



Manda & Company Advocates

Ngugi Manda Residence, Kiambu,

P. O BOX 1967-00621, Nairobi

Tel: +254 713 732 520

info@mandaadvocates.com

peter.manda@mandaadvocates.com

MEMORANDUM ON THE FINANCE BILL 2025

(NATIONAL ASSEMBLY BILLS NO. 19 OF 2025)

PRESENTED TO

THE NATIONAL ASSEMBLY
THE THIRTEENTH PARLIAMENT
(FOURTH SESSION 2025)

SUBMITTED TO
CLERK OF THE NATIONAL ASSEMBLY

Email: cna@parliament.go.ke and financecommitteena@parliament.go.ke

IN THE MATTER OF CONSIDERATION BY THE DEPARTMENTAL COMMITTEE ON
FINANCE AND NATIONAL PLANNING: FINANCE BILL 2025 (NATIONAL ASSEMBLY BILLS
NO. 19 OF 2025)

26th May 2025

SUBMITTED BY:

Manda & Co Advocates
Ngugi Manda Residence/LG Floor, Jumuia Place, Lenana Road,
P. O. Box 1967 - 00621,
Village Market, Nairobi
Tel: +254 713 732 520
Email: info@mandaadvocates.com

1.0 INTRODUCTION

The Honorable Members of Parliament,

Pursuant to Article 118 (1) (b), Article 201 (a) of the Constitution, Standing Order 127(3) of the National Assembly Standing Orders and Section 7 (d) of the Public Finance Management Act, I hereby submit this Memorandum on the Finance Bill 2025 (National Assembly Bills No. 19 of 2025) for consideration and enactment by Parliament.

The Finance Bill 2025 ('FB25') seeks to give effect to the fiscal policies and revenue-raising measures proposed in the Budget Statement for the Financial Year 2025/2026, as presented by the Cabinet Secretary for the National Treasury. This Bill is critical in ensuring the sustainability of public finances, fostering economic growth, and aligning taxation and expenditure frameworks with the government's developmental agenda.

I have reviewed the provisions of this Bill to ensure conformity with constitutional principles, statutory requirements, and national economic objectives. The proposed amendments and new provisions are designed to enhance revenue mobilization, promote equity in taxation, and streamline fiscal management while safeguarding the interests of taxpayers and the public.

Further, I submit this memorandum in response to the invitation for public participation and submission of memoranda by the National Assembly dated 13th May 2025.

This Memorandum provides a detailed analysis of some of the Bill's proposals, their legal and policy justifications, and their anticipated socio-economic impact. It also includes new proposals that should be introduced in the FB25 and for your consideration.

I urge the Honorable House to scrutinize the proposals herein thoroughly and enact them in the best interest of the nation.

Respectfully submitted,



Peter Manda Wanjiku.

Advocate of the High Court of Kenya.

Address:

Ngugi Manda Residence,

Karura, Kiambu,

P. O. Box 1967 - 00621,

Village Market, Nairobi

Tel: +254 713 732 520

Email: info@mandaadvocates.com

2.0 BACKGROUND/CONTEXT

The BETA Agenda propelled by the Kenya Kwanza (KK) government focuses on inclusive economic growth and is meant to address the current challenges facing the country's economic recovery and to bolster resilience.

The proposals in this memorandum include critical interventions in some of the key pillars, to ensure the successful implementation of BETA and to spur economic growth.

This memorandum also provides observations on select proposed amendments contained in the Bill as well as additional proposals for further amendments to be included in the Bill.

3.0 THE PROPOSALS

1. Restriction of the ability to carry forward tax losses

Tax Law impacted: Income Tax Act, Cap 470-Section 15(4) ITA.

FB25 introduces a 5-year cap on the utilization of tax losses thereby restricting a taxpayer's ability to carry forward taxes indefinitely.

Though taxpayers can utilise tax losses during the 5-year period to offset against taxable profits, the introduction of a 5-year cap limits this usage especially where tax losses arise due to capital allowances granted under the Act, or in the case of capital or cost intensive industries.

Maintaining the current provision where a business can carry forward tax losses indefinitely will:

- a) mitigate the unintended consequence of disincentivizing capital allowances;
- b) enable businesses recover during periods of financial setbacks; in addition to
- c) making Kenya an attractive investment destination.

Proposal:

I therefore propose the **deletion of Paragraph 8(c) of the FB25** which proposes to insert the word "five" immediately after the word "succeeding in Section 15(4) of the ITA.

2. Refund of VAT paid on outstanding debts

Tax Law impacted: Value Added Tax Act, Cap 476- Section 31(1)(a)

The VAT refund policy on bad debts currently mandates a three-year waiting period before a business can apply for a refund, except when the debtor is under statutory management.

Pending the refund, a business is many times forced to borrow to plug the gap created by the debt thereby increasing the company's finance costs. By reducing the refund period to 12 months, Kenya would strike a balance between business support and effective tax administration and ensure timely revenue collection while fostering economic growth.

The time reduction would also establish a reasonable timeline to be followed, avoiding delays in administrative actions and promoting greater trust and fairness in tax administration.

A recent holding in **Hotpoint Appliances Limited v Commissioner of Domestic Taxes (Tax Appeal 1526 of 2022) [2024] KETAT 487 (KLR) (19 April 2024) (Judgment)**, confirmed that a business can claim a VAT refund on bad debts based on insolvency even before the formal insolvency procedure are complete. The Court also reinforced the importance of timely administrative actions and the need for fairness in processing VAT refund claims.

The FB25 has proposed an amendment which reduces the period within which a taxpayer can lodge a VAT refund claim on outstanding debt, from the current 36 months to a proposed 24 months.

Proposal:

I therefore propose the enhancement of the proposed amendment under **Paragraph 33(a)** of the FB25 by **deleting the words 'two years'** and substituting therefor the words **'twelve months'** to achieve the intended impact on Section 31(1)(a) of the Value Added Tax.

3. VAT status of locally assembled devices

Tax Law impacted: VAT Act, Cap. 476-First Schedule

The FB25, proposes an amendment to the First Schedule of the VAT Act to include the exemption of VAT on the supply of locally assembled and manufactured mobile phones. This proposal is welcomed and will work to mitigate the increased cost of capital borne by local device assemblers due to the significant outstanding VAT refunds due from KRA.

On the flipside, exempting them from VAT means that the manufacturers will no longer be able to reclaim input VAT costs, potentially leading to higher prices for consumers. The proposal will increase (by about 16%) the unit cost of the assembled devices, and by extension, the retail price of the disassembled or unassembled kits used to assemble the devices (semi-knocked down units – SKDs) remain subject to 16% VAT. This is because the local assemblers will not be able to recover the input VAT on these SKDs.

Promotion of the local assembling of mobile phones will not only drive affordability of the devices but will also increase mobile phone penetration in Kenya and promote the government's digital agenda.

Proposal:

I therefore propose the introduction of a new paragraph within **Section A of Part 1 of the First Schedule to the VAT Act** (which covers exempt goods) to include **“Disassembled or unassembled kits for local assembly or manufacture of mobile phones.”**

4. Integration of a taxpayer's electronic tax system with the Commissioner's data management and reporting system

Tax Law impacted: Tax Procedures Act, Cap. 469B

Section 59A(1B) currently does not permit the Commissioner to require a taxpayer to electronically transmit data relating to their trade secrets and private or personal data held on behalf of customers or collected in the course of business.

This proposed amendment will allow the Commissioner to require a taxpayer to electronically share data relating to their trade secrets and private or personal data held on behalf of customers or collected in the course of business.

The proposed amendment is in contravention of the data privacy and data protection rights embodied in the Constitution. It could also reduce a company's competitiveness where such trade secrets are leaked and end up in a competitor's hands.

Proposal:

I therefore propose the **deletion of Paragraph 52 of FB25** which proposes to delete subsection (1B) of Section 59A of the Tax Procedures Act ('TPA'). In this way, **Section 59A(1B) of the TPA will be retained.**

5. Introduction of investment allowances on spectrum licenses

Tax Law impacted: Income Tax Act, Cap 470- paragraph 1(C) of the Second Schedule.

The Communications Authority is responsible for issuance of Spectrum Licenses, which allow telecommunication companies to use specific radio frequency bands for various services like television and radio broadcasting, and cellular networks.

The increasing demand for mobile services raises the importance of effective spectrum management and of a regulatory framework that supports ongoing high levels of network investment. While operators may be prepared to pay the high license fee, the high fee levels can have harmful effects like having only a few operators being able to meet the costs meaning that competition is lessened and consequently higher prices to the customers.

An incentive to investment could come in the form of reduction of the capital expenditure made by operators in obtaining spectrum licenses, from their taxable income, thereby achieving efficient delivery of telecommunication services at an affordable price and supporting high levels of network investment.

The Second Schedule of the Income Tax Act ('ITA'), currently only provides for a deduction of investment allowance of 10% per year in equal instalments for Indefeasible right of Use (IRU's) for fibre optic cables by a telecommunication operator. Effectively ignoring the capital expenditure required by the same telecommunication operators to acquire spectrum licenses that are needed to operate telecommunication services.

Proposal;

To have a proposal in the Finance Act, 2025 ('FA25') amending the following subparagraph in **paragraph 1(c) of the Second Schedule to the ITA** to allow telecommunication operators to claim investment allowance on spectrum fees.

*"Purchase or an acquisition of an indefeasible right to use fiber optic cable **or spectrum license by a telecommunication operator. In the case of the spectrum license purchased or acquired prior to 1 July 2025, the deduction shall be restricted to the unamortized portion over the remaining useful life of the spectrum license.**"*

6. Issuance of a demand notices

Tax Law Impacted: Tax Procedures Act, Cap. 469B

Section 14 (e) of the TPA currently restricts the Commissioner's power to collect tax from third parties owing money to a taxpayer where the taxpayer has not appealed against an assessment specified in a decision of the Tribunal or court. This is in line with the Constitutional guarantee to access to Justice and the right to a fair hearing.

The proposal in the FB25, to delete this paragraph will give the Commissioner unfettered powers to issue demand notices even in situations where a taxpayer has disputed and has appealed against a Tribunal or court decision.

This proposed amendment infringes a person's right to a fair hearing in that it curtails the person's opportunity to be heard and to object an assessment or claim while giving KRA a right to go after a taxpayer's debtors without recourse to the taxpayer.

Proposal:

I therefore propose the **deletion of Paragraph 47(m)(v) of the FB25** which proposes to delete Section 42(14)(e) of the TPA. The proposed deletion will ensure that the right to accessing justice as embodied in the Constitution is upheld.

7. Reduction of excise duty on fees charged for money transfer services from 15% to 10%.

Tax Law Impacted: Excise Duty Act, Cap 472

The Cabinet Secretary, Treasury, in his FB24 budget speech had indicated a reduction in the excise duty ('ED') rate charged on money transfer services provided by payment service providers from 15% to 10% owing to the pivotal position of this service to the economy.

Over the years, the ED rate on mobile money transfer fees has always been lower than ED rates charged on other money transfer options, as the mobile money transfer segment generally serves the unbanked community.

Harmonizing the ED rate on all money transfer fees to 15% (following the FA23 amendment) could potentially erode all the gains already made regarding financial inclusion.

Proposal:

The proposal for consideration under the FA25 would be to **delete para 3 of Part II of the First Schedule of the Excise Duty Act** the phrase '**Shall be fifteen [15] percent**' and substitute it with the following phrase '**shall be ten [10] percent**'

8. Deferral of the effective date of compliance with Sec 16(1)(c) of the ITA from 1st January 2024 to 1st July 2025)

Tax Law Impacted-Income Tax Act, Cap 470

The Finance Act, 2023 introduced an amendment to the ITA which requires a taxpayer to support, for income tax purposes, specific business costs/expenses using invoices generated from an electronic tax invoice management system ('eTIMS')

While appreciating the benefits the eTIMS rollout will bring to the economy at large, including expansion of the taxpayer base, taxpayers have experienced setbacks in the implementation of eTIMS including;

a) Limited guidance provided under the TPA on the expenses exempt from electronic tax management systems.

The currently provided list is not exhaustive. There are several expenses which typically do not pass-through invoicing such as foreign exchange differences, donations (which are not incomes from business), money transfer charges (due to their electronic nature), a category of airtime costs (bought electronically), among others.

b) The requirement is administratively onerous, and taxpayers need more time to implement, the case in point being the roll out of reverse invoicing where the KRA would

be required to issue guidance on how this will be undertaken.

Proposal:

To avoid future tax disputes around this provision, I propose that the implementation of **Section 16(1)(c) be deferred to 1 July 2025** to allow the KRA to issue comprehensive guidelines clarifying how the expenses that do not pass through invoicing but are legitimately incurred in generating taxable income shall be treated.

Further I propose the introduction of a clause in FA25 that defers the effective date of **Section 16(1)(c) of the ITA from 1 January 2024 to 1 July 2025.**

Section 16(1)(c) provides as follow: “(c) any expenditure or loss where the invoices in support of the transactions are not generated from an electronic tax invoice management system except where the transactions have been exempted in accordance with the Tax Procedures Act, 2015.”

9. Remove Treasury’s discretion on Funding to KRA

Law Impacted-Kenya Revenue Authority Act, Cap 469-Section 16 (1) (a)

Presently, KRA’s funding is capped at 2% of the revenue estimated in the financial estimated for each financial year to be collected by the Authority, as may be determined by the cabinet secretary, Treasury, in each financial year. KRA’s funding while capped at a minimum percentage, ultimately relies on the Treasury’s discretion as to what rate of the minimum percentage will be allocated.

The main weakness in KRA’s governance and administrative structures, remains inadequate funding, hindering implementation of planned projects and programs. It is estimated that KRA will receive full funding for its recurrent expenditure of, **Kshs 260,128 million** and seek further grants for capital expenditure of, **Kshs 23,420 million.**

KRA reports having collected Kes. 2.407 trillion in FY 2023/24, which numbers it hopes to successfully use to negotiate with the National Treasury to be allocated 2% thereof. Ideally, KRA should be receiving the minimum capped amount of Kes. 48,140,000,000.00, and not have to rely on the cabinet secretary’s discretion.

With increasing needs to enable KRA implement its various initiatives aimed at achieving its strategic objectives, it is critical that there is a deterministic system to its funding, where the amount is determined by the specific input of revenue collected and the pre-defined in the law, rather than being open to the discretion of the Cabinet Secretary. While remaining cognizant of fluctuating revenue targets achieved, despite projections, it would be more prudent to have a range of funding available to KRA, based on achieved targets.

Proposal:

The proposed amendment will remove the discretion of Treasury and peg KRA’s funding to such amount **not below 1.5% and not exceeding 2.5% of the estimated revenue,**

creating certainty in how much it receives in funding.

I therefore propose the **introduction of a clause in the FB25** which proposes to **delete the following words in Section 16(1) (a) of the Kenya Revenue Authority Act “not exceeding two percent” and “as may be determined by the Cabinet Secretary”** and to insert the following words in **Section 16(1) (a) of the Kenya Revenue Authority Act “not below one point five percent and not exceeding two-point five percent”**

10. Introduce a Commissioner General/Deputy Commissioner to specifically co-ordinate, lobby and present to the National Assembly policy changes within the East Africa Community Tax regime.

Law impacted: Kenya Revenue Authority Act, Cap 469 or Excise Duty Act, Cap

Part of the functions of KRA, is to advise the government on all matters relating to the administration of, and the collection of revenue under the written laws or the specified provisions of the written laws set out in the First Schedule. One of those laws is The East African Community Customs Management Act, which applies to customs generally. Imports are therefore by extension an Eastern Africa community issue.

The lack of human resource capacity to analyze and negotiate favorable tax policies at the EAC Secretariat is a challenge we presently face, with partner states coming off as stronger players within the region and consequently promoting harmful tax competition.

Without a coordinated effort by KRA to get expedient formal feedback on decisions relating to tax implementation made at community level, Kenya will remain at the back-seat of driving the community agenda to harmonize and increase tax coordination and thus continue to lose our individual fiscal flexibility.

Furthermore, Articles 209 and 210 of the Constitution derogate the power to impose custom duties on import and export of goods and excise tax on the national government. As such decisions made at the EAC bloc level and that have an implication on Kenya's tax regime should be ratified by the National Assembly in line with Articles 209 and 210 of the Constitution.

Proposal:

Introduce a clause in the KRA Act or Excise Duty Act, specifically creating a commissioner/deputy commissioner, whose function is to initiate, coordinate, relay and provide feedback on proposals and policies made at community level and that have an implication on Kenya's tax policies and to draft bills for presentation before the National Assembly for its consideration on ratification.

4.0 CONCLUSION AND RECOMMENDATION

I would implore this Honorable House to consider the above proposals, which are aimed at spurring economic growth and cushioning Kenyans against projected inflation rates.

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Respectfully submitted,



Peter Manda Wanjiku.
Advocate of the High Court of Kenya.