



THE CONSTITUTION OF KENYA

REFUSAL TO ASSENT TO THE FINANCE BILL, 2018

MEMORANDUM

By His Excellency the Honourable Uhuru Kenyatta, President
and Commander-in-Chief of the Kenya Defence Forces.

Submitted to the Speaker of the National Assembly.

WHEREAS a Bill entitled “A Bill for An Act of Parliament to amend the law relating to various taxes and duties and for matters incidental thereto”, the short title of which is “The Finance Bill, 2018”, was passed by the National Assembly on the 30th August, 2018;

AND WHEREAS the Finance Bill, 2018, was presented to me for assent, in accordance with the provisions of the Constitution, on the 13th September, 2018;

NOW THEREFORE, in exercise of the powers conferred on me by Article 115 of the Constitution, I refuse to assent to the Finance Bill, 2018 for the reasons set out hereunder:

**INSERTION OF A NEW DEFINITION IN SECTION
2 OF THE INCOME TAX ACT**



The definition of the term “winnings” in section 2 of the Income Tax Act, reads as follows:

“winnings” means the positive difference between payouts made and stakes placed in a given month, for each player, payable to punters by bookmakers licensed under the Betting, Lotteries and Gaming Act;

It is noted that the definition limits the tax charged to the net payments. Further, reference to bookmakers also limits the tax to winnings from betting only. No tax will therefore be charged on the winnings from lotteries, prize competition and gaming hence narrowing the tax base.

RECOMMENDATION:

For the foregoing reasons, I recommend that a new Clause 2A be inserted in the Bill immediately after Clause 2 to read as follows:

Amendment to Section 2 of Cap. 470	2A. Section 2 of the Income Tax Act is amended by deleting the definition of the term “winnings” and substituting therefor the following new definition: <i>“winnings” include winnings of</i>
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	<i>any kind and a reference to the amount or to the payment of winnings shall be construed accordingly”</i>
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CLAUSE 18

The Bill under Clause 18 proposes to amend section B of Part I of the First Schedule to the Value Added Tax Act, 2013 by deleting the expression "1st September, 2016" appearing in paragraph (2) and substituting therefor the expression "1st September, 2018" to read as follows:

Notwithstanding paragraph (1), the exemption shall be extended by a further two years from the 1st September, 2018.

The import of this provision is that the transition period for exemption of petroleum products is extended to the year 2020. This means that VAT shall not be charged on these products in the current financial year affecting the estimated revenue of Kshs. 35 billion expected to be collected by the end of June, 2019.

The figure is already factored in the revenue estimates for FY 2018/19 Budget. In this respect, further extension of this exemption will create a huge budget deficit that may require



use of other measures to bridge. In the course of approval of the Finance Bill, 2018, the National Assembly removed other policy measures that had revenue impact. In sum, the Finance Bill, 2018 as currently approved by Parliament has created a funding gap of Kshs 48.6 billion. This is in addition to Kshs. 18.9 billion in the Appropriation Act, 2018. We are therefore looking at a budget funding gap of Kshs. 67.5 billion in the FY 2018/19 budget from the two events.

RECOMMENDATION:

For the foregoing reasons, I recommend that Clause 18(b) of the Bill be deleted.

INSERTION OF A NEW PARAGRAPH IN SECTION 5(2) OF THE VALUE ADDED TAX ACT, 2015

VAT is a broad-based tax and should therefore have limited exemptions in order to reduce or eliminate revenue leakages in the VAT system. Imposition of VAT on vatable supplies has numerous benefits including:-

- (i) The suppliers of products are able to claim input VAT which reduces their costs and therefore make their supplies cheaper. This benefit is expected to trickle down to the final



consumers of such supplies. In addition, under the current VAT Act, most of the VAT associated with petroleum products is not claimable due to the exempt status of the products. For example, VAT incurred by distributors of petroleum products to bring the exempt supplies to sale cannot be recovered.

- (ii) Imposition of VAT also helps the Government widen the tax base and raise more revenue to deliver services to the public. Such services include infrastructure, education, affordable healthcare among others. As you are aware Government has invested in these services that have benefited all Kenyans.
- (iii) Further, the main objective of modernizing the tax laws was to reduce the number of exempt items and therefore ensure equity in treatment of taxable supplies.

The imposition of VAT on petroleum products is a widely accepted practice in the VAT Systems. Progressive countries in Africa have enhanced their domestic resource mobilization to improve revenues and mainly through taxation. Tax revenues help the Government to finance expenditures, develop infrastructure and provide social services.

Countries which have low domestic resource mobilization largely depend on grants and loans to finance part of their



expenditure. In sub Saharan Africa, we have various countries that charge VAT on petroleum products. Examples of the countries include: South Africa – at the rate of 14%; Ghana – at the rate of 15%; Nigeria – at the rate of 5%.

Unlike the other sectors in the Kenyan economy, the Government pursuant to section 102 (w) of the Energy Act and the Energy (Petroleum Pricing) Regulations, 2010, regulates the retail prices of petroleum products. The legislation empowers the Energy Regulatory Commission (ERC) to determine the maximum retail pump prices of Super petrol, Diesel and Kerosene taking into account key cost components including taxes and levies. This therefore ensures that the interests of consumers, investors and stakeholders are protected in order to avoid escalation of petroleum pump prices when the petroleum products are vatable.

VAT on the petroleum products is supposed to supplement domestic revenue mobilisation. This revenue mobilisation will enable the country fund most of the infrastructure projects. The vatability of the petroleum products will limit exemptions and make our VAT system more efficient and productive by reducing or eliminating revenue leakages. Kenya is not levying VAT on Petroleum products to pay her



debt. The revenues received will be used to fund Government programmes and projects in FY 2018/19 budget. Kenya continues to upgrade the quality of her infrastructure particularly roads, airports, sea ports, rail (Standard Gauge Railway), energy generation among others. The quality of this infrastructure is not comparable to those found in most countries in the sub region and sub Saharan Africa. In addition, Kenya has substantially invested in the education sector under the free primary education and free day secondary education. Further, the country has improved health facilities in most of the hospitals in the country, invested heavily in the security sector among others.

RECOMMENDATION:

In view of the above reasons, I recommend that section 5 of the Value Added tax Act, 2013 be amended by inserting Clause 18A in the Bill to provide as follows:

**Amendment
of section 5 of
No. 35 of
2013.**

18A. Section 5 of the Value Added Tax Act, 2013 is amended in subsection (2) by inserting the following new paragraph immediately after paragraph (a)—



(aa) in the case of goods listed in section B of Part I of the First Schedule, eight percent (8%) of the taxable value, effective from the date of assent:

Provided that –

(i) the taxable value in respect of these goods shall exclude excise duty, fees and other charges; and

(ii) despite section 1 of the Finance Act, 2018, this paragraph comes into effect upon enactment of the Supplementary Appropriation Act.

**PROPOSED AMENDMENTS TO PART I OF
THE FIRST SCHEDULE TO THE EXCISE
DUTY ACT, 2015**



Clause 31(a)(iii) of the Bill proposes to delete the item on “motor vehicles excluding locally assembled motor vehicles and school buses for use by public schools of tariff heading 87.02.87.03 and 87.04” and rate of excise duty thereof and substituting therefor the following new items:

<i>Description</i>	<i>Rate of Excise Duty</i>
Motor vehicle (excluding locally assembled motor vehicles, school buses for use by public schools, and motor vehicle of tariff no. 8703.24.90) of tariff heading 87.02,87 and 87.04	20%
Motor vehicles of tariff no. 8703.24.90 and 8703.33.90	30%

My Government had proposed an additional item relating to sugar confectionery. This item was dropped by the National Assembly prior to the passage of the Bill. The purpose of this item was to raise extra revenue to finance the 2018/19 budget expenditures keeping within the provisions of section 40(5)(a) of the Public Finance Management Act, 2012. That section requires that any amount of revenue raised be consistent with the approved fiscal framework and the Division of Revenue Act. Failure to include this item will therefore adversely affect the revenues to be collected making it



inconsistent with the approved fiscal framework and provisions of the Division of Revenue Act, 2018.

RECOMMENDATION:

For the foregoing reasons, I recommend that Part I of the First Schedule of the proposal be amended by adding the following new item:

<i>Description</i>	<i>Rate of Excise Duty</i>
Sugar confectionery (including white chocolate) of tariff heading 17.04; chocolate blocks, slabs or bars of tariffs nos.1806.31.00, 1806.32.00 and 8806.90.00	Shs. 20 per kg

**PROPOSED AMENDMENTS TO PART II OF
PARAGRAPH 3 OF THE FIRST SCHEDULE
TO THE EXCISE DUTY ACT, 2015**

Clause 31(b) of the Bill proposes to delete paragraph 3 and substituting therefor the following new paragraph:

Excise duty on fees charged for money transfer services by cellular phone service providers shall be twelve percent of the excisable value



Further to the above amendments, the proposal by my Government with regard to paragraphs 5 and 6 were deleted. The deletion of paragraphs 5 and 6 will lead to financing deficit of Kshs. 7.6 billion. This implies that the Government will have to find alternative means of generating an additional Kshs. 7.6 billion to fill the revenue shortfall that will result from scrapping of this tax by the National Assembly. Further, this will be in conflict with section 40 (5) (a) of the Public Finance Management Act that requires any recommendations made by the relevant committee of the National Assembly or adopted by the National Assembly on revenue matters shall ensure that the total amount of revenue raised is consistent with the approved fiscal framework and the Division of Revenue Act, 2018.

RECOMMENDATION:

For the foregoing reasons, I further recommend that Part II of the First Schedule be amended:

- (i) by deleting paragraph 1 and substituting therefor the following new paragraph:**

Telephone and internet data services shall be charged excise duty at a rate of fifteen percent of their excisable value.



- (ii) by deleting paragraph 2 and substituting therefor the following new paragraph:

Excise duty on fees charged for money transfer services by banks, money transfer agencies and other financial service providers shall be twenty percent of their excisable value.

- (iii) by deleting paragraph 4 and substituting therefor the following new paragraph:

Excise duty on other fees charged by financial institutions shall be twenty percent of their excisable value.

INSERTION OF NEW SECTIONS IN THE BETTING, LOTTERIES AND GAMING ACT

The Income Tax Act was amended to introduce taxation on winnings at the rate of 20%. Subsequently, the taxation of betting, gaming, lotteries and prize competition was proposed to be reduced from 35% to 15% in order to enhance equity and fairness.



RECOMMENDATION:

For the foregoing reasons, I recommend that new sections be inserted in the Act, as follows:

Amendment
of section 29
A of Cap.
131. Section 29A of the Betting, Lotteries
and Gaming Act is amended in
subsection (1) by deleting the expression
“thirty-five” and substituting therefor
the expression “fifteen”.

Amendment
of section 44
A of Cap.
131. Section 44A of the Betting, Lotteries
and Gaming Act is amended in
subsection (1) by deleting the expression
“thirty-five” and substituting therefor
the expression “fifteen”.

Amendment
of section 55
A of Cap.
131: Section 55A of the Betting, Lotteries
and Gaming Act is amended in
subsection (1) by deleting the expression
“thirty-five” and substituting therefor
the expression “fifteen”.

Amendment
of section 55
A of Cap.
131 Section 59B of the Betting, Lotteries
and Gaming Act is amended in
subsection (1) by deleting the expression
“thirty-five” and substituting therefor
the expression “fifteen”.



INSERTION OF NEW DEFINITIONS IN SECTION 2 OF THE EMPLOYMENT ACT

The proposed section 31A uses terms that are technical in nature that require to be defined for clarity.

RECOMMENDATION:

For the foregoing reasons, I recommend that Section 2 of the Act be amended by defining the following terms –

“employer contribution” means the employer’s contribution payable into the National Housing Development Fund;

“employee contribution” means a contribution payable under this Act for his or her benefit;

“employee earnings” means the taxable amount determined under the Income Tax Act for purposes of levying income tax on the employee emoluments.

“National Housing Development Fund” means the Fund established under section 6 of the Housing Act.

INSERTION OF A NEW SECTION 31A TO THE EMPLOYMENT ACT

In order to support the housing pillar of the Government’s Big Four Plan, the Government had



proposed to introduce a contributory scheme where both the employee and the employer would contribute to the National Housing Development Fund. The objective of the proposed scheme is to enable Kenyans get access to affordable housing upon maturity of their individual schemes. Given that many Kenyans do not own a house, removal of this proposal from Employment Act adversely affects their dream of being house owners. This amendment to the Finance Bill, 2018 by the National assembly is a major drawback to the Government's Big Four Plan on affordable housing.

RECOMMENDATION:

For the foregoing reasons, I recommend that the Act be amended as follows –

The Employment Act is amended by inserting the following new section:

**Contributions to
the National
Housing
Development
Fund.**

31A. (1) An employer shall pay to the National Housing Development Fund in respect of each employee –

- (a) the employer's contribution at one point five per centum of the employee's monthly basic salary; and**
- (b) the employee's contribution at one point five per centum of the monthly basic employee's salary:**



Provided that the sum of the employer and employee contributions shall not exceed five thousand shillings monthly.

(2) The benefits to an employee shall accrue as follows –

(a) for employees who qualify for affordable housing, the contributions accrue to the employee and shall be used to finance the purchase of a house under the affordable housing scheme; or

(b) for employees who are not eligible for affordable housing, upon the expiry of fifteen years from the date of the start of making the contributions, or after the attainment of retirement age, whichever is sooner –

(i) a transfer of their contributions to a pension scheme registered with the Retirement Benefits Authority;

(ii) a transfer of their contributions to any person registered and eligible for affordable housing under the National Housing Development Fund; or



- (iii) a transfer of their contributions to their spouse or dependent children; or
- (iv) to receive their contributions in cash;

Provided that contributions paid out in cash shall be subject to tax at the prevailing rates.

- (3) All contributions shall get a return based on the return on the Fund.
- (4) The employer shall remit both employee and employer contributions to the National Housing Development Fund before the ninth day of the following month.
- (5) If the contributions due under this section are not paid on or before the day on which the payments are due, a penalty of five percent of the contributions shall be payable by the employer for each month or part thereof during which the contributions remain unpaid, and any such penalties shall be recoverable as a sum due and payable to the National Housing Development Fund.
- (6) This section shall become effective upon the Gazettement of Regulations prescribing the requirements for qualification to the scheme by the Cabinet Secretary responsible for housing in consultation with the Cabinet Secretary responsible for



finance.

INSERTION OF A NEW SECTION TO THE MISCELLANEOUS, FEES AND LEVIES ACT

Apart from causing pollution and damaging vehicle engines due to the use of adulterated fuel, fuel adulteration has also denied the Government revenue to fund its programs.

Price difference between kerosene and diesel is the main motivation for fuel adulteration. In order to eliminate this vice, there is need to harmonize the price of kerosene to that of diesel by introducing an anti-adulteration levy.

RECOMMENDATION:

For the foregoing reasons, I recommend that the Act be amended as follows –

Insertion of
Section 8A of
No. 29 of 2016

The Miscellaneous Fees and Levies Act is amended by inserting the following new section 8A immediately after section 8 –

Anti-
adulteration
levy

8A.(1) There shall be paid a levy to be known as the anti-adulteration levy, on all illuminating kerosene imported into the country for home use.

(2) The levy shall be at the rate of eighteen shillings per litre of the customs value of the illuminating kerosene and shall be paid by the



importer at the time of entering the illuminating kerosene into the country.

FURTHER PROPOSALS IN RELATION TO THE FINANCE ACT, 2018

AMENDMENT TO THE APPROPRIATION ACT, 2018

The proposed amendments in the Finance Bill under Clause 18 which seeks to amend section B of Part I of the First Schedule to the Value Added Tax Act, 2013, effectively extending the exemption for a further two years shall, together with the additional expenditures in the Appropriation Act, 2018 result in a major financing gap of the budget. In addition, the estimated revenues for FY2017/18 submitted together with the budget estimates and the Finance Bill turned out to be Kshs. 37 billion higher than the actual estimates owing to the weak revenue performance in the fourth quarter of the financial year. This has further widened the financing gap. The amendments that I have proposed reduce the financing gap but do not eliminate the gap. To this end, the National Assembly needs to effect a reduction in the expenditure as contained in the Appropriation Act, 2018 by at least Ksh. 55 billion.



RECOMMENDATION

For the foregoing reasons, I recommend that National Assembly amends the Appropriation Act, 2018 by way of Supplementary Appropriation Act by reducing the expenditure of the National Government by at least Kshs 55 billion.

Dated the 13th 9 September, 2018.

UHURU KENYATTA,
President.