

Approved for tabling.

REPUBLIC OF KENYA



Ben
SNA
13/5/2021

THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT- FIFTH SESSION (2021)

COMMITTEE ON DELEGATED LEGISLATION

REPORT ON THE CONSIDERATION OF THE EXEMPTION
FROM INCOME TAX FOR JAPANESE COMPANIES,
JAPANESE CONSULTANTS AND JAPANESE EMPLOYEES

(Legal Notice No. 15 of 2021)

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

MAY, 2021

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

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1.0 PREFACE

1.1 Establishment and Mandate of the Committee

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

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

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

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

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

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

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

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

2.0 CONSIDERATION OF THE EXEMPTION FROM INCOME TAX FOR JAPANESE COMPANIES, JAPANESE CONSULTANTS AND JAPANESE EMPLOYEES

2.1 Introduction

5. The legal basis for granting an exemption as contained in Legal Notice No. 15 of 2021 is stipulated in section 13(2) of the Income Tax Act, Cap 470 which empowers the Cabinet Secretary to exempt certain income tax.
6. Section 13(2) of the Income Tax Act (Cap 470) empowers the Cabinet Secretary responsible for the National Treasury, by Notice in the Gazette, to provide that any income or class of income which accrued in or was derived from Kenya be exempted from tax to the extent specified in such a Notice and that any such exemption shall cease to have effect either generally or to the extent specified in the Notice.
7. Further, that where the Cabinet Secretary issues such a Notice, it has to be laid before the National Assembly without unreasonable delay.
8. ***The Act also provides that if a resolution is passed by the Assembly within twenty days on which it next sits after the notice is so laid that the notice be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the issuing of a new notice.***
9. The House, therefore, has to pronounce itself within the statutory timelines and if the Notice is expressly approved or (is not annulled) then it shall be deemed to have been impliedly approved.
10. Legal Notice No. 15 of 2021 seeking to exempt Japanese companies, Japanese consultants and Japanese employees was published on 26th February 2021 submitted to the Clerk of the National Assembly on 9th March, 2021 and laid before the House on 23rd March, 2021 in accordance with section 11 of the Statutory Instruments Act, 2013. It was then referred to the Committee on Delegated Legislation for consideration, pursuant to section 12 of the SI Act and Standing Order 210 of the National Assembly.

2.2 Object and Purpose of the Exemption

11. The exemption is in respect of income accruing in or derived from Kenya by Japanese companies, consultants and employees involved in the projects under the Financing Agreements signed between the Government of Kenya and Government of Japan.
12. The policy and requirement of the Government of Japan is to have Japanese companies, consultants and employees involved in the implementation of any project financed by the Government of Japan exempted from tax. This is not limited to Kenya but is the requirement by the Government of Japan for all financing agreements between the Government of Japan and any other Government. All Agreements signed between Japanese Government and the Government of Kenya contain this exemption.
13. The specific Agreements are contained in the Schedule to the Exemption Notice below—

No.	AGREEMENT	DATE	SCHEME	AMOUNT
16.	Mombasa Special Economic Zone Development Project (1)	27 th February, 2020	Loan	JPY 10.077 billion

2.3 Conferring with the Regulation Making Authority

14. In accordance with section 16 of the Statutory Instruments Act, 2013, the Committee held a virtual meeting with the regulation making authority, i.e. the Cabinet Secretary for the National Treasury & Planning on 15th April, 2021.
15. The Cabinet Secretary assured the Committee that the overall benefits to be derived from effective and efficient implementation of the projects out way the tax foregone. In addition, the income from the jobs created from the projects and the income derived from the expenditure on the said projects generates revenue that is far above the tax foregone as a result of the exemption.
16. The Members were concerned that the exemption seems discriminatory and stands to benefit the Japanese nationals more than the Kenyan citizens considering that local companies are not exempted from taxes, yet the Japanese enjoy expatriate benefits. In addition, Kenyan companies doing business in Japan do not enjoy similar exemptions.
17. Members also sought to know the status of each of the Agreements earmarked for exemption. Documents were submitted indicating that four (4) of the sixteen (16) projects are grants while the rest are loan agreements.

3.0 COMMITTEE OBSERVATIONS

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

3.1 Statutory Timelines

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

3.2 Public Participation

- 2) THAT, the Ministry submitted both before the Committee and in their documentation forwarded to the National Assembly that the Legal Notice is an understanding between the two Governments and that public participation may, therefore, not apply.
- 3) Having considered the above averment, the Committee subjected the Notice to the test specified in the Statutory Instruments Act, 2013, in respect thereto and noted that –

ANNEXURES

- 1. Adoption Schedule**
- 2. Legal Notice No. 15 of 2021 and the Explanatory Memorandum**
- 3. Committee Minutes**

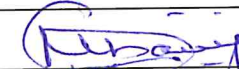
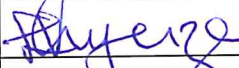
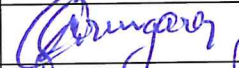
COMMITTEE ON DELEGATED LEGISLATION

ADOPTION SCHEDULE

Report on the Consideration of the Exemption from Income Tax for Japanese Companies, Consultants and Japanese Personnel (LN 15 of 2021)

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

DATE: 12 May 2021

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



REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING
 PAPERS LAID

Telegraphic Address: 22921
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DATE: 23 MAR 2021

DAY
 Tues

THE NATIONAL TREASURY
 P.O. Box 30007-00100

NAIROBI

Ref. No. ZZ/TS/GP/30

4th March, 2021

Michael Sialai, EBS
 Clerk of National Assembly
 Parliament Building
NAIROBI

Dear

Sialai,

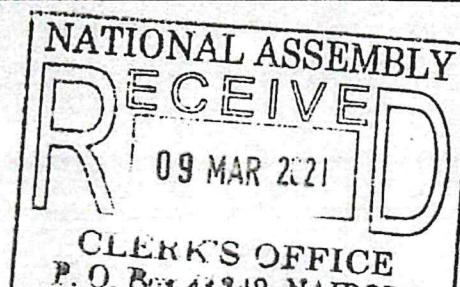
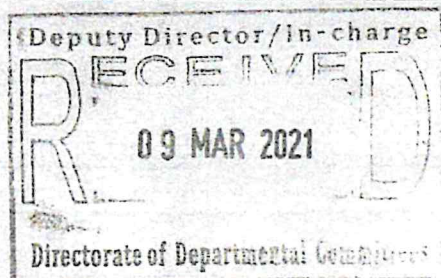
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9/3/2021/23/03/21

RE: EXEMPTION FROM INCOME TAX FOR JAPANESE COMPANIES, CONSULTANTS AND JAPANESE PERSONNEL

The following Financing Agreements signed between the Government of Kenya and the Government of Japan provide for exemption from tax in respect of income accrued in or derived from Kenya by Japanese Companies, Consultants and Japanese nationals involved in implementation of those projects.

In order to facilitate processing of the exemptions as provided in the listed Financing Agreements, Legal Notice No. 15 was published on 26th February, 2021 and a memorandum prepared.

	Agreement	Date Signed
1	The Project for the Improvement of Power Distribution System in and around Nakuru City and around Mombasa City	18/9/2020
2	The Project for the Infrastructure Development in Mombasa Special Economic Zone at Dongo Kundu Area	27/2/2020
3	The Project for Enhancing Trade Facilitation and Border Control Capacity in East Africa	6/11/2019
4	The Project for Human Resource Development Scholarship	18/9/2020



MEMORANDUM

PART I

Name of Statutory Instrument : The Income Tax Act

Name of Parent Act : Income Tax Act

Enacted Pursuant to : Section 13(2) of the Income Tax Act (Cap 470)

Name of the Ministry/Department : The National Treasury and Planning

Gazetted on : 26th February, 2021

PART II

1.0 Purpose of the Statutory Instrument

The objective of this Memorandum is to submit the Legal Notice No. 15 of 2021 for tabling in the National Assembly in accordance with the provisions of Section 11 of the Statutory Instruments Act, 2013.

2.0 Legislative Context

The Legal Notice on the Income Tax Act, 15 is made pursuant to Section 13(2) of the Income Tax Act, (Cap. 470) which empowers the Cabinet Secretary to exempt tax in respect of income accrued in or derived from Kenya by Japanese Companies, Consultants and Japanese nationals involved in implementation of those projects.

In order to facilitate processing of the exemptions as provided in the listed Financing Agreements, Legal Notice No. 15 was published on 26th February, 2021.

OK

SPECIAL ISSUE

Kenya Gazette Supplement No. 17

2nd February, 2021

Legislative Supplement No. 70

LEGAL NOTICE NO. 15

THE INCOME TAX ACT

(Cap. 476)

EXEMPTIONS

IN EXERCISE of the powers conferred by section 8 of the Income Tax Act, the Cabinet Secretary for National Treasury and Planning directs that the income which accrued in or was derived from Kenya by Japanese companies, Japanese consultants and Japanese employees associated with the projects under the Financing Agreements specified in the second column of the Schedule that were signed on the corresponding dates specified in the second column of the Schedule shall be exempt from income tax to the extent specified in the Financing Agreements.

SCHEDULE

S/No	Agreement	Date
1	The Project for the improvement of the Power Distribution System in and around Nakuru City and around Mombasa City	18th September, 2020
2	The Project for Infrastructure Development in Mombasa Special Economic Zone and Changamwe Kundu Area	25th February, 2020
3	The Project for Enhancing Trade Facilitation in South Asia	18th September, 2020
4	The Project for Human Resource Development Scholarship	18th September, 2020
5	Health Sector Policy Loan for Attainment of the Universal Health Coverage (Phase 2)	27th August, 2020
6	Olkaria I Unit 4 Geothermal Power Project	31st March, 2010
7	Mwea Irrigation Development Project	16th August, 2010
8	Olkaria - Lessos - Kiunga Transmission Lines Project	10th December, 2010
9	Mombasa Port Area Road Development Project (Phase 1)	2nd June, 2012
10	Mombasa Port Area Road Development Project (Phase 2)	4th July, 2017
11	Mombasa Port Development Project (Phase 1)	20th November, 2007
12	Mombasa Port Development Project (Phase 2)	9th March, 2015
13	Olkaria V Geothermal Power Development Project	9th March, 2016
14	Olkaria I Unit 1, 2 and 3 Geothermal Power Plant Rehabilitation Project	16th March, 2018

TABLED		THE NATIONAL ASSEMBLY PAPERS LAID
BY:	LDN Hon. Amos Kimani	
DATE:	23 MAR 2021	DAY Tuesday

98

Kenya Subsidiary Legislation, 2021

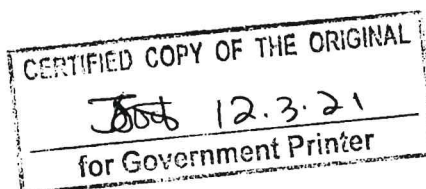
<i>S/No.</i>	<i>Agreement</i>	<i>Date</i>
15.	Mombasa Gate Bridge Construction Project (1)	5th December, 2019
16.	Mombasa Special Economic Zone Development Project (1)	27th February, 2020

Dated the 25th February, 2021.

UKUR YATANI,
Cabinet Secretary for National Treasury and Planning.

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LAW REPORTING
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SPECIAL ISSUE

97

Kenya Gazette Supplement No. 17

26th February, 2021

(Legislative Supplement No. 10)

LEGAL NOTICE NO. 15

THE INCOME TAX ACT

(Cap. 470)

EXEMPTION

IN EXERCISE of the powers conferred by section 13 (2) of the Income Tax Act, the Cabinet Secretary for National Treasury and Planning directs that the income which accrued in or was derived from Kenya by Japanese companies, Japanese consultants and Japanese employees involved in the projects under the Financing Agreements specified in the second column of the Schedule that were signed on the corresponding dates specified in the second column of the Schedule shall be exempt from income tax to the extent specified in the Financing Agreements.

SCHEDULE

<i>S/No.</i>	<i>Agreement</i>	<i>Date</i>
1.	The Project for the Improvement of the Power Distribution System in and around Nakuru City, and around Mombasa City	18th September, 2020
2.	The Project for Infrastructure Development in Mombasa Special Economic Zone near Dongo Kundu Area	27th February, 2020
3.	The Project for Enhancing Trade Facilitation and Border Control Capacity in East Africa	6th November, 2019
4.	The Project for Human Resource Development Scholarship	18th September, 2020
5.	Health Sector Policy Loan for Attainment of the Universal Health Coverage (Phase 2)	27th August, 2020
6.	Olkaria I Unit 4 Geothermal Power Project	31st March, 2010
7.	Mwea Irrigation Development Project	16th August, 2010
8.	Olkaria – Lessos – Kisumu Transmission Lines Project	10th December, 2010
9.	Mombasa Port Area Road Development Project (Phase 1)	2nd June, 2012
10.	Mombasa Port Area Road Development Project (Phase 2)	4th July, 2017
11.	Mombasa Port Development Project (Phase 1)	20th November, 2007
12.	Mombasa Port Development Project (Phase 2)	9th March, 2015
13.	Olkaria V Geothermal Power Development Project	9th March, 2016
14.	Olkaria I Unit 1, 2 and 3 Geothermal Power Plant Rehabilitation Project	16th March, 2018

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

PRESENT

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

ABSENT WITH APOLOGY

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

IN-ATTENDANCE

National Assembly Secretariat

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

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

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

Way Forward

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

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

ADJOURNMENT

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

Signed:.....

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

HON. KASSAIT KAMKET, M.P.

(CHAIRPERSON)

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

PRESENT

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

ABSENT WITH APOLOGY

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

IN-ATTENDANCE

National Assembly Secretariat

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

environment, energy, wildlife and meteorology.

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

2) Consultation / Public participation

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

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

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

Committee Resolution

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

MIN.NO. /NA/CDL/2021/107

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

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

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

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

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

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

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

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

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

Way Forward

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

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

ANY OTHER BUSINESS

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

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

ADJOURNMENT

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

Signed:.....

Date.....

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

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

PRESENT

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

ABSENT WITH APOLOGY

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

IN-ATTENDANCE

National Assembly Secretariat

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

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

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

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

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

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

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

1) LEGAL BRIEF ON PETROLEUM PRICING PARAMETERS

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

Legal Framework

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Source: KRA

Committee Observations

The Committee made the following observations –

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

Way Forward

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

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

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

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

No other business arose.

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

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

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

PRESENT – VIRTUAL

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

ABSENT WITH APOLOGY

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

IN-ATTENDANCE

National Assembly Secretariat

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

The National Treasury and Planning (Virtual Attendance)

CONSULTANTS & EMPLOYEES (L.N. NO. 15 OF 2021)

The Cabinet Secretary informed the Committee that –

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

Plenary Discussions

The Committee raised the following concerns –

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

Way Forward

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

- 5) Implementation will be monitored by the Kenya Revenue Authority and may be reviewed as the target institution improves profitability.

Plenary Discussions

The Committee raised the following concerns –

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

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

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

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

Way Forward

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

Legal Notice 15 of 2021: Exemption from Income Tax for Japanese Companies, Consultants and Employees

- i. Brief on the Agreement(s) between the Government of Kenya and the Japanese Government including the date(s) they were signed, what they seek to achieve, projects to be undertaken, project(s) duration and copies of such Agreement(s);
- ii. Clarification on the loans and grants including the percentage of each; and
- iii. List of countries with similar exemptions including ongoing negotiations for such exemptions.

Legal Notice No. 27 of 2021: Exemption from Income Tax by an Airline in which the Government of Kenya owns at least 45% of its shares and its subsidiaries

- i. List of Kenya Airways' subsidiary companies and shareholding in each of the companies;
- ii. How the exemption will affect Kenya Airways Partners e.g. KLM and Air France; and

MIN.NO. /NA/CDL/2021/091

ANY OTHER BUSINESS

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

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

ADJOURNMENT

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

Signed:.....

HON. KASSAIT KAMKET, M.P.

(CHAIRPERSON)

Date.....

15th April, 2021