



## **ICPAK SUBMISSIONS**

**ON**

**THE FISCAL BUDGET FOR THE FINANCIAL YEAR 2015-2016**

---

**The Institute of Certified Public Accountants of Kenya**

## TABLE OF CONTENTS

PREAMBLE .....	0
INCOME TAX PROPOSALS .....	2
2.1 Re-Introduction Of Capital Gains Tax .....	2
CORPORATION TAXES .....	5
3.1 Tax losses .....	5
3.2 Refund of tax overpaid – Section 105 .....	6
3.3 Capping of interest on Unpaid Tax – Section 94 (1) .....	7
VAT PROPOSALS .....	9
VAT REGULATIONS 2014 .....	13
IMPLEMENTATION OF THE EAST AFRICAN COMMUNITY COMMON MARKET PROTOCOL .....	22
MISCELLANEOUS PROPOSALS.....	23

## PREAMBLE

This submission provides an assessment of fiscal matters that the Institute believes are critical to the budget considerations FY 2015/2016. Taxation is indeed one of primary fiscal tools used by government to achieve its fiscal objectives. The Public Financial Management Act, 2012 entrenches fiscal responsibility as foundation of sound financial management in the Public sector. It is therefore critical for government to balance the need to attract investment that fosters growth while generating adequate revenues to fund budgeted activities.

The Budget Policy Statement (BPS) provided an assessment of the current state of the economy and the financial outlook over the medium term. This included macroeconomic forecasts and financial projections on Government revenue, expenditures and borrowing for the next financial year over the medium term. We have therefore utilized the provisions of the BPS and the proposed tax reforms to guide the submissions herein.

*The review of the Income Tax Act enacted in 1973.*

The submissions herein propose to simplify the administration of income tax while modernizing the tax system to facilitate a responsive tax regime that aligns to the changing business environment and supports investment and growth in the economy.

*The enactment of the Tax Procedure Bill, 2014.*

The Bill seeks to provide uniform procedures for the administration of Income Tax, VAT and excise duty while harmonizing tax procedural rules. This will align the current tax legislations to international practice by having consolidating the tax laws in one law. These submissions aim to reduce the cost of compliance and ease tax administration.

*Excise Duty Bill*

This bill aims to align Kenya's tax procedure to international best practice by simplifying and modernizing the administration and management of excise duty in line with the EAC Customs Law.

*Capital Gains Tax (CGT)*

Following a 30 year suspension, the Finance Act 2014 reintroduced CGT as a tax chargeable on gains accruing from the transfer of property situated in Kenya. While we welcome this move, these submissions aim to contribute to the development of an implementation strategy that insulates business interest while broadening the tax base.

*The Tax Appeals Tribunal 2013 Act*

This act seeks to consolidate the existing tax tribunals - Income Tax Tribunal, VAT Tribunal, the Customs and Excise Tribunal and the Local Committee (Income Tax) - into one arbitration body. These submissions aim to strengthen the tax dispute resolution mechanism.

*Implementation of the VAT Act 2013*

The VAT Act aimed to reform the legal framework governing administration and enforcement of the VAT regime in Kenya. The 2015 World Bank study on ease of doing business ranked Kenya at 102 out of 189 countries on the ease of paying taxes. The VAT regulations will play a critical role in improving country's global competitiveness attracting global and regional investment.

## INCOME TAX PROPOSALS

### 2.1 RE-INTRODUCTION OF CAPITAL GAINS TAX

The Institute welcomes the reintroduction of the Capital Gains Tax (CGT) which was historically chargeable from 1975 until its suspension in 1985. The current rate of five per cent (5%) on capital gains is reasonable given its intention to broaden the tax base, increase tax revenue and collection as well as align Kenya with its neighboring countries. Nonetheless, there is need to develop a good implementation strategy to prevent a slump in the property market, money market and other crucial sectors of the economy.

We recommend the following:

#	Issue of Concern	Proposal
1.	<b>Indexation</b> <ul style="list-style-type: none"> <li>The introduction of CGT has not taken into account indexation of values due to inflationary increases.</li> <li>While the Eight Schedule does provide some mechanism of indexation of investment shares (i.e. those traded on the NSE), the indexation is based on the market values at 13<sup>th</sup> June 1975.</li> <li>Moreover, Part III of the Schedule on indexation of other property has been deleted in its entirety.</li> <li>The historical nature of property acquisitions and the 7 year timeframe to maintain records under the Income Tax Act could prove challenging for the tax payer to verify the adjusted cost (or historical cost) supported by existing documentation.</li> </ul>	<p>The two options available include:</p> <ol style="list-style-type: none"> <li>Allowing for indexation using the Retail Price Index; or</li> <li>Allowing the market values as at 31<sup>st</sup> December 2014 to be the base cost for the purposes of determining the adjusted cost.</li> </ol>

#	Issue of Concern	Proposal
2.	<b>Transfer of Land</b> <ul style="list-style-type: none"> <li>The base value used in 1975 and has not been adjusted when re-introducing CGT. According to Schedule 1, Para 36, the transfer of land with a transfer value not exceeding <b>Shs 30,000</b> is <b>exempt</b> from CGT.</li> </ul>	<ul style="list-style-type: none"> <li>Adjust the value to an exemption limit of <b>Shs 1,000,000</b> to take into account inflation.</li> </ul>
3.	<b>Exemption of Groups undertaking Restructuring</b> <ul style="list-style-type: none"> <li>According to Schedule 8 Para 13 – Exemption from CGT is considered for groups undertaking restructuring and should be in public interest.</li> <li>The growing complexity of business structures attracts inward and outward investments restructuring. However in the case where there is internal reorganisation that does not result in the sale of assets and transfer of cash, CGT should be exempted.</li> </ul>	<ul style="list-style-type: none"> <li>The aim of CGT is to tax realized gains on sale, the Eight Schedule therefore needs to be amended to allow for internal reorganization where the ultimate ownership of the group does not change.</li> <li>For consistent application, the exemption should mirror the provisions on Stamp Duty, which exempts the transfer of land from individuals to a family owned company.</li> </ul>
4.	<b>Compensating tax</b> <ul style="list-style-type: none"> <li>While Section 34 (j) sets the CGT rate at 5% as a final tax, there have been no attempts to amend Section 7A of the Income Tax Act dealing with Dividend Tax Account and Compensating Tax.</li> <li>This means that where a company (as opposed to an individual) sells a capital asset and pays compensating tax at a rate of 5%, it will still be required to pay an additional 25% compensating tax when it declares such a gain as a dividend.</li> <li>Section 7A was introduced as an indirect means to tax capital gains made by a company and also to tax dividends paid out of untaxed profits</li> </ul>	<ul style="list-style-type: none"> <li>amend sec 7A of the income tax act to provide that (either); <ul style="list-style-type: none"> <li>‘where such compensating tax is directly related to assets that have been subjected to CGT, compensating tax will not apply.</li> <li>Or ‘where dividends have been declared out of gains taxed under sec 32 f, then compensating tax shall not apply.</li> </ul> </li> </ul>
5.	<b>Property held by a Trustee</b> <ul style="list-style-type: none"> <li>According to Schedule 8 Para 6 (2) (e) - Where a property held by a</li> </ul>	<ul style="list-style-type: none"> <li>Transfers of property between a trustee and beneficiary should only require exemption from</li> </ul>

#	Issue of Concern	Proposal
	<p>trustee is transferred to a beneficiary, the transaction has to be approved by the Commissioner for it to be exempt from CGT.</p> <ul style="list-style-type: none"> <li>• The transition also has to be approved by the Collector of Stamp Duty for Stamp Duty exemption.</li> <li>• This double approval is cumbersome and a mechanism is required for a single point of approval</li> </ul>	<p>the Collector of Stamp Duty to qualify for both exemptions</p>
6.	<p><b>Inheritance</b></p> <ul style="list-style-type: none"> <li>• Transfers of property as provided by the Eighth Schedule paragraph 6(2) are not considered as transfers for the purpose of CGT.</li> <li>• These includes the transfer through inheritance, the transfer of an asset between spouses, or former spouses, as part of a divorce settlement or bona fide separation agreement, are not considered as “transfers” for the purposes of CGT.</li> <li>• This may be subject to exploitation, where inheritance is used to transfer property to several spouses and families.</li> </ul>	<ul style="list-style-type: none"> <li>• Provide that ‘where inheritance happens to immediate family members, CGT will not be applied to the transfer of property’.</li> </ul>

## CORPORATION TAXES

### 3.1 TAX LOSSES

#	Issue of Concern	Recommendation.
7.	<ul style="list-style-type: none"> <li>Section 15 (4) &amp; (4A) of the Income Tax Act provides that tax losses is available for offset against the taxable income for the next four years after the year in which the loss arises.</li> <li>However, the period within which the tax loss is utilizable may be extended by the Minister upon application through the Commissioner, and providing evidence of the inability to extinguish the loss within the stipulated period</li> <li>This legislation is applicable on the tax losses generally. It is important to note however, that under certain circumstances, tax losses are induced by the tax incentives granted to the taxpayer under the Income Tax Act, such as claims of one off capital deductions (e.g. investment deduction and farm works allowance) in the ascertainment of the total income. In this case, investors may not be able to utilize the tax losses within the stipulated four-year period especially where the value of the qualifying investment is high.</li> <li>The locking out of tax losses arising from investment tax deductions renounces incentives previously granted which could discourage investment</li> </ul>	<ul style="list-style-type: none"> <li>Amend Section 15 (4A) to accommodate utilization of such losses beyond the stipulated period such that the provision would read <i>“Notwithstanding subsection (4), the Minister may, on the recommendation of the Commissioner, extend the period of deduction beyond five years where a person applies through the Commissioner for such extension, giving evidence of inability to extinguish the deficit within that period, Provided that –where a deficit referred to in subsection (4) is proved to have arisen from a deduction made under paragraphs 22 and 24 of the second schedule, such a deduction shall be deemed to be sufficient ground for the extension.”</i></li> <li>We propose that a one-off capital deduction be considered automatic grounds for extension of tax loss utilization; provided that it is proved that the tax losses have solely arisen from one-off capital deductions.</li> </ul>



### 3.2 REFUND OF TAX OVERPAID – SECTION 105

#	Issue of Concern	Recommendation.
8.	<ul style="list-style-type: none"> <li>Section 105(1) of the Income Tax Act provides: that the Commissioner is obligated to refund any tax overpaid together with interest that may have accrued thereon.</li> <li>This means that where tax has been overpaid, the Commissioner should not only refund the overpaid tax but should as well pay interest that may have accrued since the overpaid tax became refundable.</li> <li>The current legislation is ambiguous since it has not specified the following vital aspects:               <ol style="list-style-type: none"> <li>The period within which the overpaid tax becomes due for refund;</li> <li>The point in time when the interest on refundable tax should start accruing; and</li> <li>The applicable interest rate.</li> </ol> </li> <li>It is important to note that the interest due on unpaid tax is well stipulated under Section 94 (1) of the income Tax Act. The aforementioned section states that <i>“In addition to the penalty under section 72D, a late payment interest of <b>two per cent per month</b> or part thereof shall be charged on the amount of tax remaining unpaid for more than one month after the due date until the full amount is recovered.”</i></li> </ul> <p>In practice, KRA is never keen to refund the overpaid tax to the taxpayers. This is largely attributable to the vagueness of the Income Tax legislation as regards the three vital aspects noted above.</p>	<p>We propose the introduction of the following amendments:</p> <ol style="list-style-type: none"> <li>1) The period within which the overpaid tax becomes due for refund be <b>capped at 6 months</b> following the return due date and if the return was filed after the due date, the 6 months period should apply after the date the return is filed;</li> <li>2) The interest on overpaid tax should accrue immediately after the lapse of 6 months as stipulated above; and</li> <li>3) The interest rate applicable be harmonised with the interest applicable on unpaid tax.</li> </ol> <p>We propose that Section 105(1) of the Income Tax Act read as follows:</p> <p><i>“if it is proved to the satisfaction of the Commissioner that, in respect of a year of income, tax has been paid by or on behalf of a person, whether directly or by deduction or otherwise, which is in excess of the amount payable by that person as finally determined in respect of that year of income, the Commissioner shall refund the amount of the excess, together with any interest which may be payable thereon under this Act, to the person entitled to the refund”.</i></p>

#	Issue of Concern	Recommendation.
		<p><i>Provided that –</i></p> <p>(a) <i>The overpaid tax referred to under section (1) shall be due for refund at the earlier of 12 months after return date referred to under section 52B of this Act or 12 months from the date of return filing;</i></p> <p>(b) <i>The interest shall become due from the date the overpaid tax is due for refund; and</i></p> <p>(c) <i>Interest of two per cent per month or part thereof shall be due on the amount of overpaid tax not refunded after more than one month after the due date until the full amount is refunded. ”</i></p>

### 3.3 CAPPING OF INTEREST ON UNPAID TAX – SECTION 94 (1)

#	Issue of Concern	Recommendation.
9.	<p>Section 94(1) of the Income Tax Act provides that:</p> <p><i>“In addition to the penalty under section 72D, a late payment interest of two per cent per month or part thereof shall be charged on the amount of tax remaining unpaid for more than one month after the due date until the full amount is recovered”</i></p> <p><i>Provided that –</i></p> <p>(a) <i>the interest chargeable under this subsection shall not exceed one hundred percentum of the tax owing;</i></p> <p>(b) <i>The penalty referred to in this subsection or imposed under any other section of this Act shall not attract any interest. ”</i></p> <ul style="list-style-type: none"> <li>• The above tax provisions seek to align the in duplum rule applicable in the financial institutions to the interest chargeable on unpaid taxes.</li> <li>• The ultimate objective is to protect financial strain on businesses likely to</li> </ul>	<p>We propose that the application of the in duplum rule be extended to incorporate the penalty imposed on unpaid tax.</p> <p>Based on the foregoing, Section 94(1) (a) of the Income Tax Act will read as follows:</p> <p><i>“the interest chargeable under this subsection <b>together with any penalty imposed under any section of this Act</b> shall not exceed one hundred percentum of the tax owing;”</i></p>

#	Issue of Concern	Recommendation.
	<p>result from the heavy burden of interest on unpaid tax.</p> <ul style="list-style-type: none"> <li>• It worthwhile to note that the capping of interest to the principal tax amount excludes the penalty element which forms substantial amount of penalization on unpaid tax. In this regard, the burden of penalties and interest are still very high and has the potential to adversely affect the cash flow status as well as the financial stability of the businesses.</li> <li>• The inclusion of the penalty in the in duplum rule will encourage defaulters to settle any unpaid taxes, penalties and interest with less financial strains on their businesses</li> </ul>	

## VAT PROPOSALS

The VAT Act 2013 became operational in September 2013. However, there are administrative deficiencies in the legislation that should be revised to ensure its smooth implementation. We therefore make the following proposals to the VAT Act 2013:

	ISSUE	IMPLICATION	RECOMMENDATIONS
10.	<b>Section 11 of the repealed Act</b>	<ul style="list-style-type: none"> <li>Where a person acquired any exempt goods, the price paid for such goods shall be deemed to be inclusive of VAT where such goods were used in providing taxable supplies. This provision has been removed.</li> </ul>	<ul style="list-style-type: none"> <li>This provisions needs to be re-inserted to cater for persons supplying taxable goods that have either been bought from exempt persons or where input VAT is not claimable e.g. purchase of a saloon motor vehicles by a dealer where such goods are held as stock-in-trade.</li> </ul>
12.	<b>Making tax representatives personally liable for taxes – Section 9 (3)</b>	<ul style="list-style-type: none"> <li>While the intention is to prevent tax leakage, this provision will discourage tax representatives from taking up the role of tax representatives, or on the other hand make the process of appointing tax representatives expensive.</li> </ul>	<ul style="list-style-type: none"> <li>A tax representative should only be made personally liable where it is proven that he has committed an offence willfully or by neglect or fraud, but not in ordinary circumstances where for instance the non-resident fails to remit tax.</li> </ul>
13.	<b>Essential commodities</b>	<ul style="list-style-type: none"> <li>Several proposals have been tabled to zero rate the basic consumer commodities.</li> <li>Kenya Revenue Authority (KRA) exempted these items instead of zero rating them. For the tax payer exemption is not an appropriate treatment for essential goods because when a commodity is exempt from VAT, it implies that the manufacturer</li> </ul>	<ul style="list-style-type: none"> <li>We propose that the KRA implement a graduated VAT rate approach where the VAT rate is split into three categories namely; <ul style="list-style-type: none"> <li>a lower rate for basic consumer commodities which could be set at maybe 30% of the standard;</li> </ul> </li> </ul>

	ISSUE	IMPLICATION	RECOMMENDATIONS
		<p>incurs VAT on the raw materials however they are unable to recover this amount from VAT on the sales. The manufacturer is therefore forced to adjust prices of the commodities as a means of compensation</p> <ul style="list-style-type: none"> <li>• This has in effect caused an increase in the prices of the basic consumer commodities such as milk, bread and tea leaves and medicaments since the enactment of the VAT Act 2013</li> <li>• The demerits of zero rating essential commodities is anchored the argument that this increases the administrative and financial burden of VAT refunds which negatively affects government revenue.</li> </ul>	<ul style="list-style-type: none"> <li>○ a standard rate for all the other commodities</li> <li>○ and a higher rate for specific commodities which are viewed as to both the population and the environment. This could be set at 130% of the standard rate.</li> </ul> <p>This will deliver price stability around the basic consumer commodities as well as safeguard the interest of manufacturers in recovering input VAT without having to adjust prices.</p> <p>It will also provide an avenue for the government to influence consumer behavior around certain products by subjecting them to a higher rate of VAT.</p>
14.	<b>Withholding VAT</b>	<p>Withholding VAT was introduced in Kenya effective October 2003. Intended to ensure that all the VAT charged reaches the Government.</p> <p>However tax collection efficiency is significantly improved with an optimal number of tax payments, efficient use of technology and simplification. The Introduction of the iTax is a step in the right direction. Implementation within a user friendly and secure platform will improve tax payer participation and reduce incentives for none compliance.</p>	<p>We propose the removal of withholding VAT and the rapid implementation of the iTax as a more efficient means to ensure tax payer participation.</p>

	ISSUE	IMPLICATION	RECOMMENDATIONS
15.	<b>Metered Supplies – Section 12 (3)</b>	<ul style="list-style-type: none"> <li>• This provides for that tax on metered supplies taxes place where either successive supply is due or received. As supply in this case is received on a daily basis, it would mean the output VAT needs to be accounted for on a daily basis.</li> </ul>	<ul style="list-style-type: none"> <li>• It would be useful to bring metered supplies under Section 12 (2) of the Act to make tier tax point at the time the meter reading is taken.</li> </ul>
16.	<b>Exempt goods of Chapters 84 and 85</b>	<ul style="list-style-type: none"> <li>• KRA have interpreted that only certain items (i.e. plant and machinery used for manufacture) are exempt, which is totally not compliant with the provisions of the Act for the following reasons: <ul style="list-style-type: none"> <li>○ If the law had intended that only certain items of a schedule to be exempt, it would have excluded these items like for Chapter 10. In the case of Chapters 84 and 85, the law has not excluded any items.</li> <li>○ Items like computers are specifically defined as machines under Chapter 84, and under the EACCMA, machinery includes machines.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• All items of Chapter 84 and 85 need to be exempt If required, the schedule should be amended to indicate which tariff codes are exempt.</li> </ul>
17	<b>Second Schedule – Zero Rated Supplies – Goods In Transit</b>	<ul style="list-style-type: none"> <li>• Item 14 in the Schedule of zero-rated supplied in the Repealed Act included “the supply of taxable services in respect of goods-in-transit”. While, this provision has been removed, it is clear that goods in transit are still zero-rated on their account of being export of goods and services. Regulation 20 (2) in the Repealed Act, which survives, states that “where transportation ends outside the country, the transport service shall be deemed to have been supplied outside the country”.</li> </ul>	<ul style="list-style-type: none"> <li>• These services are similar to the provision of ship-stores and services supplied to international sea or air carriers on international voyage or flights and would be zero-rated under the (1) the export of goods or taxable services, and therefore a formal clarification of the zero-rated status of supplies to transit goods needs to be clarified to avoid any confusion and the taxable services provided in</li> </ul>

	ISSUE	IMPLICATION	RECOMMENDATIONS
			respect to goods in transit need to be zero-rate.
	<b>Hiring /leasing of exempted goods</b>	<ul style="list-style-type: none"> <li>• It is needs to be stated in law that such will be considered to be exempt supplies</li> </ul>	<ul style="list-style-type: none"> <li>• The hire or leasing of exempt goods needs to be exempted.</li> </ul>
	<b>S 48 (1) (d) and S48 (4)</b>	<ul style="list-style-type: none"> <li>• Any person will be required to attend on notice and give evidence regardless of confidentiality.</li> </ul>	<ul style="list-style-type: none"> <li>• This is a significant legal burden on everybody and the law needs to be amended such that it should only be the person who is been investigated can be required to attend.</li> </ul>
	<b>S49</b>	<ul style="list-style-type: none"> <li>• Any authorized officer can entry premises</li> </ul>	<ul style="list-style-type: none"> <li>• The legislation should provide for rules and procedures in place for this.</li> </ul>
	<b>Schedule one</b>	<ul style="list-style-type: none"> <li>• In a number of paras, there is a broad description of services e.g. burial and cremation services</li> </ul>	<ul style="list-style-type: none"> <li>• Specific guidance and rulings need to be given to determine what is covered under such services</li> </ul>
	<b>Schedule two</b>	<ul style="list-style-type: none"> <li>• In a number of paras, there is a broad description of services</li> </ul>	<ul style="list-style-type: none"> <li>• Specific guidance and rulings need to be given to determine what is covered under such services</li> </ul>
	<b>Schedule two</b>	The public notice and clarification made by KRA is against the legislation and will create bigger problems for companies processing milk under income tax in relation to investment deduction,	The Act should be amended to provide a comprehensive list of zero rated unprocessed agricultural produce. We are concerned that vegetables, honey and other important produce that are essential to Kenyans are vatable.

## VAT REGULATIONS 2014

We note that the VAT Act 2013 is a Principal Legislation passed by Parliament which then becomes an Act of Parliament. The VAT Act 2013 is enforced by the Cabinet Secretary for the National Treasury in conjunction with the Kenya Revenue Authority.

To enable the National Treasury implement the Principal Legislation (VAT Act 2013), it has worked out on details on how to enforce it through the VAT Regulations 2014. In this regard, we propose the following amendments and additions on the VAT Regulations 2014 based on technical deficiencies in the Principal Act and the VAT Regulations 2014 tabled before Parliament.

Regulation	Issue Of Concern	Recommendation	Justification
<b>Regulation 2: Interpretation</b>	The definition is not clear	We propose that the definition be expounded.	To expound the definition to meaning ' a transaction between person dealing with each other independently and have no relationship with each other,
	The words have not been defined	We propose that definition for both be included.	This will make it easily understandable by users of the regulations.
	The words have not been defined	We propose that definition for both be included.	<p>This will make it easily understandable by users of the regulations</p> <p>A <u>right</u> is a scenario whereby a shareholder is given a chance to right to purchase new shares at a discount to the market price on a stated future date</p> <p>An option is a contract that gives the buyer the right, but not the obligation, to buy or sell</p>



Regulation	Issue Of Concern	Recommendation	Justification
			an <u>underlying</u> asset at a specific price on or before a certain date.
	The word has not been defined	We propose that definition be included	<b>A bill of lading</b> is a document issued by a <u>carrier</u> which details a <u>shipment</u> of <u>merchandise</u> and gives <u>title</u> of that shipment to a specified <u>party</u> in <u>international trade</u> to help guarantee that <u>exporters</u> receive payment and <u>importers</u> receive merchandise
	The word has not been defined	We propose that definition be included	Air Waybill is a non-negotiable transport document covering transport of cargo from airport to airport.
<b>Regulation 3: Open market Value</b>	The Commissioner may determine higher taxable values where the open market value is not easily determinable.	The open market value should be determined on the basis of comparative method e.g. similar goods / transactions	This should not be at the discretion of an individual for avoidance of biasness
<b>Regulation 4: Related persons</b>	The regulation tightens the business meaning of related parties but does not give a procedure for determining the level of control.	Amend to take into consideration situations where an individual is not aware of the employment of a spouse / relative in another entity as well as procedure for disclosure.	There is need to have a procedure for determining the level of control as well as procedure for disclosures
<b>Regulation 5: Mixed supplies</b>	The regulation ignores the differences between single supplies, mixed supplies and composite supplies and does not define what incidental/ancillary supplies are and does not outline the procedure for determining what these are.	It would be ideal if this regulation was amended to set out in clear terms what incidental / ancillary supplies are and also a clear definition of single supplies and Composite supplies.  The regulation should also be	This will ensure clarity.

Regulation	Issue Of Concern	Recommendation	Justification
	<p>This creates a situation where there can only be a single supply (with ancillary supplies) that is fully taxable and mixed supplies that are also taxable</p> <p>The regulation also overlooks the existence of Composite supplies.</p>	<p>amended to cover supplies involving promotional items which are given free of consideration</p> <p>Does Regulation 10 apply in such cases?</p> <p>The formula provided for separating components of mixed supplies is overkill as it stretches the calculation of the value to the OMV instead of the consideration for the supply as stated in Section 13 of the Act</p> <p>The power of the Commissioner needs to be checked as well since this can lead to total misapplication of the law</p>	
<b>Regulation 6: Exportation of goods or services</b>	<p>The provisions of the VAT Act on exported services will continue to be the subject of divergent interpretations unless proper guidelines are formulated There is need therefore for the Committee to formulate and include rules pertaining to the place of use, consumption and enjoyment of services in these regulations for avoidance of doubt on the VAT treatment of the same. This will be similar to the place of supply of services provided in Kenya</p>	<p>The regulations to be amended to clearly set out the place, criteria and documentation required for export of services with respect to use or consumption or enjoyment.</p>	<p>To avoid divergent interpretations and disputes that have arisen in the past</p>

Regulation	Issue Of Concern	Recommendation	Justification
	<p>Reg. 6 (2) is missing/ skipped.</p> <p>Reg. 6 (3) refer to regulation 31 which is not related in any way to this regulation.</p>	<p>Reg. 6 (3) should be renumbered as 6(2) and</p> <p>Reference should be made to the correct regulation, in this case, regulation 30.</p>	For clarity and consistency.
<b>Regulation 7: Place of supply of telecommunications services</b>	The numbering of the sub	<p>The regulation captures the practice under the repealed VAT Act especially in respect of Satellite TV. A continuation of old practice</p> <p>The regulation will aid the implementation of the provisions of Section 8 (2) and the requirement under Section 9. A positive move</p> <p>However, there is no regulation that covers the criteria, requirements and guidelines for appointing a tax representative in line with Section 9. The Committee should consider including such guidelines to conclusively cover this aspect</p>	Need for a regulation that covers the criteria, requirements and guidelines for appointing tax representatives for proper administration

Regulation	Issue Of Concern	Recommendation	Justification
<b>Regulation 8: Place of supply of Professional services</b>	None. This is a positive move	The regulation will aid the implementation of the provisions of Section 8 (2) and the requirement under Section 9.	None
<b>Regulation 9: Supply of Imported Services</b>	None	The regulation seeks to reinforce the provisions of the Act relating to imported services. It provides more clarity on the application of Section 10 (4) which is a welcome move	None
<b>Regulation 10: Taxable value of supply</b>	None	Welcome change as this has been controversial in the past especially on complementary supplies in the hospitality industry.	None
<b>Regulation 12: Application of section 15</b>	None	This is an extension of Section 15 which currently only covers taxable supplies and not taxable importation. A positive move	None
<b>Regulation 15:  Application of goods or services to exempt use</b>	It is not clear how, for instance, capital items will be treated considering that their use (including future use) may not be determined with certainty. E.g if they are used initially to make taxable supplies and later used to make exempt supplies, it is not clear how the usage should be apportioned	In such circumstances, clear guidelines should be formulated to ensure input tax is fairly claimed e.g based on the expected life.	For clarity and avoidance of conflict with other provisions.
<b>Regulation 17:  Second-hand Goods</b>	A tax invoice or ETR/ESD is not available from non-registered suppliers.	There need to be clarification of the support documentation required to support the input tax.	For clarity purposes
<b>Regulation 19:  Deduction of</b>		The regulation should be widened to allow for deduction of VAT on capital items, acquired when the business was	For clarity purposes

Regulation	Issue Of Concern	Recommendation	Justification
<b>input tax on registration or change in use</b>		exempt; on all goods in stocks that have suffered input VAT, VAT on constructed building or civil works and VAT on assets purchased for use in making taxable supplies. The current law may lock out property developers	
<b>Regulation 20: Refund of VAT on bad debts.</b>	Issue of VAT refunds backlog and the burden it created to the private sector need to be addressed.	<p>Make Regulation 20 in line with section 15 (2) (a) and Legal Notice 37 of 2011 to broaden the instances where bad debts occur, other than insolvency, such as court order, debt recovery cost exceeds debt and lack of partial security. The regulation also contradicts the provision of Section 16(1) which provides that a credit note must be issued within six months after the issue of the relevant tax invoice.</p> <p>We propose a regulation on the processing of refunds outlined and/or the necessary reforms effected speedily.</p>	<p>Considering that some recipients may no longer be in business, the requirement to issue a credit note to the supplier may not be practical.</p> <p>The pending refunds will go a long way in easing the inadequacy of resources available for doing business.</p>
<b>Regulation 21: Application for registration</b>	<p>This contradicts sec 34(1) that requires one to register within 30 days of meeting the threshold.</p> <p>The provision as it is is subject to misuse.</p>	<p>We propose amendment of 21(1) to read... 'shall be made within 30 days of the person's taxable supplies exceeding threshold...'</p> <p>Clear guidelines should be provided to determine when the value of taxable supplies made by a related person should be considered to determine the registration threshold.</p>	<p>For consistency with section 34(1)</p> <p>For clarity purposes.</p>

Regulation	Issue Of Concern	Recommendation	Justification
<b>Regulation 22:</b> <b>Voluntary registration</b>	No new development as pertains section 34(4)	We propose the Regulation (22) on voluntary registration be deleted from the regulations.	This is a direct repetition and since no new information to be deleted.
<b>Regulation 23:</b> <b>Registration of a group of companies as a single registered person</b>	The requirement for companies to be in wholly owned group is not practical.	There is need to revise the requirement that companies need to be in a wholly owned group as this is not achievable in practice. We propose removal of ‘wholly owned’ and replace it with an appropriate level of shareholding or simply majority shareholding.	It is unlikely that the regulation(in its current state) will achieve its intended purposes as many group companies will be restricted by this condition. The key to group registration would be to look at it from a perspective of management and control and set a threshold for shareholding to either a certain level of shareholding or just majority shareholding
<b>Regulation 25:</b> <b>Changes in membership of a registered group</b>	The requirement that there should be no VAT credits to be carried forward is very stringent and should be reviewed to allow it to be refunded or transferred to the representative member of the group after approval by the Commissioner if necessary.	Need to remove the restriction to allow a company to carry forward credit upon admission into a group	
<b>Regulation 26:</b> <b>Cancellation of the registration of a registered group</b>	These are agreeable but the cancellation should be a properly drawn out process with merits and demerits, not just by notice in writing.	Need to have a proper process for deregistration	To curb from malicious actions by an aggrieved member.

Regulation	Issue Of Concern	Recommendation	Justification
<b>Regulation 33:</b> <b>Assessment of recipient of a supply</b>	This may lead to double standards as the regulations further states that the supplier who pays the said tax and penalties may later recover the amount from the recipient of the supply.	We propose deletion of the part that subjects the recipient to assessment and leave the assessment to be done on the supplier in consistency with other tax laws.	This will enhance smooth operation
Regulation 34: Prescribed form	The regulations should set out the commonly used prescribed forms either under the principal Act of the regulation. (eg as provided in the I-tax, VAT 3, VAT 4, VAT 5, VAT 7, VAT 28, VAT 57 etc	The regulations should set out the commonly used prescribed forms either under the principal Act of the regulation. (eg as provided in the I-tax, VAT 3, VAT 4, VAT 5, VAT 7, VAT 28, VAT 57 etc )	
<b>Regulation 35:</b> <b>Tax representative</b>	The regulation does not prescribe the “mode, manner and requirements for appointing a tax representative”	We recommend that the mode, manner and requirements for appointing a tax representative be prescribed in the regulations.	For clarity.
<b>Regulation 36:</b> <b>Tax exemption card</b>	We don’t have the Schedule in the VAT Act and zero rating should be covered under the Second Schedule to the VAT Act.	We propose that reference be made to the right schedule.	For consistency
<b>Regulation 38:</b> <b>Currency translation</b>	Not clear on the accounting dates of both the supplier and recipient	The regulation need to specify this in both the context of the supplier and recipient since their accounting dates may be different.	For consistency.

Regulation	Issue Of Concern	Recommendation	Justification
<b>Regulation 39:</b>  <b>Revocation of Regulations, Rules and Orders</b>	<p>No public notices and information letters have been revoked. This draft regulation revokes only listed regulations, rules and orders.</p>	<p>There is need to ensure that all public notices issued before publication of these regulations/Tax Procedures are revoked.</p> <p>Using notices issued under the old law will lead to inconsistent application of the Act.</p> <p>It would be ideal if this regulation is modified to state that all regulations, rules and orders, information letters, public notices, press notices, rulings and other directives issued under the repealed VAT Act are revoked.</p>	<p>This will enable consistent Application of the Act.</p>



## IMPLEMENTATION OF THE EAST AFRICAN COMMUNITY COMMON MARKET PROTOCOL

The establishment of the East African Community Common Market being line with the provisions of the EAC Treaty provides for free movement in the following areas; the free movement of goods; labour; services; and capital. The proposals below will focus on the movement of capital and services in order to boost trade and investments in the region.

#	Issue of Concern	Recommendation.
10.	<ul style="list-style-type: none"> <li>• Tax harmonization is a significant part of the EAC integration agenda.</li> <li>• This implies that Partner States would need to make intentional efforts to harmonize their monetary and fiscal policies to ensure that tax distortion are minimized and indeed eliminated</li> <li>• The implementation of the EACCM would establish a single customs territory to facilitate free movement of goods within the region while lowering the cost of doing business.</li> <li>• Whereas there is 0% import duty on goods originating from within the region, other indirect taxes are still applicable and services are taxable.</li> <li>• Goods imported into the EAC are subject to Common External Tariffs (CET). However there are still significant non tariff barriers that make trade between the partner states inefficient.</li> </ul>	<p>We propose that the EAC governments hasten the process of implementation of the following articles of the treaty and the protocol;</p> <ul style="list-style-type: none"> <li>• Article 75 - for the Customs union and Common Market.</li> <li>• Article 80 1</li> </ul> <p>(f) for the harmonization and rationalization of investment incentives relating to taxation of industries</p> <p>(h) Avoid double taxation.</p> <ul style="list-style-type: none"> <li>• Article 83 2 (e) of EAC Treaty – Harmonization of tax policies.</li> <li>• Article 85 – harmonization of policies impacting on capital markets particularly granting of incentives for the development of capital markets.</li> <li>• Article 86 - free movement of capital by removal of controls</li> </ul>

## MISCELLANEOUS PROPOSALS

#	Issue of Concern	Rationale	Recommendation
1.	<p><b>Programme based budgeting</b> In Nov. 2011, the Treasury launched the Programme Based Budgeting (PBB) seeking to reorient budgeting from an input based financial programming to a result-based budget.</p> <p>This FY, sector allocations were divided as per what each ministry was allocated in the last FY and divided the extract allocations by the number of ministries in the sector. A case in point is the agriculture, land and urban development sector.</p>	<ul style="list-style-type: none"> <li>Allocation of funds will be for distinct deliverables and outcomes</li> <li>Improve prioritization of expenditure</li> <li>It is easier to measure results</li> </ul>	Strict adherence to use of Programme Based Budgeting in Ministries
2.	<p><b>PFM Regulations</b> Section 205 of the Public Finance Management Act, 2012 gives the Cabinet secretary powers to make regulations for giving effect to the Act. The draft PFM regulations were availed to the public for input but have not been presented to Parliament for approval.</p>	The regulations aims to strengthen financial reporting in both the National and County government levels while at the same time introducing internal control mechanisms in public financial management.	The Cabinet Secretary should speed up this process to help deepen reforms in the expenditure management systems at both levels of government. This will improve efficiency and reduce wastages.
3.	<p><b>Tax Appeals Tribunal Act, 2013</b> The various tax legislation currently provide for taxpayers to file their tax disputes to local committees/tribunals as the case may be. In an</p>	An effective appeals process as envisaged by the intent behind the Act should result in a	Expedite the operationalization of the Act.

#	Issue of Concern	Rationale	Recommendation
	attempt to reform administration of tax disputes the Cabinet Secretary has proposed by the Tax Appeals Tribunal Act 2013 to consolidate all tax appeals under a single tribunal. In our understanding, it is a move aimed at reducing the administrative bureaucracies of the system.	framework that provides for speedy resolution of tax disputes.	
4.	<p><b>Public Expenditure Rationalization</b></p> <p>Initiatives by the Government towards ensuring expenditure rationalization have faced numerous challenges.</p> <p>The government adopted performance contracting in 1995 in a bid to enhance efficiency and productivity in public service delivery and in-order to achieve value for money. In addition, there is lack of data and effective Monitoring and evaluation, that is, public resource allocation and monitoring in Kenya is considerably handicapped by the lack of quantitative indicators for the economic composition of expenditures in the Forward Budget and Annual Estimates.</p>	Investment and financial plans of the parastatals are not integrated with those of the Central Government, which means that key economic variables such as total public investment and the public sector deficit may not be accurately measured.	<p>We therefore propose the following in regard to public expenditure rationalization:</p> <ol style="list-style-type: none"> <li>1. Kenya needs to boost productivity and regain its competitiveness. To maintain high growth rates, Kenya needs to continue investing in infrastructure and human capital, improve the business and regulatory environment, and diversify exports;</li> <li>2. Public enterprises should, in general, not be a drain on the budget. Preferably, they should be privatized and fully exposed to a competitive market environment.</li> <li>3. Foreign Direct Investment (FDI) is key to Kenya's development agenda. Since domestic savings are low, attracting FDI would supplement domestic savings in financing Kenya's growth agenda. Kenya should aggressively seek more productivity enhancing FDI to diversify its economy, and develop its private sector, encouraging technology transfer to sharpen its competitive edge in the external</li> </ol>

#	Issue of Concern	Rationale	Recommendation
			<p>market.</p> <p>4. The National Treasury rolled out electronic procurement in July 2014 as part of efforts to automate and streamline Government financial management processes and procedures. This will increase control and visibility over the entire life-cycle of a procurement transaction from procurement planning to payment. “Electronic procurement will therefore play a key role in prudent government financial management and resource allocation.</p> <p>Program reductions: Programs often can and should be dropped, pruned, or consolidated, as economies develop and government priorities change. Effective price liberalization can eliminate the need for subsidies. Program elimination usually leads to effective savings.</p>

*The Institute of Certified Public Accountants of Kenya (ICPAK) is the professional organization for Certified Public Accountants in Kenya established in 1978 by the Accountants Act, CAP 531. ICPAK is dedicated to the development and regulation of the accountancy profession in Kenya so as to enhance its contribution and that of its members to the national economic growth and development. In this regard, ICPAK wishes to advise the public that an Accountant by Law is an individual who has qualified by passing the three levels of the CPA examinations and is duly registered by the Institute of Certified Public Accountants of Kenya.*