section 2 of the Principal Act is amended by inserting the following words-  
*“Cabinet Secretary” means the Cabinet Secretary in the time being responsible for the National Treasury.*

Also, delete the word “Minister” wherever it occurs and replace with “Cabinet Secretary”  
**Justification**

*The word “Minister” is used severally in the Principal Act and therefore need to be replaced with Cabinet Secretary for the Act to be in complacence with the Constitution of Kenya, 2010*

That, The Insurance (Amendment) Bill, 2013 be amended by inserting a new clause 2A immediately after clause 2 as follows –

Insertion 2A. The Principal Act is amended by inserting section 3AA immediately after

of a Section 3A as follows-  
new  
section  
3AA

Assistance in3AA. (1) The Authority may, where it receives a request from a investigation.regulatory body, whether established within or outside Kenya, for assistance in investigating a person specified by the regulatory body who has contravened or is contravening any legal or regulatory requirements which-

- (a) are enforced or administered by that regulatory body; or
- (b) relate to insurance transactions regulated by that regulatory body,

and where it is of the opinion that the request meets the requirements of subsection (3), provide the assistance requested for by exercising any of its powers under this Act or by providing such other assistance as the Authority may consider necessary.

(2) For the purposes of subsection (1), the provisions of this Act shall, with such modifications as may be necessary, apply and have effect as if the contravention of the legal or regulatory requirement referred to in subsection(1) were an offence under this Act.

(3) A regulatory body which requests for assistance under subsection (1) shall demonstrate that-

- (a) it is desirable or expedient that the assistance requested should be provided in the interest of the public; or
- (b) the assistance shall assist the regulatory body in the discharge and performance of its functions.

(4) The Authority shall, in deciding whether the requirements under subsection (3) have been satisfied in a particular case, take into account whether the regulatory body shall-

- (a) pay the Authority any of the costs and expenses incurred in providing the assistance; and
- (b) be able and willing to provide reciprocal assistance within its jurisdiction in response to a similar request for assistance from Kenya.

- (5) Nothing in this section shall be construed as limiting the powers of the Authority to co-operate or co-ordinate with any other regulatory body in the exercise of its powers under this Act, in so far as any such co-operation or co-ordination is not contrary to the objectives of this Act.

#### Justification

Kenya was evaluated on its Anti- Money Laundering and Combating the Financing of Terrorism (AML/CFT) regime in 2010, based on the Financial Action Task Force (FATF) Recommendations. The evaluation sought to analyze, among others, the extent to which the legal and regulatory framework in the financial sector is in compliance with the FATF's recommendations.

A number of deficiencies were identified. In regard to the insurance industry, it was noted that the Insurance Regulatory Authority does not have powers to enable the conduct of inquiries on behalf of the regulatory bodies not established in Kenya.

Although the Authority is empowered under section 9 of the Insurance Act to conduct investigation, it was not clear to the assessors whether the Authority can conduct investigation on behalf of regulatory bodies not established in Kenya.

To address the above deficiency, an amendment to section 3A (h) of the Insurance Act was made through the Finance Act, 2012. However, the amendment has been found not to adequately address the requirements to exchange of information that would aid in investigation.

The proposal is aimed at facilitating the Insurance Regulatory Authority co-operation with the regulatory bodies outside Kenya. The proposal is similar to the ones that were incorporated in the Capital Markets Act through Capital Markets (Amendment) Act, 2012 and Retirements Benefits Act through Finance Bill, 2013 (recently passed by the National Assembly)..

#### Clause 10

That clause 10 of the Bill be deleted.

#### Justification

The provision in Subsection 2 of Section 146 of the Principal Act that is proposed to be deleted deals with an insurer appealing against a decision of the Company's refusal to accept reinsurance. It is a considered opinion that that window of appeal is crucial to for the concerned party for progressivity.

#### Clause 16

That Clause 16 of the Bill is amended by – replacing the word “Kenya” with the words “East African Community Partner States for reciprocating states”



## Justification

The further amendment to Section 197A of the Principal Act is meant to adhere to the spirit of the EAC Treaty.

## MIN.NO. 169/2013: CONSIDERATION OF THE MICROFINANCE (AMENDMENT) BILL, 2013

The Committee deliberated on the all proposed amendment by the stakeholders and adopted in principal. However, the National Treasury was directed to bring further refinements (if any) to the Bill before it goes the third reading. The following amendments were considered:

### CLAUSE 2:

THAT Clause 2 of the Bill be amended by-

- a) Inserting a definition of the words “microfinance bank” to mean a company which carries on or proposes to carry on microfinance business in Kenya and includes all branches, marketing units, outlets and offices and any other place of business that may be licensed by Central Bank of Kenya from time to time;
- b) Deleting all references in the Act to the words “deposit-taking microfinance institution” and substituting therefor with the words “Microfinance Bank”;
- c) Deleting the words “deposit-taking microfinance business” appearing in the Act and substituting therefor with the words “Microfinance Bank Business”

### CLAUSE 3

THAT Clause 3 of the Bill be amended by inserting the following new clause 3A immediately before clause 3-

3A Section 14 Sub Section 1 be amended by deleting the following three paragraphs (a) to (c)

- a) Issuing of third party cheques
- b) Operating current accounts
- c) Foreign trade operations

MIN.NO. 170/2013:

CONSIDERATION OF THE TAX APPEALS TRIBUNAL BILL,  
2013

The Committee deliberated on the report on the Tax Appeals Tribunal Bill, 2013 and adopted it unanimously. The National Treasury was however directed to study all the proposed amendments and submit its comments to the Committee for further consideration. The Following amendments to the Bill were discussed:

THAT, Clause 2 of the Bill be amended in the definition of the term “tax law” by inserting new items immediately after item (c) as follows –

(d) East African Community Customs Management Act; or

(e) any other tax law administered by the Commissioner.

**Justification**

The definition of the term “tax law” in clause 2 of the Bill omitted the “East African Custom Management Act”. This Act is administered by the Commissioner of Customs Services and a dispute arising from the Commissioner of Customs is expected to be handled by the Tribunal.

The proposal to have a general provision is to cater for any tax law that may be enacted latter. For example the enactment of an Excise Management Act to handle excise matters alone. The process of preparing an Excise Management Bill is at an advanced stage.

**CLAUSE 4:**

THAT the Bill be amended in Clause 4(2) by-

Replacing the words “At least” appearing before the words “five Members” with the words “Not more than”

**Justification**

We need to provide room for an adequate mix of professionals to enable the tribunal acquire at no cost the benefit of technical input from cross-section of professionals. It is important to note that issues relating to determination of tax disputes go beyond interpretation of tax laws. Industry-specific skills and competencies may be useful to the Tribunal.

This will be made possible if we could have as many categories of professionals as possible as members of the Tribunal. The Clause in its current form is interpretable to mean that majority of members of the Tribunal (maximum 10) shall be lawyers.

THAT the Bill be amended in Clause 4(3)(iii) by-

Replacing the words “five years” with “ten years”

**Justification**

Fortifies the qualification of the Members of the Tribunal

**CLAUSE 8:**

THAT the Bill be amended in Clause 8(1) by-

Deleting it and replacing it with "8(1) The members of the Tribunal shall be paid such allowances for expenses as the Cabinet Secretary may determine with advise from the Salaries and Remuneration Commission (SRC) and the Public Service Commission.

**Justification**

The power to determine pay should not be solely given to a singular institution. It would be prudent that this authority is exercised with recommendation from the body constitutionally mandated to determine remuneration of public officers.

**CLAUSE 9:**

THAT the Bill be amended in Clause 9 (2) by-

Deleting all the words and replacing them with the words

9(2) The Chairman shall appoint three panels at the outset, one in respect of the VAT appeals, another in respect of the income Tax appeals and another in respect of the Customs Appeals. In appointing the panels, the Chairman shall give due regard to the expertise of the tribunal members

**Justification**

Given the Number of appeals that are filed daily, the responsibility of appointing a panel each time an appeal is filed will be daunting and almost impossible for the chairperson to perform. This is likely to create a backlog in the hearing of appeals.

THAT the Bill be amended in Clause 9 by-

Inserting new subsection 9(4) immediately after subsection 9(3):

9(4) The Tribunal shall hear and determine an appeal within sixty (60) days of the appeal being duly registered at the Tribunal registry.

**Justification**

Effectiveness of the Tribunal is critical in timely settlement of tax disputes which will eventually make tax administration efficient.

**CLAUSE 10:**

THAT the Bill be amended in Clause 10(2)(b) by-



Inserting the words “or a member of the Institute of Certified Accountants of Kenya” between the words “court” and “, to”

#### Justification

The Bill excludes the Civil Procedure Act and as such the expertise required to preside over the Tribunal does not necessarily have to be tied to being an Advocate of the High Court.

#### CLAUSE 11:

THAT the Bill be amended in Clause 11(2) by-

Inserting the word “not” between the words “shall” and “be”

#### Justification

This removes the ambiguity in language.

#### CLAUSE 13:

THAT the Bill be amended in Clause 13(2)(b) by deleting it and replacing it with:

(13)(2)The Appellant shall within fourteen days of the date of filing the notice of appeal submit enough copies as may be advised by the Clerk of

- (a) a memorandum of appeal
- (b) statement of facts and supporting documentation
- (c) the tax decision

#### Justification

To provide clarity on the date the memorandum of appeal and statement of facts should be filed. It also clarifies that the statement of facts should be accompanied by supporting documentation.

THAT the Bill be amended in Clause 13(3)(b) by-

Inserting the words “and the memorandum of appeal” between the words “facts” and “required”

#### Justification

Correction of an omission on the face of the record

#### CLAUSE 15

THAT the Bill be amended by deleting clause 15 (2)

#### Justification

Clause 26 adequately deals with disclosure of documents

This section allows the Tribunal to request the Commissioner to submit documents of its own motion without having been instigated by the tax payer. The Tribunal may be seen

to entering the arena of the dispute and may not be seen to be impartial if it begins to request documents of its own motion.

#### CLAUSE 18

THAT the Bill be amended by deleting clause 18 and replacing thereof as follows:-

(18) Where an appeal against a tax decision has been filed under this Act, the amount of tax in dispute shall not be paid until the hearing and determination of the appeal and subject to the provisions of section 32 of this Act.”

#### Justification

This section presupposes that there is no stay of the Commissioner’s decision until an order is made by the Tribunal. This is in conflict with Section 33 (1) of the VAT Act which provides a statutory stay as the tax payer is only required to pay the tax not in dispute and similarly Section 88(b)(ii) and Section 88(b)(iii) of the Income Tax Act. It will be extremely oppressive to require the tax payer to seek a stay from the Tribunal when the provisions for a stay are already contained in at least two of the tax statutes and it will also increase the work load of the Tribunal members who will be required to hear such applications as a matter of urgency.

#### CLAUSE 21

THAT the Bill be amended in Clause 21 by deleting Sub-clauses (b) and (c) and replacing thereof as follows:-

“21(b) interrupts the proceedings or creates a disturbance, or takes part in creating disturbance in or near a place where the Tribunal is sitting; or

#### Justification

The interruption should be in the nature of a disturbance and not just any interruption.

#### CLAUSE 22

THAT, Clause 22 of the Bill be amended in item (c) by deleting the word “deferred ” and substituting therefore the word “referred”.

#### Justification

The Bill in clause 22(c) has used the word “deferred” –in the following phrase “mentioned or deferred to any sermons served on him”. This is an error and we propose the word “deferred” be deleted and substituted with the word “referred” This is a clean up.

#### CLAUSE 24

Consider leaving some discretionary power to determine the procedure with the Tribunal in matters not prescribed for as is the case in the legacy bodies.

### Justification

This will enhance the access to justice for all taxpayers despite their background. The quasi-judicial nature of the Tribunal should be maintained as this is not a court of law.

As a general, quasi-judicial bodies need not follow strict judicial rules of evidence and procedure. This should be kept in mind in coming up with the rules to avoid matters not proceeding due to technicalities. The discretion in relation to matters of process given to the Tribunal is therefore of great importance in matters before a quasi-judicial body.

### CLAUSE 27

THAT, Clause 27 of the Bill be amended in the sub clause 5 by inserting the words “or uphold” immediately after the word “dismisses”.

### Justification

Sub-clause (5) provides that a person may appeal against dismissal of an appeal under sub clauses (2), (3) and (4). The decision under sub-clause (4) is upholding of an appeal. There is need to include upholding of an appeal, in sub- clause (5) to align it with the decision made under sub- clause (4)

### CLAUSE 32

THAT the Bill be amended in Clause 31 sub-subsection (1) by deleting and replacing thereon as follows:-

32(1) A party to proceedings before the Tribunal may within thirty days after being notified of the decision or within such period as the High Court may allow file a notice of appeal to the High Court and the party so appealing shall serve a notice of appeal on the other party within two days of filing a notice of appeal to the High Court. Provided that in the event the Tribunal does not allow the Appeal, any tax claimed by the Commissioner shall not become payable until the time for lodging an appeal has expired or, where the appeal has been commenced, until the appeal has been determined

### Justification

It is not clear whether the notice of appeal should be filed within 30 days or whether it is the substantive appeal that should be filed. It is also not clear whether there is a stay on the tax in dispute pending the hearing and determination of the Appeal to the High Court.

THAT the Bill be amended in Clause 31 sub-subsection (2) by deleting it and replacing therefor:-



32(2) The High Court shall hear and determine appeals made under this section within thirty (30) days and in accordance with the rules set out by the Chief Justice

Justification

This is aimed at introducing efficiency and effectiveness of the process so as to bring finality on tax disputes within the shortest time possible

CLAUSE 34

THAT the Bill be amended in Clause 34 sub-subsection (1) by deleting it

Justification

It is very onerous to presume an employer guilty for an offence of an employee. This vicarious liability should only be limited to body corporate as provided under Section 34 (2) of this Act.

THAT, the marginal note of clause 34 be amended by deleting the words "officer of companies" and substituting therefore the words "officers of corporate bodies".

Justification

The marginal note to clause 34 of the Bill reads "Liability of employers and officers of the companies" The current marginal note is restrictive since there are many corporate bodies other than companies targeted by the provision – eg. co-operative societies, trusts, churches and non-governmental organizations. In order to address the situation, we propose that the marginal note to clause 34 of the Bill to be amended to read "Liability of officers of corporate bodies" to capture the coverage of the provisions.

CLAUSE 44

THAT the Bill be amended in Clause 44 sub-subsection (1) by deleting the words "six months" and replacing thereof with the words "sixty days".

Justification

Expedites the process of reforming the tax appeals process by eliminating bureaucracies that have be-devilled the current appeals process

MIN.NO. 171/2013:

ANY OTHER BUSINESS

(i) Regional Integration Committee retreat

The Committee was informed that the Regional Integration Committee has invited four Members of the Committee to its workshop that will be held between 31<sup>st</sup> October, 2013 and 3<sup>rd</sup> November, 2013. The following Members were nominated to attend:

- Hon. Shakeel Shabbir Ahmed, MP
- Hon. Joash Olum, MP

- Hon. Nelson Gaichuhie, MP
- Hon. Patrick Makau, MP

(ii) Uwezo Fund

The Committee was informed that the Cabinet Secretary for Devolution and Planning will be appearing before the Committee on Wednesday, 9<sup>th</sup> October, 2013 to discuss about the implementation status of the Uwezo fund. The chairman urged all Members to attend.

(iii) Statements before the Committee

The Chairman informed the Committee that three statements had been sought pursuant to Standing Order 449(2) (c ) and the Committee was required to respond to them within one week. He further informed them the sought statements are in connection with the status tax remittances by the Aga Khan Hospital, Implementation status of Uwezo Fund and status of enactment of the Scrap Metal Bill. The Committee resolved to discuss the matter once the responses from the relevant government bodies on the matter have been received.

(iv) pre-publication Scrutiny of the VAT (Amendment) Bill, 2013

The Committee was informed that a legislative proposal to amend the VAT Act, 2013 had been submitted to the Committee for Pre-Public Scrutiny. The Bill is sponsored by the Hon. John Mbadi, MP. The Committee resolved to invite the Attorney General, the Commission on Implementation of the Constitution and the Kenya Law Reform Commission to its meeting on Tuesday 15<sup>th</sup> October, 2013 to discuss the matter. The Secretariat was therefore asked to make necessary arrangements for the same.

MIN.NO. 172/2013:            ADJOURNMENT

There being no any other business, the Chairman adjourned the meeting at 1:33 P.M.

Chairman.....Date.....