4th May 2022.

Michael R. Sialai, CBS,
The Clerk of the National Assembly,
P.O Box 41842-00100,
E-mail: clerk@parliament.go.ke

Dear Sir,

RE: SUBMISSIONS ON NATIONAL GOVERNMENT FINANCE BILL FOR FY 2022/23

Members of non-state organizations listed below deliberated and prepared this joint proposal for the National Assembly on proposed tax proposals to be considered by the National Assembly in preparation for the National Fiscal Budget for the Financial Year finance 2022/23.

This joint proposal was prepared by the following Civil Society Organizations in Kenya. The submission highlights the proposed amendment to the law, supported by a statement on the issues to be addressed and a justification for the proposed amendment.

Thank you for your consideration.

Yours sincerely,
Irene Otieno
National Coordinator
National Taxpayers Association
Phone No: - 0734500940/ 0701946557
Email- iotieno@nta.or.ke

REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY- FIFTH SESSION
FINANCE BILL, 2022

FINANCE BILL, 2022

NO.	CLAUSE *(as it is in the Bill)*	PROPOSED AMENDMENT	JUSTIFICATION
1	**CLAUSE 9** The Second Schedule to the Income Tax Act is amended – (a) in the proviso to paragraph (1), by deleting the words "through the national grid" appearing in the definition of "manufacture"; (b) by inserting the following new paragraph immediately after paragraph (1A) – (1B) The provisions of paragraph (1A) – (a) shall only apply to items listed under paragraph 1(a)(I) and (ii) and paragraph 1(b)(a) of the Second Schedule; and (b) shall not apply to investments which, due to the nature of their business, have to be located in places which are outside Nairobi	Delete paragraph 1A (c) OR Inserting the words: the person has incurred investment in a special economic zone *and met the requirements under paragraph 1A and 1B.* A definition of businesses that due to their nature would not be carried out in Nairobi City County and Mombasa County needs to be provided.	The Finance Bill proposes to limit the entitlement of investment allowances under the Income Tax Act Kenya with regard to paragraph 1A of the Second Schedule of the Income Tax Act, Cap. 470. Prior to this proposed amendment, investment deductions of 100% would be available in instances whereby there would be an accumulated investment value of 2 billion Kenyan shillings outside Nairobi and Mombasa counties or the investment value for that year was at least 250 million Kenyan shillings. Further, investment allowances of 100% would be allowed for any entity in any special economic zone. This Bill seeks to limit this only to hotel buildings and machinery used in manufacture. The proposed paragraph 1B also limits investment deductions, excluding

	City County and Mombasa county.		businesses which would ordinarily carry out their business outside Nairobi and Mombasa from benefiting from this deduction. While efforts to reduce increase revenue are commendable, the blanket application of 100% and possibly 150% investment deductions in special economic zones (SEZs) is worrisome. This comes after the release of the Tax Expenditures Report of 2021 which indicated that tax expenditures arising from capital deductions amounted to around 77 million Kenyan shillings in 2018 and around 56 million Kenyan shillings in 2020.This decrease was only due to the reduction of capital deductions in the Tax Amendment Act of 2020 in response to the COVID- 19 pandemic. Further changes, especially towards the application of investment deductions towards special economic zones should be made to make it more fair, equitable and efficient. This can be done by requiring persons in special economic zones to meet the requirements of paragraph 1A and 1B especially with regard to investment value. This is in light of the other tax incentives provided under SEZs such as tax holidays and zero- rating of goods and services from VAT. This is despite the fact that the efficacy of these incentives has not been evaluated as they were not included within the Tax Expenditure Report 2021. An exhaustive list of businesses which due to their nature would not be carried out in Nairobi

			and Mombasa counties should be provided to prevent legal uncertainty on the nature of business that would be entitled to these investment deductions.

2.	**CLAUSE 11** 18A. (1) Where – (a) a resident person carries on business with a related resident person operating in a preferential tax regime; or (b) a resident person carries on business with – (i) a non-resident person located in a preferential tax regime; or (ii) an associated enterprise of a nonresident person located in a preferential tax regime; or (iii) a permanent establishment of a non-resident person operating in Kenya	Introduce provisions that would make parties who are transacting with each other through a joint venture subject to transfer pricing rules.	This is a welcome proposal and a further improvement made from the previous Finance Act 2021 which extended transfer pricing rules to transactions that take place between any entities which are registered under any preferential tax regimes and those that are non-preferential tax regimes entities. To further enhance the effectiveness of this rule, it is necessary to further introduce rules that would ensure that entities within a joint venture are subject to transfer pricing rules.
3.	**CLAUSE 12** 12. The Income Tax Act is amended by repealing section 18B of the Act and substituting therefor the following new section – **18B.** The provisions of sections 18B,18C, 18D, 18E, and 18F shall apply to returns for the year of income 2022 and subsequent years of income.	Reduce the threshold from a gross turnover of 95 billion Kenya shillings to a much lower threshold. Delete the word 18B from the proposed section 18B so that it reads as follows: **18B.** The provisions of sections 18C, 18D, 18E, and 18F shall apply to returns for the year of income 2022 and subsequent years of income.	While it is well understood that the KES 95 billion is in line with the OECD standards, it is argued that the threshold should be much lower so as to capture more multinational entreprises that operate in Kenya and to ensure that more multinational entreprises are subject to country by country reporting requirements. This is another welcome change that builds of the attempt by the Finance Act 2021 to domesticate Country by Country reporting. This provision requires multinational entreprises to provide several documentation to tax authorities which are to be used for several tax purposes. The files

			in accordance with international standards consist of 3 including: the master file, the local file and the CbC report which is meant to show an overview of the economic activities of the group entities in another jurisdictions. However, 18B is a transitional provision that is meant to show from which time the new measures become effective. To ensure that it can be read clearly, it would be better to remove the clerical error of mentioning that provisions of section 18B shall apply to section 18B.
4.	**Clause 15** Section 34 of the Income Tax Act is amended – In subsection (1), by deleting the expression "five per cent" appearing in paragraph (j) and substituting therefor the expression "fifteen percent"	Amend the Eighth Schedule to include a provision for an indexation allowance.	While the increase in the capital gains rate is a welcome move, it should be noted that taxpayers will unduly suffer where no indexation allowance is provided for to consider the rate of inflation.
5.	**Clause 28** The First Schedule to the Value Added Tax Act, 2013 is amended- (a) In Section A of Part I i) by deleting paragraph 63: Provided that notwithstanding this subparagraph, any approval granted by the Cabinet Secretary before the commencement thereof in respect of the supply of taxable goods and which is in force at such commencement shall continue to apply until the supply of the exempted taxable	This clause should be abandoned in its entirety	The VAT exemption of goods under paragraph 63 covered the construction of taxable goods for the direct and exclusive use in the construction and equipping of specialized hospitals with a minimum bed capacity of fifty. This encouraged the construction of hospitals which is particularly important given the shortages that were made evident during at the height of the COVID-19 pandemic. The standard rating of these goods will be contradictory to the countries Big 4 agenda of providing for Universal Health Care.

	goods shall be made in full.		
6.	**Clause 30** The Tax Appeals Tribunal Act, 2013 is amended by repealing section 32 and replacing it with the following new section: 32(1) A party dissatisfied with a decision of the Tribunal under section 29 may appeal to the High Court within 30 days of being notified of the decision or within such longer period as the High Court may allow. 32(2) Before filing an appeal under section (1), the appellant shall deposit with the Commissioner fifty percent of the disputed tax in a special account of the Central Bank of Kenya 32(5) Where all appeals have been exhausted and the court has ruled in favour of the aggrieved person, the Commissioner shall refund the monies deposited by that person under subsection (2) within thirty days after the determination of court	The proposed section 32(2) and 32(5) should be deleted	These two provisions are problematic in several ways; first to require a taxpayer to deposit 50% of the tax in dispute may be difficult especially where their cashflows will be significantly affected. This may force them to borrow funds to raise said amounts. Secondly, this is a departure from the current practice where an objection can only be lodged where the tax not in dispute has been paid. Third, this clause is problematic given that the taxpayer will have to exhaust all measures before they can be refunded. It takes an unduly long time for decisions to move from the Tax Appeals Tribunal to the High Court, the Court of Appeal and finally the Supreme court. In addition, 32(5) is unclear about what happens where the taxpayer wins at the High Court and KRA opts not to appeal the decision. In such an instance one can argue that "all" appeals have not been exhausted. Finally, there may be grounds for arguing that not this is an unconstitutional denial of the right to property.
7.	Amendment of section 10 of No. 23 of 2015 proposes to give the Commissioner General discretion to exclude some products from inflation adjustments after considering the prevailing economic and social circumstances facing the country at the point the adjustment	The parameters that will be used to exempt certain products from inflation adjustments review by the CG should be explained	Inflation adjustments yearly review keep the excise as proportion of the retail price the same

	is due to take effect. The exemption will be subject to approval by the Cabinet Secretary (CS) for the National Treasury and will communicated through a notice in the Kenya Gazette.		
8.	**Clause 34 (b) (viii)** *The First Schedule to the Excise Duty Act, 2015 is amended-* a) In the second table appearing in paragraph 1 of Part I- viii) by deleting the expression "Shs. 13,906.04 per kg" in respect of the tariff description "Cigars, cheroots, cigarillos, containing tobacco or tobacco substitutes" and substituting therefor the expression "Shs. 13,296.6 per kg"	This proposed amendment should be deleted or amended to increase rather than reduce the excise duty rate	Tobacco products are harmful to the health of consumers. Reducing the rate on any tobacco product would make it cheaper to consume thereby encouraging its use and hence encouraging non communicable diseases (NCDs)
9.	**Clause 34** The First Schedule to the Excise Duty Act, 2015 is amended – b) In the second table appearing in paragraph 1 of Part I- xii) by deleting the expression "Shs 12,185.16 per unit" in respect of the tariff description "Motorcycles of tariff no 8711 other than motorcycle ambulances and locally assembled	This proposed amendment should be deleted	While it is understood that an increase in excise duty on imported motorcycles may encourage local manufacture, whilst this is a welcome move, where the local demand does not meet supply then the high cost of motorcycles may make the cost of motorcycles expensive despite the fact that the poor rely on them for transport and as a source of livelihood.

	motorcycles" and substituting the expression " Shs 13,403.64 per unit"		
10	**Clause 34** The First Schedule to the Excise Duty Act, 2015 is amended – In the second table appearing in paragraph 1 of Part I- (xvi) by deleting the tariff description "Imported Glass bottles (excluding imported glass bottles for packaging of pharmaceutical products)" and the proviso thereto and substituting therefor the tariff description "Glass bottles (excluding glass bottles for packaging of pharmaceutical products)	This proposed paragraph should be deleted	The excise duty on glass bottles was only payable on imported glass. This gave local manufacturers an edge by reducing the cost of their bottles and subsequently the demand for those bottles. Making domestic glass bottles excisable will reduce the competitive advantage that they had affect that industry. In the long run there may be impetus for turning to the use of plastics as a substitute.
11.	by deleting the expression "shs. 3,447.61 per mille" in respect of the tariff description "Cigarette with filters (hinge lid and soft cap)" and substituting therefor the expression "Shs. 3,825.99 per mille"; by deleting the expression "shs. 2,502.74 per mille" in respect of the tariff description "Cigarettes without filters (plain cigarettes)" and substituting therefor the exp	The proposed amendments in these two sections should be amended to include both categories of cigarettes under one uniform specific tax rate set at the higher of the two options	Global data show that specific and ad valorem taxes have different effects on the retail prices of cigarettes. Tax systems that rely more on specific excise tend to result in higher tobacco prices than systems that rely more on ad valorem taxes. Merits of uniform specific taxes include: 1.Enhances effectiveness of tax administration since it is more simplified tax system 2.Limits incentives for reducing non-compliance by producers and for substitution by users

			3.Restricts incentives for introduction of pricing strategies that reduce tax liability by producers.
12.	**(b)iv), (vii), ix), x), xi), xvii) (c)**	We are in support of the proposed amendments in these clauses/sub-clauses	Consumption of the products in these sections are key risk factors for Non-Communicable Diseases (NCDs) and increased taxes will hike their prices thereby making them less accessible thus reducing their prevalence.
13.	**Clause 38** The Tax Procedures Act, 2015 is amended by repealing section 40 and replacing it with the new section 40 (5) Where a taxpayer fails to pay the tax liability described in the notification under subsection (1) within two months of after receipt of the notification, the Commissioner or authorized officer may, at the cost of the taxpayer dispose of the property that is the subject of the restraint on disposal , mortgage or charge, by public auction or private treaty, or as provided for under the Act for the recovery of tax	This section should be deleted	Under the current section 40 of the TPA the Commissioner is allowed to direct the registrar to be subject of a security for the unpaid tax. There are no rights to sell the property and the Commissioner can only cancel the charge once payment has been made. The proposed amendment seeks to give wide-sweeping powers for the sale of property within two months of notification of the creation of a charge where taxes remain unpaid. This is potentially an abuse of powers and a violation of the right to property under the Constitution of Kenya.
14.	**Clause 41** Section 51 of the Tax Procedures Act, 2015 is amended by d) deleting subsection 11 and substituting therefor the following new subsections –	This proposed amendment should be deleted	Under the current provision of the TPA the objection is deemed to be allowed where KRA does not respond within the 60-day limit. Removing this limit creates uncertainty for taxpayers as the road to the TAT may be a long winded one if the revenue authority is given leeway to determine when they will respond to the objection.

	(11) the Commissioner shall make the objection decision within 60 days from the date of receipt of a valid notice of objection		
15.	**Clause 44** The First Schedule to the Miscellaneous Fees and Levies Act, 2016, is amended by: (ii) by deleting the expression “80% or USD 0.52” appearing in tariff no. 4101.20.00 and substituting therefor the expression “50% or USD 0.32”. (iii) by deleting the expression “80% or USD 0.52” appearing in tariff no. 4102.21.00 and substituting therefor the expression “50% or USD 0.32”. (iv) by deleting the expression “80% or USD 0.52” appearing in tariff no. 4102.29.00 and substituting The Finance Bill, 2022 46 therefor the expression “50% or USD 0.32”. (v) by deleting the expression “80% or USD 0.52” appearing in tariff no. 4103.20.00 and substituting therefor the expression “50% or USD 0.32”. (vi) by deleting the expression “80% or USD 0.52” appearing in tariff no. 4103.30.00 and substituting therefor the expression “50% or USD 0.32”;	These proposed amendments should be deleted	The export levies are required to encourage domestic production of goods that are subject to the levy by making it cheaper to supply domestic manufacturers. The reduction in the export levy under all the listed goods relate to animal hides and skins. In order to continue to support this industry, the export levies should not be reduced.

	(vii) by deleting the expression “80% or USD 0.52” appearing in tariff no. 4103.90.00 and substituting therefor the expression “50% or USD 0.32”; (viii) by deleting the expression “80% or USD 0.52” appearing in tariff no. 4104.19.00 and substituting therefor the expression “50% or USD 0.32”. (ix) by deleting the expression “80% or USD 0.52” appearing in tariff no. 4301.60.00 and substituting therefor the expression “50% or USD 0.32”.		
16.	The Bill proposes to delete paragraph 108 of section A of part of the first schedule. The Bill seeks to revoke the VAT exemption on maize flour, wheat or meslin flour and cassava flour and introduce 16% VAT on supply of maize flour, wheat flour and cassava flour.	Re-introduce the zero rating of the supply of maize flour, wheat and meslin as well as cassava flour.	The Bill seeks to revoke the VAT exemption on maize flour, wheat or meslin flour and cassava flour. This proposal will lead to an increase in prices of maize, wheat, and cassava flours. Kenyans are living in hard economic times having to deal with the high inflation and increase in fuel prices, to add on to the COVID-19 effects still being felt as evident in the hard economic times. The increase in flour commodity prices will hit the poor people the most since flour is a necessity good which has to be consumed by people despite the increase in price.