The National Treasury
Treasury Building
Harambee Avenue
PO BOX 30007-00100
NAIROBI

30 August 2021

Dear Sirs,

RE: SUBMISSION OF MEMORANDUM ON THE FINANCE BILL, 2022

We refer to the above matter and your public notice inviting the public to submit their comments on the Finance Bill, 2022 (the **Bill**) which was published on 9th July 2021.

Please see annexed to this letter a schedule setting out our comments and proposals relating to the Bill.

Should you require any clarifications, please do not hesitate to contact myself (Maxwell@amcham.co.ke).

Yours faithfully,

Maxwell Okello

Chief Executive Officer
American Chamber of Commerce, Kenya

#	ISSUE OF CONCERN	RECOMMENDATION	LIKELY IMPACT
A.	**INCOME TAX**		
1.	**Deductibility of interest expense (New EBITDA base interest limitation)**	Overhaul of thin capitalization provisions is a vital amendment, which suggests introduction of restriction on tax deductibility of interest expense on any gross interest amounts exceeding 30% of Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA). This provision shall come to effect on 1 January 2021 and shall apply to all entities except banks or financial institutions licensed under the Bank Act, and micro and small enterprises registered under the Micro and Small Enterprises Act, 2012. Under the new provision, interest is broadly defined to include interest on all loans, payments that are economically equivalent to interest and expenses incurred in connection with raising the finance.	Subjecting interest income paid to resident lenders to the interest limitation rule is likely to lead to taxation of the same income twice.

#	ISSUE OF CONCERN	RECOMMENDATION	LIKELY IMPACT
		Though the amendment is largely in tandem with Action 4 of the BEPS project, the amendment is likely to negatively impact on businesses that are highly and genuinely geared which may encourage investors to divert their investments to other countries. In order to address the likely negative impact, we recommend the following; • For companies that are not foreign controlled, start-ups, Special Purpose Vehicles (SPVs), real estate firms and businesses operating in capital heavy sectors the interest restriction should only apply to interest that is paid to non-resident persons; • Inclusion of all lenders irrespective of whether they are registered under the Banking Act; • Introduction of a transition clause to the effect that the debts existing as per the	

#	ISSUE OF CONCERN	RECOMMENDATION	LIKELY IMPACT
		date of the amendment will not be subject to the new law; and • Allowing individuals to claim interest without any restrictions	
2.	**Introduction of Country-by-Country reports for Ultimate Parent Entities (UPEs) of Multi-National Enterprises resident in Kenya**	This proposal is to introduce Country-by-Country (CbC) reporting requirements for Ultimate Parent Entities (UPEs) of multinational enterprises (MNEs) which are tax residents in Kenya; not controlled by another entity; and own or control a MNE group. The UPE of the MNE shall submit to the Commissioner a return describing the Group's financial activities in Kenya and in all other jurisdictions where the group has taxable presence. The return shall be submitted not later than 12 months after the last day of the reporting financial year of the group. Further, the return shall contain information on the group's aggregate information on revenue, profit and loss before income tax, income tax paid, income	Adoption of this proposal will ensure that the effort to administer is commensurate to the benefits that the amendment will yield

#	ISSUE OF CONCERN	RECOMMENDATION	LIKELY IMPACT
		tax accrued, stated capital, accumulated earnings, number of employees and tangible assets regarding each jurisdiction in which the group operates. The amendment is in line with KRA's continued scrutiny on MNEs to ensure they pay their fair share of taxes in Kenya. The Act did not prescribe any threshold for purposes of the MNEs qualifying for the CbC reporting. In effect, all UPEs will be required to comply irrespective of the size of the subsidiaries. To ensure that the amendment meets its objective and eliminate unnecessary administrative burden on the UPEs, we recommend introduction of a threshold of gross turnover that MNEs should meet for the UPE to be required to comply with this requirement. The recommended threshold by OECD is 750 million Euro (or near equivalent amount in the local currency)	

#	ISSUE OF CONCERN	RECOMMENDATION	LIKELY IMPACT
3.	**Review of the Digital Service Taxes**	Digital services taxes introduced in many countries to cope with the absence of global consensus on taxation of Digital Economy. In 2021, OECD reached a consensus on the approach and it is expected to be implemented by individual countries in the next couple of years. Recommend Kenya to abolish Digital Services Taxes and implement OECD solution instead concerning Digital Economy.	This would eliminate distortive impacts of Digital Services Taxes and provide alignment with international practices
	Amendment of the definition of Management and Professional fees and Royalty under Section 2 of the Income Tax Act	The amendment will exclude interchange and scheme fees. Interchange fee is in essence the fee accruing to an issuer to subsidize the cost they incur when a card they have issued is used in a card transaction it is therefore not a professional or management fee.	Currently, card transactions are an automated process which rely on the platforms deployed by the card companies. Including interchange fees and bank card transaction fees under management or professional fees would make the cost of card transactions expensive at a time when many businesses are struggling with the effects of COVID-19.

#	ISSUE OF CONCERN	RECOMMENDATION	LIKELY IMPACT
			It also negates the Government efforts and aspirations to minimize use of cash and progressively embrace a cashless economy Classifying scheme and subscription fees paid to card companies as part royalties is incorrect because payment for accessing a platform is not the same as payment for a right to use intellectual property. The above clarification will bring to an end on-going disputes between taxpayers and the KRA on the taxation of card transactions.
B.	**VAT**		
4.	**The Finance Act 2021 moved exported services**	The Finance Bill 2022-23 reinstates exported services to zero rated from exempt category	Taxpayers are not allowed to claim input VAT associated with exempt supplies.

#	ISSUE OF CONCERN	RECOMMENDATION	LIKELY IMPACT
	from the zero rated to exempt category		According to generally accepted VAT principles, VAT should be a tax borne by the end user. Thus, businesses should not bear the burden of VAT, where they are not the end-user. Application of VAT on exported services should not depart from the neutrality and destination principles which govern administration of VAT. The new input VAT recovery restrictions linked to exported services have introduced significant costs and compliance challenges for local businesses. Many businesses have chosen to use Kenya as a Hub for both domestic and cross-border business activities, thereby bringing revenue, employment and expertise to Kenya. As a result of the VAT

#	ISSUE OF CONCERN	RECOMMENDATION	LIKELY IMPACT
			exemption, there is an increased cost and significantly less reason for such businesses to continue operating as Kenya Hubs due to the associated costs and overheads. The change affects their competitiveness as compared to businesses operating in a similar capacity from other countries. Consequently, the entities may eventually relocate to other countries and going forward this cost may also discourage Foreign Direct Investments by both new and existing investors.
5.	**Request to exempt interchange fees from VAT.**	Merchant Service Discount, Merchant Service Fee, interchange fee and other money transfer related fees and commissions are expressly listed as exempt from VAT by amending First Schedule, Part II Paragraph 1(b) to VAT Act.	Card transactions, interchange fees and other applicable fees are equivalent of "dealing with money" which is currently exempted from VAT. Further, the Ministry of Health recommendations in response to Covid 19 is the use of plastic money and general encouragement for

#	ISSUE OF CONCERN	RECOMMENDATION	LIKELY IMPACT
			business to go for cashless transactions. Therefore, introducing a specific exemption on card fees and interchange will promote the use of cards as opposed to cash and eliminate the current disputes between the KRA and taxpayers
6.	**The First Schedule to the Value Added Tax Act,2013 is amended. Exempt supplies to Standard rated supplies**	By including: Standard rated supplies to exempt supplies Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating) barbeques, braziers, gas-rings, plate warmers and similar non-electric domestic appliances, and parts thereof, or iron or steel of tariff numbers 7321.11.00, 7321.12.00, 7321.19.00, 7321.81.00, 7321.82.00, 7321.83.00 and 7321.90.00 are exempt from VAT.	• VAT exemption would directly result in lower consumer prices, which would result in higher demand. • Household customers switching from kerosene or charcoal would save approx. KSh 500 per month on their cooking fuel costs. • Formalizing the cooking fuel sector will result in significant new tax revenues for Treasury, from corporate and employment taxes. The Government of Kenya would make a significant step to achieving its stated

#	ISSUE OF CONCERN	RECOMMENDATION	LIKELY IMPACT
			goal of affordable and accessible clean cooking fuel for all by 2028.
C.	**CUSTOMS**		
7.	**Removal of Import Tariffs on Denatured Bio-Ethanol Cooking Fuel**	To support the growth of the nascent industry, and enable greater investment into Kenyan ethanol production there is need to remove the import tariffs on denatures bio ethanol cooking fuel Confirming that Bioethanol Vapour (BEV) stoves are classified under HS Code 7321.11.00, and thereby attract a 10% tariff as applicable to other types of gas stoves.	Import Tariff exemption would directly result in lower consumer prices, which would enable significant demand growth. Additional investment unlocked in building distribution networks across Kenya, which would result in an additional 1,000 – 1,500 jobs.
D.	**TAX PROCEDURES**		
8.	**Clarity on Tax Refunds**	Section 47 of the Tax Procedures Act provides for the refund of overpaid tax by the Commissioner. The section prescribes a number of conditions to	• The 5 year limit under section 47(1) does not factor in unforeseen circumstances which may lead to

#	ISSUE OF CONCERN	RECOMMENDATION	LIKELY IMPACT
		the taxpayer and the Commissioner, among them: • The application for refund must be done within a period of five years of the date on which the tax was paid; • The Commissioner is required to notify the taxpayer the decision on the application within ninety days of receiving the application • The Commissioner is required to refund the overpaid tax within a period of two years failure to which the amount due shall attract 1% interest per month. To ensure clarity and proper implementation of the provision, we recommend the following amendments:	application for refunds beyond the stipulated period such as adjustments due to open audits. This is unfair to taxpayers since there is a possibility of losing valid tax credits due to adjustments passed by the tax authority that necessitate lodging an application for a tax refund. The timing as provided under the TPA is fully within the control of the KRA. For instance, if the KRA erroneously asserts fraud and/or wilful negligence thereby extending the statute of limitation but subsequently it is shown that this assertion was inaccurate. In such instances, the taxpayer may be past the 5 year limit thus invalidating their refund applications

#	ISSUE OF CONCERN	RECOMMENDATION	LIKELY IMPACT
		• Amend Section 47(1) of the Tax Procedures Act (TPA) to remove the 5-year limit for application of tax refund. • Amend Section 47(5) of the Tax Procedures' Act to reduce the duration within which the Commissioner is supposed to repay overpaid tax from 2 years to 1 year and incase of set-off, approve the utilization within 90 days . • Add a provison under Section 47 (5) prescribing a consequence of failure by the Commissioner to abide by the time within which the tax overpaid should be refunded	• The 2 year period for processing of tax refunds as provided by Section 47(5) of the TPA is excessive. In practice, the refund process usually takes long and a provision to allow offsetting approved overpayments against future tax liability should be introduced in the TPA. Taxpayers are facing challenging economic times due to the ongoing COVID 19 pandemic and the funds tied-up as overpayments are greatly affecting the cash flow for businesses. Businesses are forced to borrow with interest in order to fund their working capital while their funds are held by the KRA, which is benefitting from interest-free loans. The alternative to allow members discretion to

#	ISSUE OF CONCERN	RECOMMENDATION	LIKELY IMPACT
		• Amend Section 47(4) to allow for taxpayers the discretion of carrying forward approved tax overpayments for utilization against future tax liability.	carry forward tax overpayments will ensure that the challenge experienced by the Government on refunds due to cashflow challenges is side-stepped.
E.	**POST-COVID ECONOMIC RECOVERY**		
9.	**Proper Budget Allocation in the Agriculture Sector**	Food and nutrition security being an integral part of "The Big Four" Plan, the sector deserves to receive commensurate budget allocation to realize the goals and food security objectives set for it. This can be achieved if certain proposals are considered in the fiscal budget for the financial year 2022/2023. The proposals should be focus on increasing funding for the agricultural and food sector. A good starting point would be to provide extension services in crop, fish, and livestock farming through conditional grants to counties for at least five extension officers/ward.	• Extension workers provide a vital link between farmers and agricultural research institutions as they facilitate improved crop and animal husbandry. Extension workers are essential to increasing farmers and on farm productivity and are a critical mechanism for information dissemination and capacity building to small-scale farmers.

#	ISSUE OF CONCERN	RECOMMENDATION	LIKELY IMPACT
		Another proposal is to increase funding support for small-scale irrigation including water storage facilities by at least 20%.	• The main benefits of small-scale irrigation and water storage facilities are to provide farmers with adequate and reliable water for their crops and livestock and domestic use as well as to minimize dependence on rain-fed agriculture.

END