SUBMISSION OF MEMORANDA TO THE NATIONAL ASSEMBLY-TWELFTH PARLIAMENT SECOND SESSION

FINANCE BILL 2018

In the matter for consideration by the National Assembly of the Finance Bill, 2018

EAST AFRICAN TAX AND GOVERNANCE NETWORK (EATGN)| DEVELOPMENT INITIATIVES (DI)| INSTITUTE FOR ECONOMIC AFFAIRS KENYA (IEA-KENYA) | INTERNATIONAL INSTITUTE FOR LEGISLATIVE AFFAIRS (IILA)| NATIONAL TAXPAYERS ASSOCIATION (NTA)

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INTRODUCTION

The East Africa Tax and Governance Network (EATGN) is a collaborative initiative of various East African civil society organizations (CSOs) with diverse interests on tax issues within the region due to a conscious need for a greater understanding of taxation, tax justice and public financial management issues within the East African Community (EAC). EATGN has membership in Burundi, Kenya, Rwanda, Tanzania and Uganda thereby recognising how taxation is central to growth and development particularly in the EAC and has therefore become the central feature of integration after the operationalisation of the East African Common Market in July 2010.

Tax provides East African governments with the funding required to finance the infrastructure on which the region's economic development and growth is based. It also creates an environment in which business and wealth creation is carried out. It therefore plays a defining role in shaping the way in which the activities of government are conducted especially with regards to service delivery demands placed upon them by various constituencies. Consequently, EATGN views itself as a critical entity in galvanising citizen voices around these issues.

In Kenya the network comprises members of civil society and academia working on tax, budget and other public finance management issues either at the county or national level. This submission of memoranda on the Finance Bill 2018 encompasses contributions from the following organisations Development Initiative (DI), the East African Tax and Governance Network (EATGN), Institute for Economic Affairs Kenya (IEA-KENYA), International Institute for Legislative Affairs (IILA), National Taxpayers Association (NTA) and the contributions of Dr. Eric Kibet an academic in constitutional law.

THE FINANCE BILL 2018

The Finance Bill 2018 formulates the proposals announced in the Budget for 2018/2019 relating to liability, and collection of taxes and matters incidental thereto. This submission seeks to specifically address aspects of the Finance Bill 2018 in relation to how it will affect the following legislations namely:

1. Income Tax Act,
2. Excise Duty Act 2013,
3. Tax Procedures Act 2015 and The Proceeds of Crime and Anti-Money Laundering Act (No. 9 of 2009)
4. The Employment Act (No.11 of 2007)

THE PROBLEM

Several provisions in the Finance Bill 2018 expose significant inconsistencies in relation to the goal of reducing inequality in Kenya as envisioned by the Big Four Agenda of the Jubilee Administration and

Vision 2030 as recent reporting has exposed that the proposed bill risks burdening the poor while lightening the tax load of the wealthy. This is due to existing loop holes within the bill, presumptive taxes mainly targeted at small businesses and instances of no taxes in areas where it would make good sense to collect revenues. Therefore, the preliminary findings show the Finance Bill has too many contradictions to be passed in its current form because:

1. It risks burdening the poor over the rich due to loopholes in the tax regime and by taxing essential commodities/services
2. Presumptive taxes on small businesses may hinder entrepreneurship
3. The law is counterproductive in the fight against corruption by allowing a blanket amnesty from the Proceeds of Crime and Anti-Money Laundering Act.

SUMMARY OF ISSUES AND RECOMMENDATIONS

Clause	Issue	Proposal	Grounds
6	Presumptive tax	• There is need to review the base on which the said tax may be inferred rather than use the amount paid for business permit as proposed in Clause 11 since this may not provide a good inference of income that ought to be taxed.	• Tax is charged on income and not on costs like business permit. The proposed law has therefore not explored possible methods on estimating the likely income that will be realised by the businesses. • In line with the bill this may be treated as an additional levy to the county government rather than a tax as the proposed law gives room for estimating the inferred income on which tax may be levied.
7	'Electricity allowance'	• This proposal should be dropped unless there is clarity on how its success can be evaluated and the conditions for which one must meet to enjoy the incentive.	• It should be recalled that through the Finance Act 2009 investment allowance of 150% was granted for any investment outside the municipality of Nairobi and Mombasa. The previous proposal has not significantly changed the trends of investment taking note that there are other factors that drive investments. • The proposed 130% allowance is not sustainable and may not achieve the desired result considering the current electricity cost already is a deductible expense in determination of tax liability. • The question we pose is how this benefit will be transferred to the consumer and how effective the impact can be measured. This needs to be highlighted or else like other

			incentives which have failed the proposal may be in vain.
11	Amendment of the 3rd schedule	• This amendment should be dropped OR • If it is to be revised the phrase "subject to approval by parliament" should be inserted immediately after the word "arrangement".	• As currently stated the amendment provides an avenue of abuse unless it is well monitored. • There are no clear guidelines as to the extent which such companies will be subject to this arrangement especially with increasing Public Private Partnerships thereby making it open for abuse.
28	Amending section 36 of Excise Duty	This should be dropped.	• This should be read with arguments in the next issues in Clause 31 on raising excise duty on mobile money transfer.
31	Increase in excise duty on fees charged on mobile money transfer Part II	The increase should be dropped.	• The use of Excise Tax has remained unpopular as it is mainly geared towards deterring the use of good that have been deemed to be luxurious, risk to health or ruin moral in the society if their use is not well controlled. This explains why it is often referred to as 'Sin Tax' • The proposal to increase excise tax on mobile money speaks to the fact that use of mobile money transfer services can be labelled as a sin that ought to be deterred because financial transactions through banks are partially 'holy' and thus there was on change in the excise tax rate. • This proposal is discriminatory to the users of mobile money transfer services as compared to their counterparts in other financial institutions. • The proposal is oppressive to the poor who have just started enjoying the benefits of financial inclusion as an essential service and as such it is geared towards promoting equality in Kenya. • To bring this into context. Marginalised people (poor, women, low income earners, the elderly, youth and other vulnerable persons) benefit from different streams of cash transfers under the National Safety Net Program. Often these transfers are made via mobile money. Hence an increase in the costs of transferring money ultimately reduces the amount of cash transfers that beneficiaries

		receive thereby severely affecting their livelihoods. • Even with the intention of raising revenues to finance the Big Four Agenda the increase depicts the use of mobile money transfer as an evil that should be discouraged from the society • Read together with Clause 28 the increment of 2 % is seemingly linked to the proposal of 16% portion that should be transferred to Sports, Arts and Social Development Fund. The question here is; does it mean the understanding of all revenue generation from mobile money transfers is associated with betting/gaming taxes?
	Bottled water and packaged waters Part I	• Water should be excluded from excise duty. • Instead we propose an increase in excise duty on tobacco products whose increased consumption had severe health effects. **(See Figure 1 on Page 1)**	• This provision limits people's choices in accessing clean water and further worsens government failure to provide access to clean water. • Use of excise duty to deter use of risk goods as tobacco has proved a success in both revenue raising and maintaining a healthy society by: ○ Simplification of tobacco tax structure by re-introduction of a uniform specific tax rate for all cigarettes ○ Increase of the flat tax rate from KES. 2,500 per mille to KES. 3,100 per mille of cigarettes
	The proposed new paragraph 6 imposes excise duty on the amount of money transferred in case of an amount greater than Kenya Shillings 500,000	• 0.05% excise on any amount above KES 500,000 should be dropped. • We propose that excise duty should be based on the transaction (service) fees charged by the bank and not the amount being transacted.	• This 'Robin Hood Tax' (RHT) will cause a Kenyan reversal back into a cash economy by projecting the use of banks as unnecessary evil which needs to be restricted as depicted by the proposed bill • RHT will make the cost of transaction extremely high hence discouraging transactions through banking systems. • Reading the Excise Act, Excise tax should be on the value of service rendered; with this understanding in mind the question arising is whether the excisable value proposed by the Finance Bill 2018 is the amount transacted or the transaction fee charged? • The amount transacted cannot be considered as a service for excise

			duty purposes. This premise is therefore misinformed. • Finally, as much as we need to raise revenue to fund the 'Big Four' there is need to consider the effect of the various proposals as they may wipe out all current progress being made.
38	Proposal to introduce Section 37B (4) to the Tax Procedures Act 2015. This provision seeks to exempt money remitted from a foreign country under amnesty as provided for under the section from the provisions of Proceeds of Crime and Anti-Money Laundering Act. The section extends a pre-existing tax amnesty for money transfers repatriated from incomes or investments held in foreign countries by one year. The amnesty is intended to encourage remittances of funds held outside Kenya into the country to boost the economy.	• Amend Clause 38 of the Finance Bill 2018 by dropping a proposed provision in Section 37B (4) of the Tax Procedures Act, 2015 seeking to exempt remittances eligible for tax amnesty under Section 37B • To keep out money laundering and entry of proceeds of crime into Kenya, it is important that all money, including money eligible for amnesty as proposed in the Finance Bill 2018 continue to be subjected to the Proceeds of Crime and Anti-Money Laundering Act and other laws and regulations relating to financial reporting.	• This is because Proceeds of Crime and Anti-Money Laundering Act, 2009 is intended to safeguard against entry of suspect money that could be proceeds of crime and which could also be used to fund crimes such as terrorism. • While the proposed S. 37 B (4) of the Tax Procedures Act 2015 excludes funds derived from proceeds of *terrorism, poaching and drug-trafficking*, this is not helpful, because money does not come with labels. It is only upon inquiry as provided for in the Proceeds of Crime and Anti-Money Laundering Act, 2009 and Central Bank Prudential Guidelines that the suspect origin of funds can be discerned. **(See Figure 2 on Page 9)** • Retaining this proposed exemption poses many risks: (a) Security threats: this blanket exemption will weaken the current know-your-customer rules and disclosure procedures under the Proceeds of Crime and Anti-Money Laundering Act and Central Bank Prudential Guidelines. This will in turn open ways for entry of suspect funds that could fund terrorism and similar organized crimes. (b) Economic distortion. The blanket amnesty threatens safeguards against money laundering which will in turn open the Kenyan economy to the risks of money laundering including economic and political instability. (c) The exemption is also inconsistent with Kenya's international legal obligations relating to controlling transnational and international money laundering and terrorism financing, for example, under the

			United Nations Convention against Corruption to which the country is party.
68	The Finance Bill also proposes an amendment to the Employment Act by introducing a contribution to the Housing Fund.	• This proposal should be dropped**.** • The Finance Bill should explore alternative options like the proposed mortgage refinancing as indicated through proposed amendments Clause 61, 62 and 63 of this bill. • Further, the government may provide subsidies towards the adoption of Tenant Purchase Scheme (TPS) which can cater for even low-income earners.	• The proposal will put more burden on the employees and employers in terms of the added tax obligation. Further, it likely to bring about reduction in gross salaries by employers so that they spare an amount to contribute to the proposed fund. This means that the employee take-home will be drastically affected considering the government will not be offering housing following the deduction. • There are no clear benefits linked to the amount to be deducted. Is the government proposing to standardise and pay rent for the employees involved if the proposal is read in tandem with Section 31 of the Employment Act? This may be unrealistic considering the administration costs and the possibilities surrounding its sustainability • The CS has not clearly demonstrated how such a fund will be operationalised and how or who benefits from it. Provision of housing may be a good agenda though the generic nature of this proposal is a concern of how it can be a solution to the housing problem. • Based on a recent publication by the World Bank there are more options that Kenya can explore to bridge the gap in housing instead of this proposal is which in itself will propagate poverty.

CONCLUSION

In closing. the discussions, contribution and passage of the Finance Bill should aim to clarify and tighten implementation that seeks to broaden the tax base rather than deepen it as proposed. We urge the National Assembly and the relevant Departmental Committee of Finance and National Planning to help prevent the glaring policy reversals that seek to expand the regime of exemptions that offer unnecessary exemptions that may lead to serious economic distortions. We would therefore warn against proposals on excise duty that are aimed at boosting tax revenue and environmental protection but are likely to have

the opposite effect through increased transactions costs. This is therefore likely to slow down activities, reversing gains from cash transfers particularly for the poor and vulnerable

Figure 1: A plain/no-filter cigarette, Sportsman 'full flow' introduced in 2017

Figure 2: Daily Nation News coverage as relates to change in Tax Procedures Act 2015 and the likely effect on the Proceeds of Crime and Anti-Money Laundering Act

Finance>Rotich extends amnesty for those willing to repatriate the money

Kenyans' loot stashed away in Swiss accounts rises by Sh96b

The over 4.3 per cent jump trashes pressure over financial secrecy by the two nations

BY BRIAN NGUGI
[illegible]

Money hidden by wealthy Kenyans in banks in Switzerland jumped by over 4.3 per cent last year, making nonsense of the mounting pressure against financial secrecy by Swiss and Kenyan authorities.

The total amount held by Kenyans in the European country formerly famed as a haven for secret funds were up to 950 million Swiss francs (CHF) or about Sh96 billion last year from 911.4 million Swiss francs (CHF) or about Sh92.1 billion in 2016.

That amount can fund the construction of three equivalents of Thika Superhighway (50 kilometres each).

Record high

The numbers are contained in a new report by the Swiss National Bank (SNB), the country's central bank. The funds, however, once reached a record high of CHF 1.7 billion (Sh183 billion) in 2007.

The money includes deposits from Kenyans and fiduciary liabilities or money held in Swiss banks in trust on behalf of some Kenyans.

Until it loosened its secrecy, Switzerland was considered among the top dirty-cash havens for those seeking to hide their ill-gotten wealth outside their countries.

The latest Zurich-based SNB data comes as Kenya and Switzerland continue the clamp-down on dirty cash.

Last week, Kenya and Switzerland inked a pact that paves the way for reclaiming of funds and property acquired through proceeds of corruption and stashed abroad.

The fresh data indicates that Kenyans holding undisclosed funds in Swiss banks have not made use of a state tax amnesty to declare the money and repatriate it to remain eligible.

President Uhuru Kenyatta and his Swiss counterpart, Mr Alain Berset, signed the new deal dubbed "Framework for the Return of Assets from Corruption and Crime in Kenya" during the latter's recent visit to Kenya.

"We have seen, in the last few months, a new intensity in the fight against corruption in Kenya. Quite frankly, my administration has shown that corruption cannot, and, will not, be tolerated," President Kenyatta said.

According to the presidency, the first funds the framework will target, include cash linked to the Anglo Leasing scandal.

Treasury Cabinet Secretary Henry Rotich recently said Kenyans have one more year to repatriate the loot in a move that will keep the amnesty window open beyond the June 2018 deadline.

One of recovery efforts is the tax amnesty window given to tax cheats holding cash and property abroad.

Extended period

"In 2017, I extended the period from December 30, 2017 to June 30, 2018 for the year of income 2016," he said in the Budget speech.

"However, despite the extension, the uptake of amnesty has been low partly due to concerns that when the monies are returned, questions will be raised on the source as required by Financial Reporting Centre.

Dossier

CLIENTS APPEAR ON SECRET LIST

In 2015, Kenyans were among international clients whose names featured in a trove of secret bank files that reveal how HSBC's Swiss banking arm helped individuals stash billions of dollars in the country.

President Uhuru Kenyatta's government is eyeing the more than £1 billion (Sh124 billion) looted from Kenyan taxpayers by fat cats during the Daniel Moi reign and hidden in offshore bank accounts and prime real estate overseas, according to a forensic study by Kroll Associates.