

Mr. Michael Sialai CBS

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Parliament of Kenya

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Our Ref: S/20

Your Ref: TBA

Date: 6th April 2020

Dear *Mr Michael Sialai,*

RE: TAX LAWS (AMENDMENT) BILL, 2020

The above subject refers.

The Tax Law (Amendment) Bill, 2020 (the Bill) was widely expected by the members of the Public, following the President's address held on 25th March 2020 whereby he indicated various measures that would assist members of the public as a result of the Covid-19 pandemic.

In his address, the President acknowledged that it was necessary for the Government to make targeted state interventions to mitigate shocks arising from the impact of the pandemic and to empower the public as well as the private sector to work together to support the Kenyan economy during these tough times.

The measures announced by the President on 25th March 2020 were as follows:

1. Exemption of income earned by workers earning an income of KES 24,000 (approx. USD 225) or less from PAYE;
2. Reduction of the top PAYE rate from 30 percent to 25 percent for individuals;

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3. The reduction of the corporation tax rate from 30 percent to 25 percent for corporate taxpayers;
4. The reduction of the turnover tax rate from 3 percent to 1 percent for low income earners;
5. The reduction of the VAT rate from 16 percent to 14 percent;
6. The immediate release of VAT refunds of approximately KES 10 billion (approx. USD 95 million) within three weeks or to allow the outstanding VAT refunds to be offset against VAT withheld by appointed withholding VAT Agents.

Against this background, it was expected that the Bill would only cover the implementation of these changes. Our review of the Bill however reveals otherwise. We note there is introduction of significant and far reaching measures which will impact the public negatively. We highlight below some of the shortcomings of the Bill and provisions proposed therein which are not related to Covid-19 in any way whatsoever:

1. The President's recommendation to reduce corporation tax from 30 percent to 25 percent for corporate taxpayers has not been included in the Bill;
2. The measures relating to VAT refunds have not been clarified. It was expected that there would be clear guidelines with clear timelines on the issue of VAT refunds included in the Bill, but these are lacking;
3. Basic essentials like bread and LPG gas which are currently VAT exempt will be taxable at 14% as proposed under the Bill;
4. Agricultural inputs such as fertilizers and pesticides which are exempt from VAT will be subject to VAT at 14%. This will impact the agricultural sector negatively, particularly in light of the ongoing locust crisis;
5. Pharmaceutical inputs will be reallocated from zero rated to exempt supplies. This will have a massive impact on manufacturers of pharmaceutical products as they will be required to absorb VAT on their inputs (like electricity). This will result in an increase in the costs of pharmaceutical products as these companies will invariably pass on these costs to consumers at a time when medical products should be made cheaper;
6. Electricity expense reductions, introduced by the Finance Act 2019 and intended to make manufacturing cheaper in Kenya, will be deleted. This is particularly surprising as this exemption was only introduced in November 2019 and is being deleted a few

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months later. This also applies to Green Bond exemptions introduced in November 2019 which will be deleted;

7. Capital gains tax exemptions that currently exist in Kenya, with respect to the transfer of private residences, properties worth less than KES 3,000,000/-, and agricultural properties less than 50 acres will be deleted. Similarly, tax breaks on Home Ownership Savings Plans which were expected to play a crucial role in the President's Big Four agenda have been deleted;
8. The tourism sector will be badly hit, with the services of tour operators, entry into national parks, construction of tourism facilities being subjected to VAT at 14% whereas they are currently exempt;
9. There are a raft of amendments that will impact on renewable energy negatively. In particular, equipment for solar and wind generation which were are currently exempt from VAT will be subjected to VAT. Additionally, clean stoves will be subject to VAT;
10. Interest on infrastructure bonds are proposed to be subjected to withholding tax. The infrastructure bonds are long term bonds and amending the tax rates is contrary to a legitimate expectation of the holders of the bonds. Furthermore, this will impact savings of pensioners adversely as the infrastructure bonds are held mainly by pension funds and other financial institutions;
11. Foreign direct investments through the Nairobi Securities Exchange will be badly hit, noting that all exemptions applicable to newly listed companies have been proposed for removal. Additionally, withholding tax on dividends paid to non-resident persons are proposed to be increased at a time when investment into Kenya should be encouraged;
12. Key Governmental organisations involved in the development of the agricultural sector, namely the Tea Board of Kenya, Kenya Dairy Board, the Pyrethrum Board among others, have lost their tax exemptions. Furthermore, Kenya Power and Lighting Corporation has also lost its tax exemptions. The impact of these changes will result in these costs being transferred ultimately to consumers.

The highlights above are only a summary of the far reaching changes proposed in the Bill, which have nothing to do with the Covid-19 measures announced by the President of Kenya. We have set out in the Schedule to this letter a detailed analysis pertaining to the Bill and the proposals of the Law Society of Kenya in this regard.

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As the Law Society of Kenya, we bring to your attention the constitutional requirement to adequately undertake public participation prior to the implementation of new laws, in particular those which have far reaching consequences to the country as a whole.

In particular, we would bring to your attention the following provisions of the Constitution of Kenya regarding public finance and public participation:

1. The need for public participation in matters public finance

Article 201 of the Constitution provides that the following principles shall guide all aspects of public finance in the Republic:

“(a) there shall be openness and accountability, including public participation in financial matters;”

Article 118 (1) of the Constitution provides that the Parliament shall:

“(b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.”

It is most worrying that the Bill was published on 30th March 2020 with the public being granted only six (6) days to comment on these overarching measures, with the proposals due on 6th April, 2020. We note that Parliament has been convened for a special legislative session on 8th April, 2020 during which the three committee readings will be undertaken. It follows that the members of the National Assembly will not have an adequate opportunity to consider the comments received on 6th April, 2020 by the time they begin the legislative process.

While we appreciate the need for urgency in passing the Covid-19 related tax measures, it is a cause for concern why the entire overhaul of the taxation regime in Kenya needs to be accelerated as these measures have nothing to do with Covid-19.

We advise that only those measures that are in direct response to Covid-19 should be considered by Parliament. The constitutional threshold for public participation must be complied with, and the Bill in its current form cannot be accelerated through Parliament into law. We recommend that the Bill be split into two with the effect that the most urgent measures pertaining to Covid-19 as highlighted in the President's address be accelerated while all other measures go through the usual process required for financial matters.

2. The need to shelter the public from the vagaries of economic hardship brought by Covid-19

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The tax amendments sought to be introduced by the Bill will make lives of Kenyans even harder in this turbulent time. There will be an increase in the price of basic commodities like LPG gas and bread, and sectors like pharmaceuticals, agriculture and tourism which are the backbone of our economy will be adversely affected. There will also be consequent impact on retirement benefit savings and foreign direct investment into Kenya.

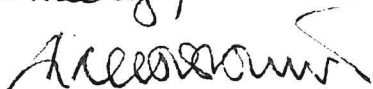
The need to apply tax measures fairly is set out in **Article 201 of the Constitution** which requires the public finance system shall promote an equitable society, and in particular, the burden of taxation shall be shared fairly. Additionally, the failure to follow due process in enacting these far reaching tax changes goes against **Article 47 of the Constitution** which guarantees the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

The true implication of proposals in the Bill will be the complete opposite of what the President had offered in his address, to the detriment of the public as a whole.

As the Law Society of Kenya, we advise the National Assembly and the National Treasury that the Bill does not pass the constitutional threshold set out in the Constitution of Kenya. Further, in line with our mandate as set out under Section 4 of the Law Society of Kenya Act, 2014, inter alia to: to assist the Government and the courts in all matters affecting legislation and the administration of justice and practice of the law in Kenya, and to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law, we are committed to resisting all such unjust encroachments on due process, and reversal of constitutional gains.

Therefore, in our role as a public guardian in respect of administration of justice and promoting rule of law in Kenya, we shall not hesitate to challenge this Bill before a constitutional court if it is passed in its current form.

Yours Sincerely,



NELSON HAVI ANDAYI
PRESIDENT, LAW SOCIETY OF KENYA.

CC

Mr. Ukur Yatani Kanacho

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