OKOA UCHUMI!

4th August 2022

Hon. (Amb.) Ukur Yatani, Egh
Cabinet Secretary/ The National Treasury & Planning
Treasury Building
Harambee Avenue
P.O Box 30007-00100
Email: budgetproposals@treasury.go.ke

Dear Sir,

RE: CIVIL SOCIETY SUBMISSIONS ON THE KENYA DRAFT NATIONAL TAX POLICY

This submission is made by members of Okoa Uchumi Coalition, an initiative of civil society organizations interested in Kenyan public finance management issues. More specifically, Okoa Uchumi is interested in tax matters as proposed by the draft national tax policy,which sets out broad parameters on tax policy and related tax matters in Kenya.The Institute for Social Accountability (TISA),Oxfam Kenya, The East African Tax and Governance Network (EATGN), National Taxpayers Association (NTA), Africa Centre for People Institutions and Society(ACEPIS),Transparency International(TI),AFRODAD, Tax Justice Network Africa (TJNA) and Participants from Social Justice centers worked to analyse the policy and are therefore giving their proposals in this joint submission to the National Treasury, herein attached to this correspondence.

The Draft National Tax Policy has been analysed in the context of the challenges currently facing the taxation regime in the country such as huge informal sector that is hard to tax, unpredictability of tax policies, huge tax expenditure poor compliance among others.

Our analysis has also focused on the following considerations, namely: 1. Need for enactment of a Public Participation Act or the development of public participation guidelines to enable effective stakeholder engagement as tax issues are cross cutting and are matters of national importance.2. Need for development of a mechanism for feedback and have clarity on who has the role and responsibility to acknowledge and address the feedback. 3. Tax exemptions should not be arbitrary and discretionary as this increases the scope for tax abuse and reduced government revenue.4. Special VAT rates for special categories of goods like LPG given the ripple effect this has on the economy and the potential to hurt low-income earners.

Thank you for your consideration.

Yours sincerely,

for Kinaga

Wanjiru Gikonyo, National Coordinator, TISA,
On behalf of Okoa Uchumi Coalition

KENYA DRAFT NATIONAL TAX POLICY SUBMISSIONS BY CIVIL SOCIETY ORGANIZATIONS

No.	Policy Guideline/Issue	Proposed amendment	Justification for the Proposed Amendment
1	1.5 Guiding Principles	Include the following principles in line with human rights-based approaches to tax justice: . Inclusion and empowerment: tax policy should ensure participation and involvement of citizens in the articulating of their ideas to influence decision making processes, enhancing their dignity, and improving their capacity that will increase domestic revenue mobilization. Legitimacy: tax policy decision making shall be made in accordance with the rule of law thereby ensuring that there is no impunity, corruption, or circumvention of due process.	1. The principles of Equity and Fairness, Transparency and Accountability; plus, Neutrality currently in the draft tax policy can only be strengthened if human rights-based approaches to tax justice are implemented holistically to include Inclusion and empowerment plus Legitimacy. 2. Including the following two principles will activate and ground the reasons for citizen or non-state actors' involvement in tax policymaking based on Article 43 on Economic and Social Rights under Constitution of Kenya (COK) 2010. Guaranteeing: (1) Every person has the right-- (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; (b) to accessible and adequate housing, and to reasonable standards of sanitation. (c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities; (e) to social security; and (f) to education. (2) A person shall not be denied emergency medical treatment. (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependents.
2	Under the implementation,	The policy should recommend the	Given the currently limited focus on taxpayers' feedback, there is a

	framework Taxpayers have a role and responsibility to give feedback on tax administration services however the framework does not provide a mechanism for consideration and/or response to the feedback.	development of a mechanism for feedback and have clarity on who has the role and responsibility to acknowledge and address the feedback.	need to develop a clear feedback loop in part as an element of stakeholder engagement and secondly to underscore the importance of the policy's guiding principle.
3.	Under the policy guidelines Tax incentives should be given in line with a criterion that takes into consideration the costs and benefits of incentives and a public record of the same maintained. This criterion is also referred to in the PFM Act, 2012 Section 77 which gives the CS the power to grant tax incentives. The criterion is supposedly provided for in the regulations.	The policy should provide measures for the public record and access to the criterion to which tax incentives are granted if they exist. In the case in which the policy is not in existence the development of one should be a focus of the policy with details on what it should entail.	The inadequacy of information around the criterion for tax incentives is contrary to the guiding principles for transparency and accountability. The lack thereof/inaccessibility of the criterion creates a gap for abuse of the tax incentives system by tax officials with discretionary powers.
4.	As per the provisions of Article 201(1) the constitution requires that any tax waiver given should be recorded and availed to the public and the reason for the waiver reported to the auditor general however this is not covered in the policy	Addition of the requirement for recording of tax waivers, public access and the communication of the reasons for the waiver to the OAG. Addition of the OAG's office to the implementation framework actors as well as the office's role in relation to reasons	The practice of justifying tax incentives promotes transparency and accountability in tax administration and reduces tax expenditure on the governments' end.

	guidelines and the implementation framework.	for tax waivers as given by the National treasury.	
5	The Public Finance Management Act, 2012 provides for the role of the CS in giving tax incentives in Section 77 in accordance with the provisions of the criterion provided for in the regulations.	The addition of mandate of the CS in relation to tax incentives and their application in both the policy guidelines and the implementation framework. We propose for the capping of the powers of the CS or expunging the entire section of the PFM Act, Sec 77 that gives the discretionary powers on the application of tax incentives?	Tax incentives granting and application have long been subject to lobbying and the practices lack openness outlining the discretionary powers of the CS in the practice is important and key in promoting accountability.
6	Under the predictable tax rates and tax base, the tax policy provides for the requirement to have Stakeholder engagement before undertaking any amendment of the tax laws	The policy should recommend for the enactment of a Public Participation Act or the development of public participation guidelines to enable effective stakeholder engagement as tax issues are cross cutting and are matters of national importance.	Public participation is a Constitutional requirement in Kenya, and it has been recognized as a right. Article 10(2) of the Constitution opines that the national values and principles of governance include patriotism, national unity, sharing and devolution of power, rule of law, democracy, and participation of the people Article 174 (c) of the Constitution demands public participation in all arms of government. Parliament presented three different bills on Public Participation (Sen. Bills No. 4 of 2018), the Public Participation Bill (NA Bill No. 69 of 2019), and the Public Participation Bill (NA Bill No. 79 of 2019). The purpose of these Bills was to give effect to the Constitutional provisions on public participation Currently, only one of those bills has passed the first reading and has been with

			the Budget and Appropriations Committee for 3 years. There is no clarity on what constitutes adequate participation, the nature of the participation that meets the constitutional threshold, or the most effective mechanisms for public participation. Studies show us that public participation in some form is taking place in most of the processes in the devolved system of governance at both levels of government. The form, nature, and levels of public participation are however unsatisfactory in both the county and national governments, and this can be addressed through creation of a legal framework to govern the exercise.
7.	Additionally, under this guideline the government aims to undertake comprehensive review of tax laws every five years to align with other Government policies.		Stable tax policy allows taxpayers and investors to make far reaching decisions knowing future tax implications. Our current tax system doesn't make any commitment or give any guarantee of what would be in force in any period, not even in the immediate future. As a developing economy we need investors and of course very generous tax incentives have been extended. However, the fact that the incentives can be introduced and withdrawn at will creates uncertainty within investor circles. Stability is also necessary in the way new tax proposals are allowed to settle and gain acceptance by the stakeholders. Just like any in any other law drafting process, public participation is required, buy in from the taxpayers is necessary. This cannot be rushed, once it takes effect, individuals' life, community welfare and public

OKOA UCHUMI!

			revenue will be affected. We can take years crafting tax laws but do so for posterity, come up with laws that cannot be challenged. It is also necessary to allow some period for polishing finer details of the proposal instead of successive changes after changes. Consider taxation of income of the Digital economy. It was first mentioned in 2018, then the law came in to force in 2019 by amending the income tax act. By this time, the enabling regulations were not in place, so they came in 2020, later in 2021 the scope of digital taxpayers would be defined to exclude resident persons. Probably in 2023 there will be an overhaul of the entire tax. In as much as some of these taxes are still evolving, the government needs to move with precision, introduce laws together with their regulations and framework for administration. Finally, every new tax makes a demand on the taxpayers and the assessors to learn it. A lot goes to capacity building, having to train staff on how to comply with a new tax, therefore constant capacity building on annual basis due to the introduction of a new form of tax is not viable.
8.	VAT There shall be a single general rate for VAT, and where a preferential rate is granted, it shall not be lower than 25 percent of the general rate. VAT zero-rating shall be limited to exported goods	Introduce additional special VAT rates for special categories of goods like LPG because of the ripple effect this has on the economy and the VAT has potential to hurt low-income earners. We also propose that the V.A.T exemptions for PWDs goods should	There is a proposal to have a single VAT Tax rate of 16% with preferential VAT rates to be discounted at 25%. If increased, the highest rate would be 20% with the lowest rate at 12% This will have an impact on some of the items with preferential rates like LPG currently taxed at 8%. If this policy was to be adopted today, LPG whose VAT tax rate is

	except for transportation of passengers and supply of taxable services by carriers on international voyage or transportation of goods by land for destination terminating outside Kenya.	not be limited to importation. But this should apply to PWD locally produced and consumed, with a key focus on sanitary products (adult diapers) and braille paper.	8% will automatically go up to at least 12%. This has a ripple effect to the economy and would generally hurt low-income earners. The standardization is a welcome move. However, there is reduction of VAT exemptions to only 8 categories hence all other categories will be taxed at 16% given the general rule is that anything is Vatable unless it is exempted. VAT exemptions shall be restricted to the following general categories and their specific items/services shall be provided in the Act(a) projects financed by development partners only where financing agreements provide for such exemptions. b) persons with privileges and immunities in accordance with international agreements and conventions; c) supplies to armed security forces; d) raw farm produce that has not undergone any processing or value addition excluding cut flowers; e) live animals, fish and poultry; f) medicaments; g) financial services, educational services and social services supplied by Government or non-government organizations; and h) goods imported by persons living with disability.
9.	Under the hard to tax sectors such as agriculture and informal sectors, the tax policy provides for exploring ways of enhancing taxation in the	The policy should expound on the meaning of the informal sector and which businesses fall within the ambits of the informal sector.	There is a need to define what is meant by the informal sector. As it is, it is quite vague and as such limits the effectiveness of the proposed method of taxation, the presumptive tax. KRA defines presumptive tax as a rate equal to 15% of the amount payable for a

	agricultural sector and the informal sector including use of presumptive tax; ISSUE 1. During the 2018/2019 financial year, the government introduced presumptive tax for informal sectors but failed. What will be done differently this time? 2. Administration of the presumptive tax depends on some degree of formality (licensing, permits or some form of registration) which may not apply to a significant constituency of informal sector players. As such, using presumptive tax as the mechanisms for bringing informal sector (hard to tax sectors) may still be limiting.	The policy should explore other ways to tax the informal sector other than through presumptive tax.	business permit or trade license issued by a county government. The informal sector is comprised of various business operations, who do not necessarily pay for permits or trade licenses. These include traders involved in the sale of second-hand items like clothes, street vendors, carpentry, vegetable selling, repair and construction work. Therefore, the proposed presumptive tax will still not capture the entire informal sector unless structures are set up to ensure that stated business operate with business permits.
	Developing criterion for granting tax incentives	Policy to require Public participation in developing criterion for granting tax expenditure. That is, involve citizens(taxpayers) and other stakeholders (private sector, Non state Actors & professional bodies) in establishing the criteria	The Constitution of Kenya and PFM Act 2012 provide for citizens to be involved in decision making processes, including matters on Public Finance. Participation in developing the criterion will ensure the needs of citizens are addressed by the firms/companies that are to benefit from the tax incentives.

10.1	Maintaining a public record of developed criterion for awarding tax incentives.	Policy to require government (National Treasury and/or KRA) to maintain a public record of the developed criterion for awarding tax incentives. The criteria should be published in the KRA & National Treasury websites and other government communications channels like Gazette	Section 5 of the Access to Information Act 2016 requires public entities to facilitate access to information on procedure followed in a decision making process. Publishing the criterion will enhance transparency and accountability.
11.1	Defining sunset dates for tax incentives offered to specific beneficiaries in various sectors of the economy	Policy to require government (National Treasury) to explicitly define and indicate sunset dates of tax incentives offered to specific beneficiaries	Having sunset dates will prevent exploitation of tax incentives and avert tax evasion. Sunset dates are also necessary for accountability
12.	Developing guidelines to ensure tax expenditures are accounted for in the budget	Policy to require National Treasury to include tax expenditures in the annual national budget as an accountability measure to ensure awareness of revenues lost and incentivise their management for optimal returns	Tax incentives result in revenue forgone for the government amounting to 2.96% of GDP in 2020. As such tax incentives need to be accounted for by being include as part of the annual budgetary procedures where revenue forgone through issuing tax incentives are declared against the benefits achieved
13.	Maintaining, publishing and making available information on tax incentives	Policy to require National Treasury and/or KRA to keep a record of and make available on demand, information about beneficiaries, reviews, terms and costs (expenditures) of tax incentives.	Currently, there remains significant asymmetry in access to information about tax incentives. Providing a requirement for Treasury and/or KRA to keep a record and make available on demand, information about beneficiaries, reviews, terms and the costs (expenditures) can facilitate transparency and accountability that would make tax incentives more beneficial to the country.
14.	Applying presumptive tax to the informal sector	Instead of presumptive tax, policy to propose constant fees charged to	KRA should alternatively impose fixed amount of fees for traders under different income brackets

		all traders/vendors involved in the informal sector. The fees should vary depending on income brackets of the traders/vendors	since presumptive taxes are likely to be opposed (County governments did not comply with the directive of charging taxes on the licenses awarded to traders/vendors in counties.)
15.	Taxing informal sector	Policy to explore the avenue of taxing SACCOs under which individuals from the sector operate	It is easy to deal with SACCOs as they are more organized and have the records of individual members/subscribers.
16.	Elaborate definition of the informal sector	The policy should provide a comprehensive definition of 'informal sector' including listing or description of enterprises/businesses involved	The informal sector is comprised of various business operations, who do not necessarily pay for permits or trade licenses. These could include businesses such as consultancy services that happen in an informal setup such as over a phone call or at home and cannot be easily traced. Other businesses considered as informal include traders involved in the sale of second-hand items like clothes, street vendors, carpentry, vegetable selling, repair and construction work.
17.	Under income tax, the policy provides for exemptions on tax to serve public interest as determined by the Cabinet Secretary.	This provision should be backed with Public Participation Act.	There is underlying vagueness on the parameters that the CS can use to grant tax exemptions in public interest.
18.	The policy on international income tax is vague.	There needs to be a specific definition for "best practice" through income tax is applied.	The policy defeats the interests of the East African community of shared economic development and prosperity.

For more information contact Joan Akoth on 0716901667 or email:joan.akoth@tisa.or.ke

Annex 1

PARTNERS IN THE DRAFT NATIONAL TAX POLICY SUBMISSION

1. The Institute for Social Accountability (TISA)
2. Oxfam Kenya
3. The East African Tax and Governance Network (EATGN)
4. Tax Justice Network Africa (TJNA)
5. National Taxpayers Association (NTA)
6. Africa Centre for People Institutions and Society (ACEPIS)
7. Transparency International -Kenya (TI)
8. AFRODAD
9. Tax Justice Network Africa (TJNA)
10. Social Justice centers